Class Deviations - 20 Nov 2020

The Principal Director of Defense Pricing and Contracting issues class deviations when necessary to allow organizations to deviate from the FAR and DFARS. Below are all the current DoD class deviations in effect. All other deviations are archived by year.

Class Deviation 2021-O0001 - Combating Race and Sex Stereotyping
(29 November 2020)
- Attachment, Class Deviation 2021-O0001 - Combating Race and Sex Stereotyping
(29 November 2020)

Class Deviation 2020-O0022 - Prohibition on Providing Funds to the Enemy and Authorization of Additional Access to Records
(28 August 2020)
- Attachment 1, Class Deviation 2020-O0022 - Prohibition on Providing Funds to the Enemy and Authorization of Additional Access to Records
(28 August 2020)
- Attachment 2, Class Deviation 2020-O0022 - Prohibition on Providing Funds to the Enemy and Authorization of Additional Access to Records
(28 August 2020)
- Attachment 3, Class Deviation 2020-O0022 - Prohibition on Providing Funds to the Enemy and Authorization of Additional Access to Records
(28 August 2020)

Class Deviation 2020-O0021 - Revision 1 - Section 3610 Reimbursement Requests
(14 October 2020)
- Attachment 1, Class Deviation 2020-O0021 - Revision 1 - Section 3610 Reimbursement Requests
(14 October 2020)
- Attachment 2, Class Deviation 2020-O0021 - Revision 1 - Section 3610 Reimbursement Requests
(14 October 2020)
- Attachment 3, Class Deviation 2020-O0021 - Revision 1 - Section 3610 Reimbursement Requests
(14 October 2020)
- Attachment 4, Class Deviation 2020-O0021 - Revision 1 - Section 3610 Reimbursement Requests
(14 October 2020)

Class Deviation 2020-O0020 - Section 890 Pilot Program to Accelerate Contracting and Pricing Processes
(14 August 2020)
- Attachment 1, Class Deviation 2020-O0020 - Section 890 Pilot Program to Accelerate Contracting and Pricing Processes
(14 August 2020)
- Attachment 2, Class Deviation 2020-O0020 - Section 890 Pilot Program to Accelerate Contracting and Pricing Processes
(14 August 2020)
- Attachment 3, Class Deviation 2020-O0020 - Section 890 Pilot Program to Accelerate Contracting and Pricing Processes
(14 August 2020)
- Attachment 4, Class Deviation 2020-O0020 - Section 890 Pilot Program to Accelerate Contracting and Pricing Processes
(14 August 2020)

Class Deviation 2020-O0019 - Revision 1 - United States-Mexico-Canada Agreement
(14 August 2020)
- Attachment 1, Class Deviation 2020-O0019 - Revision 1 - United States-Mexico-Canada Agreement
(14 August 2020)
- Attachment 2, Class Deviation 2020-O0019 - United States-Mexico-Canada Agreement
(01 July 2020)
- Attachment 3, Class Deviation 2020-O0019 - United States-Mexico-Canada Agreement
(01 July 2020)

Yellow highlight indicates changes since the 15 Oct 2020 DPC Website Update.


Archived Class Deviations

<table>
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11/20/2020
Class Deviation 2020-O0018 – Prohibition on Use of Certain Energy Sourced from Inside the Russian Federation (29 May 2020)

Class Deviation 2020-O0017 – Acquisition of Dinnerware or Stainless Steel Flatware (05 June 2020)

Class Deviation 2020-O0016 – Original Documents, Signatures, Seals, and Notarization (30 April 2020)


Class Deviation 2020-O0014 – Flexibilities for Electronic Delivery of Information Related to Suspensions and Debarments (20 April 2020)

Class Deviation 2020-O0013 – Revision 2 - CARES Act Section 3610 Implementation (14 October 2020)

Class Deviation 2020-O0012 – Undefinitized Contract Actions During the National Emergency for the Coronavirus Disease 2019 (3 April 2020)

Class Deviation 2020-O0011 – Revision 1 - Submission of Interim Vouchers Under Classified Contracts (3 April 2020)

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Class Deviation 2020-O0008 – Revision 2 - Limitations on Subcontracting for Small Business (6 November 2020)
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- Attachment, Class Deviation 2018-00019 - Contractor Personnel Performing in Japan (30 August 2018)

Class Deviation 2018-00016 - Defense Commercial Solutions Opening Pilot Program (26 June 2018)

Class Deviation 2018-00011 - Enhanced Postaward Debriefing Rights (22 March 2018)

Class Deviation 2018-00002 - One Time Deviations—Section 830(d) Pilot Program for Acceleration of Foreign Military Sales (22 March 2018)

Class Deviation 2017-00009 Products and Services from the African Host Nation-Djibouti (15 September 2017)
- Attachment 1, Class Deviation 2017-00009 Products and Services from the African Host Nation-Djibouti (15 September 2017)
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Class Deviation 2017-00004 - Contractor Personnel Performing in the United States Central Command Area of Responsibility (15 September 2017)
- Attachment, Class Deviation 2017-00004 - Contractor Personnel Performing in the United States Central Command Area of Responsibility (15 September 2017)

Class Deviation 2016-00008 - Contractor Personnel Performing in United States Africa Command Area of Responsibility (10 June 2016)
- Attachment, Class Deviation 2016-00008 - Contractor Personnel Performing in United States Africa Command Area of Responsibility (10 June 2016)

Class Deviation 2015-00017 - Earned Value Management System Threshold (28 September 2015)
- Attachment, Class Deviation 2015-00017 - Earned Value Management System Threshold (28 September 2015)

Class Deviation 2014-00016 - Requirements for Contractor Personnel Performing in the U.S. Southern Command Area of Responsibility (6 October 2014)
- Attachment, Class Deviation 2014-00016 - Requirements for Contractor Personnel Performing in the U.S. Southern Command Area of Responsibility (6 October 2014)

Class Deviation 2014-00011 - Determination of Fair and Reasonable Prices When Using Federal Supply Schedule Contracts (13 March 2014)

Class Deviation 2014-00007 - Prohibition on the Use of the 8(a) Business Development Program for Acquisition of Military Simulation and Military Simulation Training (14 March 2014)

Class Deviation 2013-00018 - Past Performance Evaluation Thresholds and Reporting Requirements (24 September 2013)
- Attachment, Class Deviation 2013-00018 - Past Performance Evaluation Thresholds and Reporting Requirements (24 September 2013)

Class Deviation 2013-00017 - Contractor Demobilization (30 August 2013)
- Attachment, Class Deviation 2013-00017 - Contractor Demobilization (30 August 2013)
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DoD Class Deviations Summaries and Expiration Dates

[Added by DAU]

2021-O0001: Combating Race and Sex Stereotyping (20 Nov 2020)

Expiration Date: until it is incorporated in the FAR or otherwise rescinded.

Affects: FAR 22.807, 22.807(a)(2), 22.807(b)(5), 52.222-26

Adds: the following contract clause for use in solicitations and contracts when a contract is contemplated that will include the clause at FAR 52.222-26, Equal Opportunity or its Alternate I.

• DFARS 252.222-7999, Combating Race and Sex Stereotyping (DEVIATION 2021-O0001) (NOV 2020)

Effective immediately, except for contracts exempted from the requirements of Executive Order 11246 of September 24, 1965 (Equal Employment Opportunity) as amended, contracting officers shall:

(a) Include the above clause in solicitations issued on or after November 20, 2020, and in any resultant contracts that will include the clause at FAR 52.222-26, Equal Opportunity.

(b) Amend solicitations issued prior to November 20, 2020, to include the above clause in any resultant contract award expected to occur on or after November 20, 2020, if the contract is contemplated to include the clause at FAR 52.222-26, Equal Opportunity.

This class deviation implements Section 4 of E.O. 13950, Combating Race and Sex Stereotyping (85 FR 60683, September 28, 2020). The E.O. seeks to promote economy and efficiency in Federal contracting, to promote unity in the Federal workforce, and to combat race and sex stereotyping and scapegoating.


Expiration Date: until December 31, 2023, or otherwise rescinded.

This class deviation supersedes class deviation 2020-O0001.

Adds: the following contract clauses along with the prescriptions and procedures for their use.

• DFARS 252.225-7993, Prohibition on Providing Funds to the Enemy (DEVIATION 2020-O0022) (Aug 2020)

• DFARS 252.225-7975, Additional Access to Contractor and Subcontractor Records (DEVIATION 2020-O0022) (Aug 2020)

Contracting officers shall include the above clauses in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, with an estimated value in excess of $50,000. This class deviation applies only to contracts that will be performed outside the United States and its outlying areas in support of a contingency operation in which members of the Armed Forces are actively engaged in hostilities.

This class deviation grants the HCA authority to terminate or void contracts and to restrict future awards directly or indirectly to any person or entity that is actively opposing United States or coalition forces involved in a contingency operation in which members of the Armed Forces are actively engaged in hostilities. The above contract terms provides the authority for additional access to contractor and subcontractor records to the extent necessary to ensure that funds available under covered contracts are not provided directly or indirectly to any person or entity.

HCAs shall follow the procedures in Attachment 3 when exercising the authorities provided by this class deviation. Such procedures may be exercised only upon written notification from a combatant commander identifying persons or entities that are believed to have provided funds or have failed to exercise due
diligence to ensure that none of the funds are provided directly or indirectly to any person or entity that is actively opposing United States or coalition forces.

**2020-O0021**: Section 3610 Reimbursement Requests, (17 Aug 2020)

Expiration Date: remains in effect until rescinded.

Affects: FAR 31.201-5, 31.203, 42.302(a)(5), 42.302 (a)(9), 42.302 (a)(11), 42.302 (a)(12), 15.403-4, 15.403-4(a)(1), 15.403-4(a)(1)(ii)

DFARS 231.205-79 & 231.205-79(a)(1)(ii) under Class Deviation 2020-O0013 Revision 1, and DFARS 252.232-7006

Contracting officers shall follow the guidance provided in this class deviation when reviewing and processing contractor requests for reimbursement under section 3610 of the Coronavirus Aid, Relief and Economic Security (CARES) Act for paid leave. Section 3610 authorizes, but does not require, contracting officers to modify contracts and other agreements without consideration, to reimburse contractors for paid leave a contractor provides to keep its employees or subcontractors in a ready state, including to protect the life and safety of Government and contractor personnel during the public health emergency declared on January 31, 2020 for COVID-19.

Because Section 3610 does not contain specific language to provide retroactive coverage for paid leave as a matter of law, the authority conferred by section 3610 does not apply to reimbursements for paid leave provided prior to March 27, 2020. However, Section 3610 does not prohibit DoD from reimbursing a contractor for paid leave prior to March 27, 2020 using contract authorities otherwise available to DoD. At their discretion therefore, contracting officers may consider reimbursing such paid leave costs as other COVID-19 related costs. For additional guidance on the reimbursement of other COVID-19 related costs not authorized under section 3610, refer to DPC Memorandum “Guidance for Assessment of Other COVID-19 Related Impacts and Costs” dated July 2, 2020 at the following DPC website link:


Consequently, contracting officers should not identify any reimbursement for paid leave provided prior to March 27, 2020 as a payment made under section 3610 for purposes of tracking and reporting.

This class deviation further divides detailed requirements for consideration by contracting officers of any such contractor requests for reimbursement of paid leave into the following sections. A contractor may also choose to submit subsequent section 3610 reimbursement requests for additional paid leave costs incurred after the initial section 3610 reimbursement request. However, the time period for reimbursement of paid leave for an affected contractor under section 3610 is March 27, 2020 through September 30, 2020.

A. Notice of Intent to Request Reimbursement under Section 3610. Early Engagement. Among other conditions, contracting officers shall not make section 3610 reimbursements to a contractor unless and until funds are available for reimbursement of section 3610 costs. Also, until such time as a section 3610 reimbursement request is submitted by the contractor and evaluated by the contracting officer, any discussion of the availability of funds is notional and for planning purposes only.

B. Submission of Requests for Reimbursement under Section 3610. Among many other conditions stipulated in this section, contractors must submit the following checklists provided in the attachments to this class deviation to provide the type of information the contracting officer may need to assess a contractor’s section 3610 reimbursement request. At their discretion, contracting officers may tailor these checklists to provide guidance for processing reimbursement requests to fit specific circumstances.

- **Abbreviated Reimbursement Checklist** (Attachment 1). Guidance for section 3610 reimbursement requests when the request applies only to reimbursement under a single contract of direct charged employees provided with paid leave, and the amount of reimbursement requested is below $2,000,000 in total.

- **Multipurpose Reimbursement Checklist** (Attachment 2). Guidance for section 3610 reimbursement requests that apply to a single contract, when Attachment 1 is not applicable, or to multiple contracts when Attachment 3 is not being used. Section 3610 reimbursement requests using this...
Class Deviation Summaries (Cont’d)

checklist should include homogeneous groups of contracts, such as contracts for a single program or with a single contracting activity or DoD Component.

- **Global Reimbursement Checklist** (Attachment 3). Guidance for section 3610 reimbursement requests that seek a global reimbursement at a business unit (or segment) level. Section 3610 reimbursement requests meeting these conditions should be provided to the contractor’s assigned Cognizant Federal Agency Official (CFAO).

C. Affected Contractor. In accordance with Class Deviation 2020-O0013 (Revision 1), contracting officers shall establish, in writing, a contractor’s status as an affected contractor prior to authorizing the reimbursement of paid leave costs under the authority of section 3610 for a particular contract and a specific time period. The contracting officer shall establish whether the contractor has incurred costs to provide paid leave for its employees or subcontractors to maintain its workforce in a ready state and otherwise meets all of the requirements of section 3610. Pages 5 and 6 of class deviation 2020-O0021 establishes the conditions that contracting officers must use to verify that the contractor is an affected contractor that is worthy of reimbursement of paid leave costs under section 3610.

D. Determination of Reimbursement Amount. The determination of the reimbursement amount shall be based on the contracting officer’s review of the information provided in the contractor’s section 3610 reimbursement request and the criteria in this class deviation and Class Deviation 2020-O0013 (Rev. 1). The contracting officer shall document the rationale for the amount eligible for section 3610 reimbursement in the contract file, including any limitations due to available funding, and under the following conditions:

- In no event shall a reimbursement under section 3610 include profit or fee on any contractor or subcontractor paid leave costs.
- Reimbursement shall be made at the appropriate rates for the work performed under the contract.
- The maximum reimbursement amount under section 3610 shall be reduced by the amount of loan forgiveness under the Families First Coronavirus Response Act, and/or under the CARES Act, and/or under any other credit allowed by law that is specifically identifiable with the public health emergency declared on January 31, 2020, for COVID-19.
- Contracting officers shall document in the contract file the rationale for the amount eligible for section 3610 reimbursement, including any limitations due to available funding.

E. Availability of Funds for Reimbursement under Section 3610. Any reimbursement under the authority of section 3610 is subject to the availability of funds and is at the Department’s discretion (i.e., may choose not to provide funds for section 3610 reimbursement under any particular contract). Furthermore, funds that are otherwise legally available for use under a contract may be used to fund a 3610 reimbursement under that contract and need not be funded only with CARES Act appropriations.

F. Contract Modifications. Once a contracting officer has established that a contractor is an affected contractor, has determined the amount eligible for reimbursement, and has validated availability of funds, the contracting officer shall modify the affected contract(s) to provide reimbursement via a bilateral contract modification under the authority of section 3610 of the CARES Act. This modification must require the contractor to notify the contracting officer of any credits or loan forgiveness the contractor receives for the same paid leave costs reimbursed in the modification. To ensure traceability, the contract modification and supporting documentation must clearly specify how section 3610 costs will be identified, segregated, recorded, invoiced, and reimbursed. Contracting officers may create a firm-fixed price line item for section 3610 reimbursement to allow immediate invoicing of the full price of the line item pursuant to clause DFARS 252.232-7006, Wide Area WorkFlow Payment Instructions. If a cost type line item (to include time and material and labor hour line items) is created for section 3610 reimbursement, the contractor will use a cost voucher when invoicing for section 3610 reimbursement costs pursuant to clause DFARS 252.232-7006.

G. Duplicate Reimbursements Related to COVID-19. The contractor is required to notify the contracting officer within 30 days of receiving any credits or loan forgiveness for the same paid leave costs reimbursed under section 3610 and agree to execute a modification reducing the reimbursed amount under section 3610 by the amount received by the other means, up to the entire section 3610 reimbursement amount.
**2020-O0020**: Section 890 Pilot Program to Accelerate Contracting and Pricing Processes, (14 Aug 2020)

Expiration Date: until January 2, 2023, or otherwise rescinded

This class deviation rescinds and supersedes Class Deviation 2019-O0008, dated April 1, 2019 in order to implement the pilot program authority originally provided by section 890 of the FY19 NDAA and as further amended by section 825 of the FY20 NDAA.

Affects: FAR 52.215-21 and DFARS 252.215-7010

Adds: 252.215-7010, Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data. (DEVIATION 2020-O0020) (AUG 2020) [Atch #2, Solicitation provision. This solicitation provision is substituted for provisions DFARS 252.215-7010 – Basic (Jul 2019) or DFARS 252.215-7010 – Alternate I (Jul 2019).]

252.215-7997 Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data—Modifications—Section 890 Pilot Program (DEVIATION 2020-O0020) (AUG 2020) [Atch #3, Contract clause. This contract clause is substituted for clause FAR 52.215-21 (Jun 2020).]

252.215-7998 Pilot Program to Accelerate Contracting and Pricing Processes. (DEVIATION 2020-O0020) (AUG 2020) [Atch #4, Contract clause. This additional contract clause ensures that the contractor provides information necessary to evaluate the efficacy of the pilot program.]

Section 890, as amended, authorizes DoD to conduct a pilot program for contract actions in excess of $50 million. Section 890 allows price reasonableness determinations to be based on actual cost and pricing data for purchases of the same or similar products for the DoD, and a reduction of the cost and pricing data to be submitted in accordance with 10 U.S.C. 2306a. Contract actions best suited for the pilot program are those of a recurring nature, for which there is reliable, historical actual cost data. It is preferable to conduct these pilots with companies that have approved business systems. Additionally, while not a condition for participation, use of a fixed-price-incentive contract type can reduce the cost risk for the participating parties and provide measurable results at the conclusion of the acquisition in relation to a target cost.

Contract actions must be approved by the Director, DPC/PCI, to participate in the Section 890 pilot program prior to the issuance of a solicitation. The contracting officer may strategically establish the extent, structure, and level of detail of the historical actual cost data the contractor will be required to submit in lieu of providing complete certified cost or pricing data. Contracting officers may request approval to participate in the pilot program by completing and submitting the attached application template (Attachment 1) to osd.pentagon.ousd-a-s-mbx.dpc-pci@mail.mil.

**2020-O0019**: United States-Mexico-Canada Agreement, Revision 1 (14 Aug 2020)

Expiration Date: remains in effect until incorporated in the FAR and DFARS or otherwise rescinded.

This class deviation revises and supersedes class deviation 2019-O0019 dated 1 July 2020.

Affects: FAR 18.120, FAR subpart 22.15, 25.402(b), 22.1503(b)(1), 27.204-1, 52.213-4, 52.222-19, 52.222-11; DFARS 252.222-7013, 252.225-7017, 252.225-7018, 252.225-7021 (Basic & Alt II), 252.225-7035 (Basic and Alts II, IV, & V), 252.225-7036 (Basic and Alts II, IV, & V), 252.225-7045 (Basic and Alts I, II, & III)

The revision is necessary to make the deviation to FAR clause 52.222-19 provided in Attachment 1 applicable when used in conjunction with FAR clause 52.213-4, Terms and Conditions-Simplified Acquisitions (Other Than Commercial Items).

This class deviation is effective immediately and implements the United States-Mexico-Canada Agreement (USMCA), as enacted by Congress in the United States-Mexico-Canada Agreement Implementation Act. Chapter 13 of the USMCA (government procurement) applies only to the United States and Mexico and as a result, Canada is no longer a Free Trade Agreement country. Consequently,
this class deviation replaces all references in the FAR and DFARS to NAFTA and 19 U.S.C. 3301 with references to the USMCA and 19 U.S.C. chapter 29 (sections 4501-4732), respectively.

The requirements of FAR subpart 22.15 that result from the appearance of any end product on the List of Products Requiring Contractor Certification as to Forced or Indentured Child Labor no longer apply to a solicitation or contract if the identified country of origin on the List is Canada, and the anticipated value of the acquisition is $182,000 or more.

The requirements of FAR 27.204-1, Patented technology under the North American Free Trade Agreement, and the associated emergency acquisition flexibility at FAR 18.120 are no longer applicable or authorized. Contracting officers are advised to consult with legal counsel when questions arise with regard to the use of patented technology under the USMCA.

Contracting officers shall use the following provisions and clauses as prescribed in the corresponding attachments to this class deviation.

- FAR 52.222-19 Child Labor Cooperation with Authorities and Remedies (DEVIATION 2020-O0019) (Jul 2020)
- FAR 52.225-11 Buy American Construction Materials Under Trade Agreements– Basic (DEVIATION 2020-O0019) (Jul 2020)
- FAR 52.225-11 Buy American Construction Materials Under Trade Agreements, Alternate I (DEVIATION 2020-O0019) (Jul 2020)
- DFARS 252.225-7013 Duty-Free Entry. (DEVIATION 2020-O0019) (Jul 2020)
- DFARS 252.225-7017 Photovoltaic Devices. (DEVIATION 2020-O0019) (Jul 2020)
- DFARS 252.225-7021 Trade Agreements – Basic. (DEVIATION 2020-O0019) (Jul 2020)
- DFARS 252.225-7021 Trade Agreements – Alternate II. (DEVIATION 2020-O0019) (Jul 2020)
- DFARS 252.225-7035 Buy American--Free Trade Agreements--Balance of Payments Program Certificate. – Alternate II (DEVIATION 2020-O0019) (Jul 2020)
- DFARS 252.225-7035 Buy American--Free Trade Agreements--Balance of Payments Program Certificate. – Alternate IV (DEVIATION 2020-O0019) (Jul 2020)
- DFARS 252.225-7036 Buy American Free Trade Agreements--Balance of Payments Program – Basic (DEVIATION 2020-O0019) (Jul 2020)
- DFARS 252.225-7036 Buy American Free Trade Agreements--Balance of Payments Program – Alternate II (DEVIATION 2020-O0019) (Jul 2020)
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- DFARS 252.225-7045 Balance of Payments Program--Construction Material Under Trade Agreements. – Alternate III (DEVIATION 2020-O0019) (Jul 2020)
Class Deviation Summaries (Cont’d)

Contracting officers shall not use the following solicitation provision and contract clause:

- DFARS 252.225-7035, Buy American Free Trade Agreements Balance of Payments Program Certificate Alternates I and III
- DFARS 252.225-7036, Buy American Free Trade Agreements Balance of Payments Program Alternates I and III.

2020-O0018: Prohibition on Use of Certain Energy Sourced from Inside the Russian Federation
(30 Apr 2020)
Expiration Date: remains in effect until incorporated into the DFARS or rescinded.

Adds the following solicitation provision and contract clause to the DFARS along with the prescriptions and procedures for their use by contracting officers when applicable.

- DFARS 252.225-7971, Prohibition on Use of Certain Energy Sourced from Inside the Russian Federation Representation (Deviation 2020-O0018) (May 2020)
- DFARS 252.225-7970, Prohibition on Use of Certain Energy Sourced from Inside the Russian Federation

Unless a waiver is granted, contracting officers shall not award a contract for the acquisition of furnished energy for a covered military installation if the contract uses any energy sourced from inside the Russian Federation. “Covered military installation” means a military installation in Europe identified by the Department of Defense as a main operating base. “Furnished energy” means energy furnished to a covered military installation in any form and for any purpose, including heating, cooling, and electricity.

The head of the agency may waive application of this prohibition to a specific contract for furnished energy upon certification to the congressional defense committees that the Waiver is necessary to ensure an adequate supply of furnished energy for the covered military installation, and that the official has balanced these national security requirements against the potential risk associated with reliance upon the Russian Federation for furnished energy.

2020-O0017: Acquisition of Dinnerware or Stainless Steel Flatware (6 May 2020)
Expiration Date: remains in effect until otherwise rescinded or until the statutory sunset date of September 30, 2023.

Adds the following contract clause to the DFARS along with the prescription for its use by contracting officers when applicable.

- DFARS 252.225-7969 Acquisition of Dinnerware and Stainless Steel Flatware. (DEVIATION 2020-O0017) (JUN 2020)

Use the above clause in all solicitation and contracts, including acquisitions using FAR part 12 procedures, that are for the acquisition of dinnerware or stainless steel flatware with an estimated value that exceeds the simplified acquisition threshold if the contract is to be awarded after December 20, 2020, and before September 23, 2023. However, the prescription for this clause specifies four exceptions to its use in the acquisition of dinnerware and stainless steel flatware.

2020-O0016: Original Documents, Signatures, Seals, and Notarization (30 Apr 2020)
Expiration Date: remains in effect until rescinded.

Affects: FAR 28.101-3, 28.106-1, 28.106-8, 28.203(b), 28.203-5(a), 32.802(e), 32.805, 42.1204(f), 42.1204(i), 42.1205(b), 52.228-11, 52.228-15, 52.228-16; and DFARS 232.805.

This class deviation provides flexibility with regard to original documents, manual signatures, seals, and notarization in order to facilitate certain essential contracting procedures as summarized below.
1. When obtaining financial protection against losses under contracts per FAR part 28, electronic signatures and electronic, mechanically-applied, or printed dates may be used and shall be considered original signatures and dates. A corporate seal is not required on any form. The signed statement by the contractor that payment is due and owed is not required to be notarized. The SF28 executed by the individual surety is not required to be sworn and notarized. A written authorization of the release signed by the surety is acceptable, in lieu of the notarized authorization of release by the surety. Contracting officers shall use the following attached deviation clauses in lieu of the corresponding FAR clauses:

- FAR 52.228-11, Pledges of Assets (APR 2020) (DEVIATION 2020-O0016),
- FAR 52.228-15, Performance and Payment Bonds—Construction (APR 2020) (DEVIATION 2020-O0016),
- 52.228-16, Performance and Payment Bonds—Other than Construction (APR 2020) (DEVIATION 2020-O0016)

2. When processing assignment of claims per FAR subpart 32.8, a copy of the assignment instrument is acceptable, in lieu of a true copy of the assignment instrument as required by FAR 32.802(e). Electronic signatures by responsible parties and electronic filing of assignment instruments and notices of assignments as outlined in attachments 1 and 2 of this class deviation are acceptable, in lieu of the requirements at FAR 32.805 and DFARS 232.805.

3. When executing novation agreements and change-of-name agreements per FAR part 42, copies of the documents listed at FAR 42.1204(f) are acceptable in lieu of authenticated or certified copies. Novation Agreements as described at FAR 42.1204(i) and Change-of-Name Agreements as described at FAR 42.1205(b) do not require corporate seals.


Expiration Date: remains in effect until incorporated into the DFARS or rescinded.

Adds the following solicitation provision and contract clause to the DFARS along with the prescriptions and procedures for their use by contracting officers when applicable.


Unless an exception applies or a waiver is granted, contracting officers shall not enter into or renew a contract, including contracts for commercial items, for the procurement of the following items that are manufactured in the People’s Republic of China (PRC) or by an entity domiciled in the PRC. These are: (1) unmanned aircraft system (UAS) or any related services; (2) a UAS that uses flight controllers, radios, data transmission devices, cameras, or gimbals; (3) a UAS that uses a ground control system or operating software; and (4) a UAS using PRC network connectivity or data storage. This prohibition includes a system for the detection or identification of a UAS, or any related services or equipment.

This prohibition does not apply to procurements for the purposes of: counter-UAS surrogate testing and training; or intelligence, electronic warfare, and information warfare operations, testing, analysis, and training. Pursuant to section 848 of the FY2020 NDAA, the Secretary of Defense may waive the prohibition on a case-by-case basis by certifying in writing to the congressional defense committees that the procurement is required in the national interest of the United States.
2020-O0014: Flexibilities for Electronic Delivery of Information Related to Suspensions and Debarments  
(20 Apr 2020)  
Expiration Date: remains in effect until rescinded.

Affects: FAR 9.406-3(c), FAR 9.406-3(e), FAR 9.407-3(c) and FAR 9.407-3(d)(4); and DFARS Appendix H-101, H-103 and H-104

In response to the COVID-19 outbreak, debarring and suspending officials may deviate from the FAR requirements as stated above to provide notices of proposed debarment or suspension and debarring and suspension official decisions to contractors via certified mail, return receipt requested. In addition to these notices, debarring and suspending officials are also authorized to provide such notices and decisions to contractors electronically via e-mail and/or secure file exchange service.

Initial notices of suspension or proposed debarment sent via email shall make available copies of the record which formed the basis for the decision, as required by Appendix H-101. In addition, suspending and debarring officials shall include instructions for a contractor to present matters in opposition or evidence relevant to the facts, as authorized by DFARS Appendix H-103 and H-104, either in writing via mail or email or in person or through a representative and, as deemed appropriate by the suspending and debarring official, via telephone or video-teleconference.

2020-O0013: CARES Act Section 3610 Implementation, Revision 1 (17 Aug 2020)  
Expiration Date: remains in effect until rescinded.

Affects: FAR subparts 31.2, 31.3, 31.6, 31.7 and DFARS subparts 231.2, 231.3, 231.6, and 231.7.

Revises the following cost principle previously added to DFARS part 231—Contract Cost Principles and Procedures; DFARS subpart 231.2—Contracts with Commercial Organizations:

- DFARS 231.205-79 CARES Act Section 3610 - Implementation

Effective immediately, this class deviation revises and supersedes Class Deviation 2020-O0013 issued on April 8, 2020. The purpose of this revision is to reiterate the statement that reimbursements under section 3610 are subject to the availability of funds and change the start date of the time period for which paid leave must be taken to be eligible for reimbursement under section 3610.

In the attachment to this deviation, a new paragraph (b)(7) is added at DFARS 231.205-79 to clarify that the allowable amount under this deviation is limited to the amount of funds obligated on a separate line item specifically for the purpose of reimbursement under section 3610. Where appropriate, the time period for which paid leave must be taken is changed from January 31, 2020, through September 30, 2020, to March 27, 2020, through September 30, 2020.

Pursuant to FAR 31.101 Objectives, this class deviation to FAR part 31 and DFARS part 231 is effective immediately and authorizes contracting officers to use the cost principle at DFARS 231.205-79 attached to this class deviation as a framework for implementation of section 3610, Federal Contractor Authority, of the Coronavirus Aid, Relief, and Economic Security (CARES) Act (Pub. L. 116-136).

Currently, many Department of Defense contractors are struggling to maintain a mission-ready workforce due to work site closures, personnel quarantines, and state and local restrictions on movement. Section 3610 of the CARES Act allows agencies to reimburse, at the minimum applicable contract billing rates (not to exceed an average of 40 hours per week), any paid leave, including sick leave, a contractor provides to keep its employees or subcontractors in a ready state. This includes protecting the life and safety of Government and contractor personnel, during the public health emergency declared for COVID-19 on March 27, 2020 through September 30, 2020.

Memorandum for Record Template for Contracting Officers for Coronavirus Aid, Relief and Economic Security Act Section 3610 Reimbursement, dated August 17, 2020  
**2020-O0012: Undefinitized Contract Actions During the National Emergency for the Coronavirus Disease 2019 (3 Apr 2020)**

Expiration Date: This class deviation implements sections 13004 and 13005 of the Coronavirus Aid, Relief, and Economic Security (CARES) Act (Pub. L. 116-136) and remains in effect until rescinded.

Affects: DFARS 217.7404-4(a), 217.7404(a)(1)(i), 217.7404-3(a), and 217.7404-3(a)(1).

The requirement at DFARS 217.7404-4(a) to limit obligations, after receipt of a qualifying proposal, to 75 percent of the not-to-exceed price before definitization does not apply to UCAs related to the national emergency for the Coronavirus Disease 2019 (COVID-19), as determined by the head of the contracting activity.

The head of the contracting activity may waive the limitations in DFARS 217.7404(a)(1)(i), 217.7404-3(a), and 217.7404-4(a) for a UCA, if the head of the contracting activity determines that the waiver is necessary due to the national emergency for COVID-19. The words “without power of redelegation” at DFARS 217.7404-3(a)(1) are deleted.

**2020-O0011: Submission of Interim Vouchers Under Classified Contracts, Revision 1 (3 Apr 2020)**

Expiration Date: remains in effect until rescinded.

Effective immediately, in response to the Coronavirus Disease 2019 (COVID-19) national emergency, contracting officers shall direct contractors to submit interim vouchers under classified contracts, using an appropriate method, directly to the payment office listed in the contract. Interim vouchers under classified contracts are considered provisionally approved by the Defense Contract Audit Agency (DCAA). This deviation relieves the requirement for the interim voucher to be submitted to DCAA prior to payment.

**2020-O0010: Progress Payment Rates (20 Mar 2020)**

Expiration Date: remains in effect until rescinded.

Affects: FAR 32.502-4(a), FAR 32.502-4(c), FAR 32.504-4(d), DFARS 232.501-1, FAR 52.232-16, FAR 52.232-16 (Alternate II), DFARS 232.502-4-70(b), and DFARS 252.232-7004.

Effective immediately in response to the Coronavirus Disease 2019 (COVID-19) national emergency, the progress payment rates at DFARS 232.501-1 are increased to 90 percent for large business concerns and 95 percent for small business concerns. Contracting officers shall use the following clauses attached to this class deviation as follows:

- Use FAR 52.232-16, Progress Payments (MAR 2020) (DEVIATION 2020-O0010), in lieu of the clause FAR 52.232-16 (APR 2012) as prescribed in FAR 32.502-4(a).
- Use FAR 52.232-16, Progress Payments Alternate II (MAR 2020), (DEVIAITION 2020-O0010) in lieu of FAR 52.232-16, Progress Payments Alternate II (APR 2003) as prescribed in FAR 32.502-4(c).

Also, contracting officers shall use Alternate III (APR 2003) of FAR clause 52.232-16 (APR 2012) as prescribed at FAR 32.502-4(d) along with clause FAR 52.232-16 Progress Payments (MAR 2020) (DEVIAITION 2020-O0010).
## Class Deviation Summaries (Cont’d)

**2020-O0008: Limitations on Subcontracting for Small Business, Revision 1 (3 Apr 2020)**  
**Expiration Date:** until incorporated in the FAR or otherwise rescinded.

Affects: FAR 52.219-3, 52.219-4 (Alternate I), 52.219-4, 52.219-6, 52.219-7, 52.219-14, 52.219-27, 52.219-29, 52.219-30, and 52.219-33.

Contracting officers shall follow the procedures provided in this class deviation when issuing solicitations and awarding contracts or task or delivery orders under FAR part 19 to—

(A) Small business concerns;
(B) 8(a) program participants;
(C) Historically Underutilized Business Zone (HUBZone) small business concerns;
(D) Service-disabled veteran-owned small business (SDVOSB) concerns;
(E) Economically disadvantaged women-owned small business (EDWOSB) concerns; and
(F) Women-owned small business (WOSB) concerns eligible under the WOSB Program.

These procedures and the class deviation clauses implement revisions made by the Small Business Administration to its regulation. These revisions changed and standardized the limitations on subcontracting and the nonmanufacturer rule with which small businesses must comply under Government contracts awarded pursuant to the set-aside, sole-source, or HUBZone price evaluation preference authorities of the Small Business Act. This class deviation updates the limitations on subcontracting and the nonmanufacturer rule for all small businesses in the clauses relating to awards under FAR part 19 as described in the table below.

<table>
<thead>
<tr>
<th>Small Business Type</th>
<th>Substitute Provisions/Clauses:</th>
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| (A) Small business concerns | • Use 52.219-6, Notice of Total Small Business Set-Aside (DEVIATION 2020-O0008), in lieu of FAR 52.219-6 and 52.219-33, Nonmanufacturer Rule.  
• Use 52.219-7, Notice of Partial Small Business Set-Aside (DEVIATION 2020-O0008), in lieu of FAR 52.219-7 and 52.219-33.  
• Use 52.219-14, Limitations on Subcontracting (DEVIATION 2020-O0008), in lieu of FAR 52.219-14.  
The limitations on subcontracting and nonmanufacturer rule apply to small business set-asides for contracts that exceed the simplified acquisition threshold but do not apply at or below the simplified acquisition threshold. |
| (B) 8(a) program participants | • Use 52.219-14, Limitations on Subcontracting (DEVIATION 2020-O0008), in lieu of FAR 52.219-14 for competitive 8(a) procurements and 8(a) sole-source awards.  
• Use 52.219-33, Nonmanufacturer Rule (DEVIATION 2020-O0008), in lieu of FAR 52.219-33 for 8(a) sole-source awards only.  
The limitations on subcontracting apply to contracts and task or delivery orders awarded pursuant to competitive 8(a) procurements and 8(a) sole-source awards under FAR part 19 regardless of the dollar value of the award. |
| (C) Historically Underutilized Business Zone (HUBZone) small business concerns | • Use 52.219-3, Notice of HUBZone Set-Aside or Sole Source Award (DEVIATION 2020-O0008), in lieu of FAR 52.219-3 and 52.219-33.  
• Use 52.219-4, Notice of Price Evaluation Preference for HUBZone Small Business Concerns (DEVIATION 2020-O0008), in lieu of FAR 52.219-4 and 52.219-33.  
Contracting officers shall not use Alternate I of FAR 52.219-3 or Alternate I of FAR 52.219-4. These alternates conflict with these deviation clauses.  
The limitations on subcontracting and the nonmanufacturer rule apply to contracts and task or delivery orders that are set aside for, or awarded on a sole-source basis to, HUBZone small business concerns under FAR part 19, or awarded using the HUBZone price evaluation preference, regardless of the dollar value of the award. |
**Small Business Type**  | **Substitute Provisions/Clauses:**
---|---
(D) Service-disabled veteran-owned small business (SDVOSB) concerns | Use 52.219-27, Notice of Service-Disabled Veteran-Owned Small Business Set-Aside (DEVIATION 2020-O0008), in lieu of FAR 52.219-27 & 52.219-33. The limitations on subcontracting and the nonmanufacturer rule apply to contracts and task or delivery orders that are set aside for, or awarded on a sole-source basis to, SDVOSB concerns under FAR part 19 regardless of the dollar value of the award.

(E) Economically disadvantaged women-owned small business (EDWOSB) concerns; | Use 52.219-29, Notice of Set-Aside for, or Sole Source Award to, Economically Disadvantaged Women-Owned Small Business Concerns (DEVIATION 2020-O0008), in lieu of FAR 52.219-29 and 52.219-33. The limitations on subcontracting and the nonmanufacturer rule apply to contracts and task or delivery orders that are set aside for, or awarded on a sole-source basis to, EDWOSB concerns under FAR part 19 regardless of the dollar value of the award.

(F) Women-owned small business (WOSB) concerns | Use 52.219-30, Notice of Set-Aside for, or Sole Source Award to, Women-Owned Small Business Concerns Eligible Under the Women-Owned Small Business Program (DEVIATION 2020-O0008), in lieu of FAR 52.219-30 and 52.219-33. The limitations on subcontracting and the nonmanufacturer rule apply to contracts and task or delivery orders that are set aside for, or awarded on a sole-source basis to, WOSB concerns eligible under the WOSB Program under FAR part 19 regardless of the dollar value of the award.

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**2020-O0007:** Protection of Technical Data and Computer Software Under Small Business Innovation Research Program Contracts (17 Mar 2020)

Expiration Date: until incorporated into the DFARS or otherwise rescinded.

Affects: DFARS 227.7104(a), DFARS 227.7104(d) and DFARS 252.227-7018


Effective immediately, contracting officers shall use the clause DFARS 252.227-7018 Rights in Noncommercial Technical Data and Computer Software—Small Business Innovation Research (SBIR) Program (MAR 2020) (DEVIATION 2020-O0007) in new solicitations and contracts awarded under the SBIR Program, when technical data or computer software will be generated during contract performance.

However, contracting officers shall also use the ALTERNATE I (JUN 1995) of DFARS 252.227-7018 (FEB 2014) along with DFARS 252.227-7018 (DEVIATION 2020-O0007) in research contracts when as prescribed in DFARS 227.7104(d), the contracting officer determines in consultation with counsel that public dissemination by the contractor would be—

1. In the interest of the Government; and

2. Facilitated by the Government relinquishing its right to publish the work for sale, or to have others publish the work for sale on behalf of the Government.

This class deviation implements the Small Business Administration’s Policy Directive dated April 2, 2019 extending the period of time during which the Government must protect technical data and computer software developed or generated under SBIR contracts against unauthorized use and disclosure. This protection period begins at contract award and ends 20 years after contract award. The Government may also use, and to authorize others to use on its behalf, the data for Government purposes.
Class Deviation Summaries (Cont’d)

**2020-O0005: Prohibition on Contracting with Persons that have Business Operations with the Maduro Regime** (7 Feb 2020)

Expiration Date: until incorporated into the DFARS or otherwise rescinded.

Affects: DFARS subpart 252.225

This class deviation implements section 890 of the FY20 (NDAA). Contracting officers shall include provision DFARS 252.225-7974, Representation Regarding Persons that have Business Operations with the Maduro Regime, in all solicitations, including solicitations using FAR part 12 procedures for the acquisition of commercial items, except for contracts that are—

1. Jointly determined by the Secretary of Defense and Secretary of State to be—
   - Necessary for purposes of—
     - Providing humanitarian assistance to the people of Venezuela;
     - Disaster relief and other urgent lifesaving measures; or
     - Carrying out noncombatant evacuations; or
   - Vital to the national security interests of the United States; or
2. Related to the operation and maintenance of the United States Government’s consular offices and diplomatic posts in Venezuela.

**2020-O0004: Reporting Loss of Government Property** (7 Feb 2020)

Expiration Date: until incorporated into the DFARS or otherwise rescinded.

Affects: DFARS 245.102(5) and DFARS 252.245-7002

For solicitations and contracts that include the clause at FAR 52.245-1, Government Property, contracting officers shall use DFARS 245.102 Policy (DEVIAION 2020-O0004), paragraph (5) and clause DFARS 252.245-7002 Reporting Loss of Government Property (DEVIAION 2020-O0004) (FEB 2020) in lieu of DFARS 245.102(5) and the clause at DFARS 252.245-7002, Reporting Loss of Government Property.

Clause DFARS 252.245-7002 (DEVIAION 2020-O0004) now requires contractors to report the loss of Government property in the Government-Furnished Property (GFP) Module of the Procurement Integrated Enterprise Environment, in lieu of the Defense Contract Management Agency (DCMA) eTool software application. Losses previously reported in the DMCA eTool will be processed to completion and will not be transferred into the GFP Module.

**2020-O0003: Use of Fixed-Price Contracts for Foreign Military Sales** (8 Jan 2020)

Expiration Date: until December 31, 2020, or otherwise rescinded.

Affects: DFARS 225.401-71

Until December 31, 2020, contracting officers are not required to use firm-fixed-price contracts for foreign military sales in accordance with DFARS 225.7301-1. This class deviation implements section 807 of the FY20 NDAA. Section 807 of the NDAA for FY 2020 delays the effective date of the regulations that implement section 830 of the FY17 NDAA. Section 830 is implemented at DFARS 225.7301-1.

**2020-O0002: Authority to Acquire Products and Services Produced in Afghanistan or in Countries Along a Major Route of Supply to Afghanistan** (26 Dec 2019)

Expiration Date: until December 31, 2021, or otherwise rescinded.

This class deviation supersedes class deviation 2019-O0004.

Affects: DFARS 225.401-71, DFARS 225.7703, DFARS 225.7501, DFARS 225.7700, DFARS 225.7701, DFARS 225.7799, DFARS 225.7799-1, DFARS 225.7799-2; DFARS 225.7799-3, DFARS
Class Deviation Summaries (Cont’d)


Adds: the following contract clauses along with the prescriptions and procedures for their use.

Revises the following solicitation provisions and contract clauses issued by previous class deviations:

• DFARS 252.225-7996, Acquisition Restricted to Products or Services from Afghanistan, a Central Asian state, Pakistan, or the South Caucasus (Dec 2019) (Deviation 2020-O0002)
• DFARS 252.225-7998, Preference for Products or Services from Afghanistan, a Central Asian state, Pakistan, or the South Caucasus (Dec 2019) (Deviation 2020-O0002)
• DFARS 252.225-7999, Requirement for Products or Services from Afghanistan, a Central Asian state, Pakistan, or the South Caucasus (Dec 2019) (Deviation 2020-O0002)

Effective immediately, contracting officers shall use the procedures and clauses provided in this class deviation in lieu of the procedures and clauses at DFARS 225.7703. 252.225-7023, 252.225-7024, and 252.225-7026 when acquiring products or services in support of military or stability operations in Afghanistan. Specifically, if the acquisition is in support of operations in Afghanistan, unless an exception for AbilityOne products applies:

• Prepare and execute a written determination in accordance with DFARS 225.7799-1 and 225.7799-2 (DEVIATION 2020-O0002);
• Evaluate offers in accordance with DFARS 225.7799-3 (DEVIATION 2020-O0002), and
• Include the appropriate provision and/or clause in the solicitation and contract in accordance with DFARS 225-7799-4 (DEVIATION 2020-O0002).

This class deviation implements various FY NDAA’s authorizing DoD to provide a preference for or limit competition to products or services from Afghanistan, a Central Asian state, Pakistan, or the South Caucasus when acquiring products or services, other than small arms, in support of operations in Afghanistan. Upon contract award, contracting officers shall provide to Contract Policy, Defense Pricing and Contracting, copies of any written determinations made to utilize the authority provided in this class deviation to acquire products or services from a Central Asian state, Pakistan, or the South Caucasus.


Expiration Date: until incorporated in the DFARS or otherwise rescinded.

Affects: FAR 51.101(a)(1)

Notwithstanding the restriction at Federal Acquisition Regulation (FAR) 51.101(a)(1), contracting officers may authorize contractors to use Defense Logistics Agency (DLA) Energy as a source for fuel in performance of other than cost-reimbursement contracts, when the fuel is funded by the Defense Working Capital Fund. When providing this authorization to contractors, contracting officers shall:

• Comply with FAR 51.102 and DFARS 251.102, including the execution of a letter of authorization (LOA);
• Include FAR clause 52.251-1 and DFARS clause 252.251-7000 in the contract;
• Obtain a current DLA Energy Fuel Purchase Authorization (FPA) template from DLA Energy;
• Email to DLA Energy: Completed FPA, Contracting Officer LOA, and Documentation that clauses FAR 52.251-1 and DFARS 252.251-7000 are included in the underlying contract.


Expiration Date: until incorporated in the DFARS or otherwise rescinded.

Affects: DFARS 201.170(a)(1)(i) and DFARS 201.170(a)(1)(iii)

Defense Pricing and Contracting (DPC) will no longer conduct peer reviews for competitive procurements above $1 billion, except for procurements of major defense acquisition programs above $1 billion for...
which the USD(A&S) is the milestone decision authority and USD(A&S) special interest programs. DPC will no longer conduct postaward peer reviews for acquisitions for services with a total estimated value greater than $1 billion.

However, DoD independent management reviews of contracts for services in accordance with section 808 of FY2008 NDAA (Pub. L. 110-181) are still required. Ongoing Acquisition Category (ACAT) 1D competitive programs still must undergo peer reviews associated with any remaining phases. The requirement for noncompetitive program peer reviews remains unchanged.

Expiration Date: until incorporated in the DFARS or otherwise rescinded.

In lieu of the thresholds at FAR 42.708(a)(2)(i) and (ii), contracting officers shall consider cost amounts to be relatively insignificant when the total unsettled direct and indirect costs to be allocated to any one contract, task order, or delivery order do not exceed $2 million.

Defense Contract Management Agency (DCMA) Administrative Contracting Officers (ACOs) are further authorized to deviate from FAR 42.708(a)(2) and negotiate the settlement of direct and indirect costs for a specific contract, task order, or delivery order to be closed in advance of the determination of final direct costs and indirect rates set forth in FAR 42.705 regardless of the dollar value or percent of unsettled direct or indirect costs allocable to the contract.

2019-O0008: Section 890 Pilot Program to Accelerate Contracting and Pricing Processes (1 Apr 2019)
Expiration Date: SUPERSEDED BY DoD CLASS DEVIATION DARS 2020-O0020 [14 Aug 2020]

Expiration Date: until incorporated in the DFARS or otherwise rescinded.

Pursuant to Section 1006 of the FY19 NDAA, this class deviation adds the above clause to the DFARS for use when contracting with accounting firms providing financial statement auditing or audit remediation services to the Department of Defense in support of the audits required under 31 U.S.C. 3521. The clause requires the contractor to provide a statement setting forth the details of any disciplinary proceedings with respect to the accounting firm or its associated persons before any entity with the authority to enforce compliance with rules or laws applying to audit services offered by accounting firms.

[Supersedes Class Deviation 2018-O0007]
Expiration Date: until eSRS is modified to support ISRs for orders against BOAs and BPAs, or until otherwise rescinded.

For orders or calls against basic ordering agreements (BOAs) or blanket purchase agreements (BPAs), contracting officers shall use:

- Alternate III of the clause at FAR 52.219-9, Small Business Subcontracting Plan, in lieu of the basic clause; and
- Alternate I of the clause at DFARS 252.219-7003, Small Business Subcontracting Plan (DoD Contracts), in lieu of the basic clause;
When incorporating a subcontracting plan due to a modification to an order against a BOA or BPA, as specified in FAR 19.702(a)(3), contracting officers shall use:

- The Attachment 1 clause FAR 52.219-9, “Small Business Subcontracting Plan-Alternate IV (DEVIATION 2019-O0005)”, in lieu of Alternate IV of the clause at FAR 52.219-9; and
- Alternate I of the clause at DFARS 252.219-7003, Small Business Subcontracting Plan (DoD Contracts), in lieu of the basic clause.

Currently, the Electronic Subcontracting Reporting System (eSRS) does not support the submission of an Individual Subcontracting Report (ISR) for orders placed against BOAs and BPAs. Use of the deviation clause provided in Attachment 1, and Alternate III of the FAR clause, and Alternate I of the DFARS clause will ensure DoD is able to capture subcontracting data for these orders. These clauses instruct contractors to submit the Standard Form 294, Subcontracting Report for Individual Contracts, to the contracting officer while eSRS is being modified to support the submission of ISRs.

Expiration Date: remains in effect for five years (1 Oct 2023) or until otherwise rescinded

This class deviation rescinds and supersedes Class Deviation 2013-O0019, dated Sep 25, 2013.

Affects: FAR 12.301(b)(4), and FAR 52.212-5.

Replaces clause FAR 52.212-5 with clause FAR 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items (DEVIATION 2018-O0021) (Sep 2018)

Clause FAR 52.212-5 requires the Contracting Officer to "check a box" to identify the clauses that are applicable to the specific acquisition of commercial items. Under this class deviation, Contracting Officers may use the SPS clause logic capability to select the clauses automatically that are applicable to the specific solicitation and contract. When using this SPS clause logic capability, this class deviation also requires that clause FAR 52.212-5 (DEVIATION 2018-O0021) be incorporated into such solicitations and contracts because this revised clause fulfills the statutory requirements on auditing and subcontract clauses applicable to commercial items. The deviation also authorizes adjustments to the attached deviation clause required by future changes to the clause at FAR 52.212-5 published in the FAR.

2018-O0020: Permanent Supply Chain Risk Management Authority (19 Sep 2018)
Expiration Date: when incorporated in the DFARS or otherwise rescinded.

Affects: DFARS subpart 239.73, DFARS 239.7300, DFARS 239.7301 and DFARS 252.239.

Adds the following solicitation provision and contract clause and the prescriptions for their use:

- DFARS 252.239-7017 Notice of Supply Chain Risk (SEP 2018) (DEVIATION 2018-O0020)
- DFARS 252.239-7018 Supply Chain Risk (SEP 2018) (DEVIATION 2018-O0020)

Contracting officers shall use the above provision and clause in lieu of the provision at DFARS 252.239-7017, Notice of Supply Chain Risk, and clause at DFARS 252.239-7018, Supply Chain Risk. This class deviation implements section 881 of the FY19 NDAA. Section 881 codifies the authority for requirements for information relating to supply chain risk at 10 U.S.C. 2339a and repeals the sunset date at section 806(g) of the FY 2011 NDAA as modified by section 806(a) of the FY 2013 NDAA to make the authority permanent.
Class Deviation Summaries (Cont’d)

2018-O0019: Contractor Personnel Performing in Japan (30 Aug 2018)
Expiration Date: when incorporated in the DFARS or otherwise rescinded.

Adds the following contract clause and the prescription for its use:

Effective immediately, contracting officers shall use the above clause in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items that will require contractor personnel to perform in Japan. The deviation clause requires DoD contractors to account for contractor personnel and dependents in the Synchronized Predeployment and Operational Tracker, in order for the contractor personnel and dependents to be eligible for coverage under the SOFA.

Expiration Date: September 30, 2022, or when otherwise rescinded.

Affects: FAR subpart 5.2, FAR subpart 5.5, FAR 6.102, DFARS 215.371-2, and DFARS 235.006-71

As authorized by FY17 NDAA Section 879, contracting officers may acquire innovative commercial items, technologies, or services using a new “competitive procedure” called a commercial solutions opening (CSO) by following the procedures provided in this class deviation. Under a CSO, DoD may competitively select proposals received in response to a general solicitation, similar to a broad agency announcement, based on a review of proposals by scientific, technological, or other subject-matter expert peers.

Contracting officers shall treat items, technologies, and services acquired using a CSO as commercial items. Notwithstanding the limitation in DFARS 235.006-71 [Competition], a CSO may be used to fulfill requirements for research and development, ranging from advanced component development through operational systems development. When using a CSO in acquisitions for research and development, contracting officers shall use the procedures in this class deviation in conjunction with FAR part 35.

Contracting officers may use a CSO only –
- To obtain solutions or potential new capabilities that fulfill requirements, close capability gaps, or provide potential technological advancements;
- When meaningful proposals with varying technical or scientific approaches can be reasonably anticipated; and
- When the contract entered into under the pilot program will be fixed-price, including fixed-price incentive contracts.

A notice of CSO availability must be publicized through the Governmentwide point of entry at least annually. Synopsis under FAR subpart 5.2 of individual contract actions under the CSO is not required. In addition, the CSO must –
- Describe the agency’s interest, either for an individual program requirement or for broadly defined areas of interest covering the full range of the agency’s requirements
- Describe the criteria for selecting proposals, their relative importance, and the method of evaluation, including, where applicable, the potential type of data rights that may be determined necessary to meet DoD’s minimum needs; and
- Contain instructions for the preparation and submission of proposals and specify the period of time during which proposals will be accepted.

The primary evaluation factors for selecting proposals for award shall be technical, importance to agency programs, and funds availability. Price shall be considered to the extent appropriate, but at a minimum, to determine that the price is fair and reasonable. The requirements of DFARS 215.371-2 [i.e., promoting competition] do not apply to acquisitions of innovative commercial items, technologies, or services under a CSO pursuant to this class deviation.
Class Deviation Summaries (Cont'd)

Proposals received as a result of a CSO shall be evaluated in accordance with evaluation criteria specified therein through the review of such proposals by scientific, technological, or other subject-matter expert peers. Written evaluation reports on individual proposals are required, but proposals need not be evaluated against each other since they are not submitted in response to a common performance work statement or statement of work.

Contracting officers shall ensure that contract files fully and adequately document the market research and rationale supporting a conclusion that the requirements of this class deviation have been satisfied.

Expiration Date: until it is incorporated in the DFARS or otherwise rescinded.
Affects: FAR 15.506(d) and FAR 33.104(c)

This class deviation implements FY2018 NDAA, section 818 paragraphs (b) and (c) which provides enhanced postaward debriefing rights for unsuccessful offerors and revises the GAO protest timelines.

1. Contracting officers shall include in the debriefing information provided to unsuccessful offerors an opportunity to submit additional questions related to the debriefing within two business days after receiving the debriefing. The agency shall respond in writing to the additional questions submitted by an unsuccessful offeror within five business days after receipt of the questions. The agency shall not consider the postaward debriefing to be concluded until the agency delivers written responses to the unsuccessful offeror.

2. The agency shall comply with the requirements of FAR 33.104(c) regarding the suspension of contract performance or termination of the awarded contract, upon receipt of a protest filed by an unsuccessful offeror at the U.S. Government Accountability Office (GAO) within:
   • Ten days after the date of contract award;
   • Five days after a debriefing date offered to the protester under a timely debriefing request and no additional questions related to the debriefing are submitted; or
   • Five days after the Government delivers its written response to additional questions submitted by the unsuccessful offeror, whichever is later.

2018-O0006: Evaluation Factors for Certain Multiple-Award Task- or Delivery Order Contracts
(13 Dec 2017)
Expiration Date: when incorporated in the FAR or otherwise rescinded.

Contracting officers, at their discretion, when issuing a solicitation that will result in multiple-award contracts issued for the same or similar services, may exclude price or cost as an evaluation factor for the contract awards, if the solicitation states that the Government intends to make an award to each and all qualifying offerors. For purposes of this deviation, a qualifying offeror is an offeror that is determined to be a responsible source, submits a technically acceptable proposal that conforms to the requirements of the solicitation, and the contracting officer has no reason to believe would be likely to offer other than fair and reasonable pricing.

This deviation permits contracting officers to evaluate cost or price only at the task or delivery-order level in accordance with FAR 16.505(b)(1)(ii)(E) as long as the multiple-award contracts under which the orders are being placed are for the same or similar services, and a contract award was made to each and all qualifying offerors. This deviation does not apply to solicitations for multiple-award contracts that provide for sole source orders pursuant to section 8(a) of the Small Business Act (15 U.S.C. 637(a)).
Class Deviation Summaries (Cont'd)

2018-O0005: Educational Service Agreements for Training in the Legal Profession (13 Dec 2017)
Expiration Date: when incorporated in the DFARS or otherwise rescinded.

Affects: DFARS 237.7202(a)

DoD contracting officers may enter into educational service agreements for training in any legal profession. This deviation removes DFARS 237.7202(a) and its prohibition against making an educational service agreement that would result in the payment of Government funds for tuition or other expenses for training in any legal profession, except in connection with the detailing of commissioned officers to law schools under 10 U.S.C. 2004.

2018-O0002: One Time Deviations-Section 830(d) Pilot Program for Acceleration of Foreign Military Sales (22 Mar 2018)
Expiration Date: None specified.

Affects: 15.4, Contract Pricing

Section 830(d) of the FY17 NDAA, authorizes a pilot program to reform and accelerate the contracting and pricing processes for certain FMS requirements. DPAP is conducting a comprehensive pilot program to accelerate the contracting and pricing process for up to ten, approved FMS contracts for full rate production of major weapon systems. This pilot authority provides contracting officers broad discretion in determining the amount of certified cost and pricing data required to support any particular applicable procurement in lieu of using the procedures at FAR 15.4 and in reducing the cost and pricing data to be submitted in accordance with 10 U.S.C. 2306a.

2017-O0009: Products and Services from the African Host Nation-Djibouti (15 Sep 2017)
Expiration Date: until incorporated in the DFARS or otherwise rescinded.

This class deviation rescinds and supersedes Class Deviation 2016-O0005, dated February 4, 2016.

Affects: DFARS subparts 206.3, 225.4, 225.5, 225.75, and 225.77


Adds: the following solicitation provision and contract clauses:

- DFARS 252.225-7985 Preference for Products or Services from the African Host Nation-Djibouti (SEP 2017) (DEVIATION 2017-O0009)
- DFARS 252.225-7986 Requirement for Products or Services from the African Host Nation-Djibouti (SEP 2017) (DEVIATION 2017-O0009)
- DFARS 252.225-7977 Acquisition Restricted to Products or Services from the African Host Nation-Djibouti (SEP 2017) (DEVIATION 2017-O0009)

Contracting officers shall use the procedures, solicitation provision and clauses provided in this class deviation when acquiring products or services from the African host nation-Djibouti. This enhanced authority is to limit competition to, or provide a preference for, products or services from the African host nation-Djibouti when in support of operations in Djibouti. However, this authority is not available for the procurement of any product on the AbilityOne Procurement List if such a product can be delivered by a qualified nonprofit agency in a timely fashion to support mission requirements. This class deviation requires a written individual or class determinations in accordance with formats prescribed in this class deviation, properly executed by the appropriate official, and using applicable evaluation procedures. The furnishing of certain reports to DPAP/PACC for submittal to Congress by SECDEF are also required.
Class Deviation Summaries (Cont’d)

2016-O0008: Contractor Personnel Performing in the USAFRICOM Command Area of Responsibility
(10 Jun 2016) [Supersedes CD 2016-O0006, same subject]  
Expiration Date: until incorporated in the DFARS or otherwise rescinded  
Affects: DFARS 252.225-7040  
Adds: the following contract clause in full text and the prescription for its use:


Effective immediately, contracting officers shall incorporate the above clause in the United States Africa Command Area of Responsibility, in lieu of the clause at DFARS 252.225-7040, Contractor Personnel Supporting U.S. Armed Forces Deployed Outside the United States, in all solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items. This clause requires contractor personnel to perform in the United States Africa Command (USAFRICOM) area of responsibility. In addition, to the extent practicable, contracting officers shall modify current, active contracts with performance in the USAFRICOM area of responsibility to include the attached clause 252.225-7980.

2015-O0017: Earned Value Management System Threshold (28 Sep 2015)  
Expiration Date: until incorporated in the DFARS or otherwise rescinded.  
Affects: DFARS 234.201(1)(ii), DFARS 234.203, DFARS 252.234-7001, and DFARS 252.234-7002  
The Earned Value Management System (EVMS) compliance review threshold at DFARS 234.201(1)(ii), DFARS provision 252.234-7001, and DFARS clause 252.234-7002 is raised from $50 million to $100 million, resulting in the use of the following revised solicitation provision and contract clause in lieu of the provision at DFARS 252.234-7001 and the clause at DFARS 252.234-7002:

- DFARS 252.234-7001 Notice of Earned Value Management System (DEVIAITON 2015-O0017) (Sep 2015)

This $100 million threshold applies to cost or incentive contracts and subcontracts for which the contractor is required to have an Earned Value Management System that has been determined by the Cognizant Federal Agency to be in compliance with the EVM guidelines in EIA-748. For cost or incentive contracts and subcontracts valued greater than $20 million, the contractor is required to utilize an EVMS that complies with the guidelines in the EIA-748 to provide EVM reporting to the program management office. No EVMS compliance surveillance activities will be routinely conducted by DCMA on such contracts and subcontracts valued from $20 million to $100 million, but can be conducted on an exception basis regarding suspect EVM contract data or in case of noncompliance with one or more of the 32 EIA-748 guidelines.

Expiration Date: until incorporated in the DFARS or if rescinded  
Affects: DFARS 252.225-7040 (MAY 2014)  
Adds: the following contract clause and the prescription for its use:


Contracting officers shall insert the above clause in solicitations and contracts for performance in the USSOUTHCOM area of responsibility, unless clause DFARS 252.225.7040 applies.
Class Deviation Summaries (Cont’d)

Expiration Date: until incorporated in the DFARS or is otherwise rescinded.

Affects: FAR 8.404(d)

Effective immediately, ordering activity contracting officers shall comply with the following policy, in lieu of FAR 8.404(d), Pricing, when are responsible for making a determination of fair and reasonable pricing for individual orders when using Federal Supply Schedules.

FAR 8.404(d) Pricing. (DEVIAION)

Supplies offered on the schedule are listed at fixed prices. Services offered on the schedule are priced either at hourly rates, or at a fixed price for performance of a specific task (e.g., installation, maintenance, and repair). GSA has determined the prices of supplies and fixed-price services, and rates for services offered at hourly rates, to be fair and reasonable for the purpose of establishing the schedule contract. GSA’s determination does not relieve the ordering activity contracting officer from the responsibility of making a determination of fair and reasonable pricing for individual orders, BPAs, and orders under BPAs, using the proposal analysis techniques at 15.404-1. The complexity and circumstances of each acquisition should determine the level of detail of the analysis required.

2014-O0007: Prohibition on the Use of the 8(a) Business Development Program for Acquisition of Military Simulation and Military Simulation Training (14 Mar 2014)
Expiration Date: remains in effect until further notice.

Affects: FAR subpart 19.8

Effective January 30, 2014, contracting officers are prohibited from awarding prime contracts under the Section 8(a) program (competitive and sole source) for the purchase of military simulation and military simulation training contracts. “Military simulation” and “military simulation training” contracts are contracts for:

i. the provision or sale of devices where the primary purpose of the device or devices is instruction for the use, operation and/or maintenance of military equipment of any nature or kind (including, but not limited to, aircraft, ships, tanks, etc.), and

ii. the training in the use, operation or maintenance with all military simulator equipment.

Accordingly, contracting officers shall not use FAR subpart 19.8, Contracting with the Small Business Administration (The 8(a) Program), in the case of such procurements.

2013-O0018: Past Performance Evaluation Thresholds and Reporting Requirements (24 Sep 2013)
Expiration Date: when incorporated in the FAR or DFARS or otherwise rescinded

Affects: FAR subpart 8.4, FAR subpart 8.7 FAR 15.304(c)(3)(i), FAR 42.1502(b); DFARS subpart 208.6, DFARS subpart 208.7, DFARS 215.304, and DFARS 242.1502

1. Revises past performance thresholds to be used in lieu of the thresholds at FAR 15.304(c)(3)(i) and at FAR 42.1502(b) as follows:

- DFARS 215.304 – Evaluation factors and significant subfactors (DEVIAION) (c)(3)(i) In lieu of the threshold specified at FAR 15.304(c) (3)(iii), evaluate past performance in source selections for negotiated competitive acquisitions as follows:

<table>
<thead>
<tr>
<th>For:</th>
<th>Expected to exceed:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Systems and operations support acquisitions</td>
<td>$5,000,000</td>
</tr>
<tr>
<td>Services and information technology acquisitions</td>
<td>$1,000,000</td>
</tr>
<tr>
<td>Ship repair and overhaul acquisitions</td>
<td>$500,000</td>
</tr>
</tbody>
</table>
For: Other acquisitions per FAR 15.304(c)(3)(1) ¹
Expected to exceed: The Simplified Acquisition Threshold ¹

- DFARS 242.1502 Policy (DEVIATION)
  (b) In lieu of the threshold specified at FAR 42.1502(b), FAR 42.1502(c) and FAR 42.1502(d), except as provided at FAR 42.1502(e), (f) and (h), prepare an evaluation of contractor performance as follows:

<table>
<thead>
<tr>
<th>For:</th>
<th>Expected to exceed:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Systems and operations support acquisitions</td>
<td>$5,000,000</td>
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<td>Services and information technology acquisitions</td>
<td>$1,000,000</td>
</tr>
<tr>
<td>Ship repair and overhaul acquisitions</td>
<td>$500,000</td>
</tr>
<tr>
<td>Other acquisitions per FAR 42.1502(b),(c)&amp;(d) ¹</td>
<td>The Simplified Acquisition Threshold ¹</td>
</tr>
</tbody>
</table>

¹DAU Editor’s Note #1 The CPARS guidance lists various business sectors. DoD includes healthcare under the services business sector and fuels under the operations support business sector.

DAU Editor’s Note #2: as indicated above, pursuant to FAR 42.1502(e), past performance evaluations shall be prepared for each construction contract of $700,000 or more (optional for <$700,000). Pursuant to FAR 42.1502(f) past performance evaluations shall be prepared for each architect-engineer services contract of $35,000 or more (optional for <$35,000), and for each architect-engineer services contract that is terminated for default regardless of contract value.

2. This class deviation requires past performance reporting for contracts awarded under FAR subpart 8.7, Acquisition from Nonprofit Agencies Employing People Who are Blind or Severely Handicapped, when the thresholds in this class deviation are exceeded, and it applies these thresholds to reporting requirements for FAR subpart 8.6, Acquisition from Federal Prison Industries, Inc.

2013-O0017: Contractor Demobilization (30 Aug 2013)
Expiration Date: until incorporated in the DFARS or is otherwise rescinded.

Adds: the following contract clause and the prescription for its use:
- DFARS 252.225-7998 – Contractor Demobilization (DEVIATION 2013-O0017) (AUGUST 2013)

Effective immediately, contracting officers shall use the above clause in all solicitations and contracts with performance in Afghanistan, except solicitations and contracts for commodities. Under the terms of this clause, the Contractor is responsible for demobilizing all of its personnel and equipment from the Afghanistan Combined Joint Operations Area (CJOA) in accordance with an approved demobilization plan.

Expiration Date: until incorporated in the DFARS or otherwise rescinded.

Affects: FAR 4.804-5(a)(12), FAR 42.705-1(b)(1)(iii), FAR 42.705-1(b)(2), and FAR 42.705-2(b)(2)(i)

For the purposes of satisfying the audit requirements at FAR 4.804-5(a)(12), FAR 42.705-1(b)(2), and FAR 42.705-2(b)(2)(i), DoD contracting officers shall continue to rely on either:
- A DCAA audit report or
- A DCAA memorandum documenting the following: based on a risk assessment and a proposal adequacy evaluation pursuant to FAR 42.705-1(b)(1)(iii), DCAA deemed the incurred cost proposal to be low-risk and did not select it for further audit in accordance with DCAA Policy dated July 6, 2012 [attached to this class deviation].
Class Deviation Summaries (Cont’d)

Expiration Date: until incorporated in the FAR or the DFARS or otherwise rescinded.

Effective immediately, Contracting Officers may not require any entity to submit political information as part of a solicitation or any contract action nor may they use fiscal year 2012 funds to require or recommend the submission of political information.

This class deviation implements 10 U.S.C 2335, as added by section 823 of the National Defense Authorization Act of 2012 (Pub. L. 112-81). This class deviation also implements section 743 of the Consolidated Appropriations Act of 2012 (Pub. L. 112-74).

2011-O0006: Utilities Privatization - Class Deviation from FAR Part 31 (31 Mar 2011)
Expiration Date: when incorporated in the DFARS or rescinded

Affects: FAR Part 31; mainly, compliance with FAR 31.205-20 - Interest and Other Financial Costs and FAR 31.205-4 - Taxes

Applies to Government contracts awarded in conjunction with the conveyance of a utility system.

2011-O0002: Congressional Notification on Significant Contract Terminations (8 Oct 2010)
Expiration Date: when incorporated in the DFARS or rescinded

Affects: DFARS 249.7001

Contracting Officers are not required to provide congressional notification prior to executing any contract termination involving a reduction in employment of 100 or more contractor employees for contracts with entities that are other than United States firms, which are performed in Iraq and Afghanistan.
MEMORANDUM FOR COMMANDER, UNITED STATES CYBER COMMAND (ATTN: ACQUISITION EXECUTIVE)  
COMMANDER, UNITED STATES SPECIAL OPERATIONS COMMAND (ATTN: ACQUISITION EXECUTIVE)  
COMMANDER, UNITED STATES TRANSPORTATION COMMAND (ATTN: ACQUISITION EXECUTIVE)  
DEPUTY ASSISTANT SECRETARY OF THE ARMY (PROCUREMENT)  
DEPUTY ASSISTANT SECRETARY OF THE NAVY (PROCUREMENT)  
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE (CONTRACTING)  
DEFENSE AGENCY AND DOD FIELD ACTIVITY DIRECTORS

SUBJECT: Class Deviation—Combating Race and Sex Stereotyping

Effective immediately, except for contracts exempted from the requirements of Executive Order (E.O.) 11246 of September 24, 1965 (Equal Employment Opportunity), as amended (see Federal Acquisition Regulation (FAR) 22.807 and E.O. 13950, Combating Race and Sex Stereotyping), contracting officers shall:

(a) Include the clause provided in the Attachment in solicitations issued on or after November 20, 2020, and in any resultant contracts that will include the clause at FAR 52.222-26, Equal Opportunity.

(b) Amend solicitations issued prior to November 20, 2020, to include the clause provided in the Attachment and in any resultant contract award expected to occur on or after November 20, 2020, if the contract is contemplated to include the clause at FAR 52.222-26, Equal Opportunity.

This class deviation implements Section 4 of E.O. 13950, Combating Race and Sex Stereotyping (85 FR 60683, September 28, 2020). The E.O. seeks to promote economy and efficiency in Federal contracting, to promote unity in the Federal workforce, and to combat race and sex stereotyping and scapegoating. Section 4 requires agencies to include a clause in new solicitations and resultant contracts that prohibits contractors from using any workplace training that inculcates in its employees any form of race or sex stereotyping or any form of race or sex scapegoating. Section 4 provides an exception for contracts exempted under E.O. 11246. FAR 22.807 includes a list of these exemptions and instructions for requesting the exemptions described at FAR 22.807(a)(2) and (b)(5).
This class deviation remains in effect until it is incorporated in the FAR or otherwise rescinded. My point of contact is Mr. Michael Pelkey, who is available by telephone at (703) 614-1253 or by email at michael.f.pelkey.civ@mail.mil.

John M. Tenaglia  
Principal Director,  
Defense Pricing and Contracting

Attachments: 
As stated
252.222-7999 Combating Race and Sex Stereotyping (DEVIATION 2021-O0001)

Use this clause in solicitations and contracts, when a contract is contemplated that will include the clause at Federal Acquisition Regulation (FAR) 52.222-26, Equal Opportunity or its Alternate I.

COMBATING RACE AND SEX STEREOTYPING
(DEVIATION 2021-O0001) (NOV 2020)

(a) Definitions. As used in this clause—

“Race or sex scapegoating” means assigning fault, blame, or bias to a race or sex, or to members of a race or sex because of their race or sex.

“Race or sex stereotyping” means ascribing character traits, values, moral and ethical codes, privileges, status, or beliefs to a race or sex, or to an individual because of his or her race or sex.

(b) Exemptions. The exemptions that apply to Executive Order (E.O.) 11246 (see FAR 22.807) also apply to E.O. 13950 and the requirements of this clause.

(c) Compliance with E.O. 13950, Combating Race and Sex Stereotyping. Unless exempted under paragraph (b) of this clause, the Contractor shall not use any workplace training that inculcates in its employees any form of race or sex stereotyping or any form of race or sex scapegoating, including the concepts that—

(1) One race or sex is inherently superior to another race or sex;

(2) An individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously;

(3) An individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex;

(4) Members of one race or sex cannot and should not attempt to treat others without respect to race or sex;

(5) An individual’s moral character is necessarily determined by his or her race or sex;

(6) An individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex;
(7) Any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex; or

(8) Meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race.

(d) Notice. The Contractor shall send, to each labor union or representative of workers with which it has a collective bargaining agreement or other contract or understanding, the notice provided below advising the labor union or workers’ representative of the Contractor’s commitments under this clause, and post copies of the notice in conspicuous places available to employees and applicants for employment.

NOTICE
E.O. 13950, Combating Race and Sex Stereotyping
Employers Holding Federal Contracts or Subcontracts

Contractors shall not use any workplace training that inculcates in its employees any form of race or sex stereotyping or any form of race or sex scapegoating, including the following concepts that—

(1) One race or sex is inherently superior to another race or sex;

(2) An individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously;

(3) An individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex;

(4) Members of one race or sex cannot and should not attempt to treat others without respect to race or sex;

(5) An individual’s moral character is necessarily determined by his or her race or sex;

(6) An individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex;

(7) Any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex; or

(8) Meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race.

For use in this notice—

“Race or sex scapegoating” means assigning fault, blame, or bias to a race or sex, or to members of a race or sex because of their race or sex; and
“Race or sex stereotyping” means ascribing character traits, values, moral and ethical codes, privileges, status, or beliefs to a race or sex, or to an individual because of his or her race or sex.

Any person who believes a contractor has violated its nondiscrimination or affirmative action obligations under this notice should immediately contact the Office of Federal Contract Compliance Programs (OFCCP) Complaint Hotline to Combat Race and Sex Stereotyping at 202-343-2008 or via email at OFCCPComplaintHotline@dol.gov.

(End of notice)

(e) **Noncompliance.** In the event it is determined that the Contractor is not in compliance with this clause or any rule, regulation, or order of the Secretary of Labor, this contract may be canceled, terminated, or suspended in whole or in part, and the Contractor may be declared ineligible for further Government contracts, under the procedures authorized in E.O. 11246, as amended. In addition, sanctions may be imposed and remedies invoked against the Contractor as provided in E.O. 11246, as amended; in the rules, regulations, and orders of the Secretary of Labor; or as otherwise provided by law.

(f) **Subcontracts.** (1) The Contractor shall include the substance of this clause, including this paragraph (f), in all subcontracts that exceed $10,000 and are not exempted by the rules, regulations, or orders of the Secretary of Labor issued under E.O. 11246, as amended, so that these terms and conditions will be binding upon each subcontractor.

(2) The Contractor shall take such action with respect to any subcontract as the Director of OFCCP may direct as a means of enforcing these terms and conditions, including sanctions for noncompliance, provided, that if the Contractor becomes involved in, or is threatened with, litigation with a subcontractor as a result of such direction, the Contractor may request the United States to enter into the litigation to protect the interests of the United States.

(End of clause)
MEMORANDUM FOR COMMANDER, UNITED STATES CYBER COMMAND (ATTN: ACQUISITION EXECUTIVE) COMMANDER, UNITED STATES SPECIAL OPERATIONS COMMAND (ATTN: ACQUISITION EXECUTIVE) COMMANDER, UNITED STATES TRANSPORTATION COMMAND (ATTN: ACQUISITION EXECUTIVE) INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE DEPUTY ASSISTANT SECRETARY OF THE ARMY (PROCUREMENT) DEPUTY ASSISTANT SECRETARY OF THE NAVY (ACQUISITION & PROCUREMENT) DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE (CONTRACTING) DIRECTORS, DEFENSE AGENCIES DIRECTORS, DEFENSE FIELD ACTIVITIES

SUBJECT: Prohibition on Providing Funds to the Enemy and Authorization of Additional Access to Records

Effective immediately, this class deviation rescinds and supersedes Class Deviation 2020-O0001. Contracting officers shall include the clauses provided in Attachments 1 and 2 of this deviation in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, with an estimated value in excess of $50,000 that will be performed outside the United States and its outlying areas in support of a contingency operation in which members of the Armed Forces are actively engaged in hostilities.

This class deviation implements sections 841 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2015 (Pub. L. 113-291), as amended by section 822 of the NDAA for FY 2020 (Pub. L. 116-92), and section 842 of the NDAA for FY 2015. Section 841 grants the authority to terminate or void contracts and to restrict future awards directly or indirectly to any person or entity that is actively opposing United States or coalition forces involved in a contingency operation in which members of the Armed Forces are actively engaged in hostilities. Section 842 grants the authority for additional access to contractor and subcontractor records to the extent necessary to ensure that funds available under covered contracts are not provided directly or indirectly to any person or entity.

Heads of contracting activities shall follow the procedures in Attachment 3 when exercising the authorities provided by this class deviation, which may be exercised only upon
written notification from a combatant commander identifying persons or entities within the combatant commander’s area of responsibility that are believed to have—

- Provided funds, including goods and services, received under a covered contract, grant, or cooperative agreement of an executive agency directly or indirectly to any person or entity that is actively opposing United States or coalition forces involved in a contingency operation in which members of the Armed Forces are actively engaged in hostilities; or

- Failed to exercise due diligence to ensure that none of the funds, including goods and services, received under a covered contract, grant, or cooperative agreement of an executive agency are provided directly or indirectly to any person or entity that is actively opposing United States or coalition forces involved in a contingency operation in which members of the Armed Forces are actively engaged in hostilities.

This class deviation remains in effect until December 31, 2023, or otherwise rescinded. My point of contact is Lt Col Karen Landale who may be reached at (703) 697-0895, or at karen.a.landale.mil@mail.mil.

Kim Herrington
Acting Principal Director,
Defense Pricing and Contracting

Attachments:
As stated
252.225-7993  Prohibition on Providing Funds to the Enemy. (DEVIATION 2020-O0022)

Use this clause in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, with an estimated value in excess of $50,000 that will be performed outside the United States and its outlying areas in support of a contingency operation in which members of the Armed Forces are actively engaged in hostilities.

PROHIBITION ON PROVIDING FUNDS TO THE ENEMY (DEVIATION 2020-O0022) (AUG 2020)

(a) The Contractor shall—

(1) Exercise due diligence to ensure that none of the funds, including supplies and services, received under this contract are provided directly or indirectly (including through subcontracts) to a person or entity who is actively opposing United States or Coalition forces involved in a contingency operation in which members of the Armed Forces are actively engaged in hostilities;

(2) Check the list of prohibited/restricted sources in the System for Award Management (SAM) at www.sam.gov—

(i) Prior to subcontract award; and

(ii) At least on a monthly basis; and

(3) Terminate or void in whole or in part any subcontract with a person or entity listed in SAM as a prohibited or restricted source pursuant to section 841 of the National Defense Authorization Act for Fiscal Year 2015 (Pub. L. 113-291), as amended, unless the Contracting Officer provides to the Contractor written approval of the head of the contracting activity to continue the subcontract.

(b) The Head of the Contracting Activity has the authority to—

(1) Terminate this contract for default, in whole or in part, if the Head of the Contracting Activity determines in writing that the contractor failed to exercise due diligence, as required by paragraph (a) of this clause; or

(2)(i) Void this contract, in whole or in part, if the Head of the Contracting Activity determines in writing that any funds received under this contract have been provided directly or indirectly to a person or entity who is actively opposing United States or Coalition forces involved in a contingency operation in which members of the Armed Forces are actively engaged in hostilities.
(ii) When voided in whole or in part, a contract is unenforceable as contrary to public policy, either in its entirety or with regard to a segregable task or effort under the contract, respectively.

(c) The Contractor shall include the substance of this clause, including this paragraph (c), in subcontracts, including subcontracts for commercial items, under this contract that have an estimated value over $50,000 and will be performed outside the United States and its outlying areas.

(End of clause)
252.225-7975 Additional Access to Contractor and Subcontractor Records.
(DEVIATION 2020-O0022)

Use this clause in all solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, with an estimated value in excess of $50,000 that will be performed outside the United States and its outlying areas in support of a contingency operation in which members of the Armed Forces are actively engaged in hostilities.

ADDITIONAL ACCESS TO CONTRACTOR AND SUBCONTRACTOR RECORDS
(DEVIATION 2020-O0022) (AUG 2020)

(a) In addition to any other existing examination-of-records authority, the Government is authorized to examine any records of the Contractor and its subcontractors to the extent necessary to ensure that funds, including supplies and services, available under this contract are not provided, directly or indirectly, to a person or entity that is actively opposing United States or coalition forces involved in a contingency operation in which members of the Armed Forces are actively engaged in hostilities.

(b) The substance of this clause, including this paragraph (b), is required to be included in subcontracts, including subcontracts for commercial items, under this contract that have an estimated value over $50,000 and will be performed outside the United States and its outlying areas.

(End of clause)
Procedures—Prohibition on Providing Funds to the Enemy and Authorization of Additional Access to Records

1. United States Africa Command (USAFRICOM), United States Central Command (USCENTCOM), United States European Command (USEUCOM), United States Indo-Pacific Command (USINDOPACOM), United States Southern Command (USSOUTHCOM), and United States Transportation Command (USTRANSCOM) Commanders will identify persons and entities within the area of responsibility of such command that—

   • Provide funds, including goods and services, received under a covered contract, grant, or cooperative agreement of an executive agency directly or indirectly to a person or entity that is actively opposing United States or coalition forces involved in a contingency operation in which members of the Armed Forces are actively engaged in hostilities; or

   • Fail to exercise due diligence to ensure that none of the funds, including goods and services, received under a covered contract, grant, or cooperative agreement of an executive agency are provided directly or indirectly to a person or entity that is actively opposing United States or coalition forces involved in a contingency operation in which members of the Armed Forces are actively engaged in hostilities.

2. Upon the identification of a person or entity as described above, the combatant commanders will, in consultation with the Under Secretary of Defense for Policy, the Under Secretary of Defense for Acquisition and Sustainment (USD(A&S)), and the appropriate Chief of Missions, notify in writing the appropriate heads of contracting activities (HCA) of such identification of the person or entity.

3. Upon receipt of such notification, the HCA, without power of redelegation, will exercise this authority to determine in writing, whether to—

   • Prohibit, limit, or otherwise place restrictions on the award of any DoD contracts to such identified persons or entities;

   • Terminate for default any DoD contracts when the HCA determined that the contractor failed to exercise due diligence to ensure that none of the funds received under the contract are provided directly or indirectly to such identified person or entity; or

   • Void, in whole or in part, any DoD contract that provided funds to such identified person or entity.

4. The HCA taking an action under paragraph 3. of these procedures to restrict, terminate, or void a contract shall, in writing, notify the affected contractor of the action. The notice
to the contractor shall inform the contractor of the right to request, within 30 days, an administrative review of the action.

5. Classified information relied upon to make a decision in accordance with paragraph 3. of these procedures may not be disclosed to a contractor with respect to which an action is taken pursuant to the authority provided in paragraph 3. of these procedures, or to their representatives, in the absence of a protective order issued by a court of competent jurisdiction established under Article I or Article III of the Constitution of the United States that specifically addresses the conditions upon which such classified information may be so disclosed.

6. Upon determination by the HCA to restrict the future award of contracts or subcontracts to a person or entity, the contracting activity shall notify USD(A&S), Defense Pricing and Contracting/Contract Policy and request entry of the required data on the ineligible person or entity in the System for Award Management (SAM) Exclusions as follows (see FAR 9.404):

   
   Classification = Special Entity Designation
   
   Agency = DoD
   
   Exclusion Status = Active
   
   Exclusion Type = Prohibition/Restriction
   
   Comments: Pursuant to Subtitle E, Title VIII of the NDAA for FY 2015

7. Upon termination or voiding of a contract, the contracting officer shall treat such action as a default for purposes of reporting in the Federal Awardee Performance and Integrity Information System (FAPIIS) (see FAR 42.1503(h)(1)).

8. For contracts awarded on or before December 31, 2023, to be performed outside the United States and its outlying areas, the contracting officer shall check the current list of prohibited or restricted persons or entities in SAM Exclusions prior to awarding the contract.

9. Contracting officers with contracts being performed outside the United States and its outlying areas in support of covered contingency operations shall also check SAM, at a minimum, on a monthly basis to ensure none of the existing contracts being performed in the covered combatant commands are associated with prohibited or restricted persons or entities.

10. The authority to examine records pursuant to 252.225-7975 (Attachment 2) may be exercised only upon a written determination by the contracting officer, upon a finding by the commanding officer of USAFRICOM, USCENTCOM, USEUCOM, USINDOPACOM, USSOUTHCOM, or USTRANSCOM that there is reason to believe
that funds available under the contract may have been provided directly or indirectly to persons or entities that are actively opposing United States or coalition forces in a contingency operation in which members of the Armed Forces are actively engaged in hostilities.

11. Each HCA shall enforce inclusion of the attached clauses 252.225-7993 (Attachment 1) and 252.225-7975 (Attachment 2) as prescribed.

12. Reports on Prohibition on Providing Funds to the Enemy.

   a. The HCA that receives a notice pursuant to paragraph 2. of these procedures shall submit to osd.pentagon.ousd-atl.mbx.contingency-contracting@mail.mil and the commander of the combatant command concerned a report on the action, if any, taken by the HCA pursuant to paragraph 3. of these procedures, including a determination not to terminate, void, or restrict the contract as otherwise authorized. Include the following:

      • The contracting activity taking such action.
      • An explanation of the basis for the action taken or not taken.
      • If applicable, the value of the contract voided or terminated and the value of all contracts of the contracting activity in force with the person or entity concerned at the time the contract was terminated or voided.

   b. Reports may be submitted in unclassified form, but with a classified annex; or in classified form, as appropriate.
MEMORANDUM FOR COMMANDER, UNITED STATES CYBER
COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES SPECIAL
OPERATIONSCOMMAND (ATTN: ACQUISITION
EXECUTIVE)
COMMANDER, UNITED STATES TRANSPORTATION
COMMAND (ATTN: ACQUISITION EXECUTIVE)
DEPUTY ASSISTANT SECRETARY OF THE ARMY
(PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE NAVY
(PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE
(CONTRACTING)
DIRECTORS, DEFENSE AGENCIES
DIRECTORS, DEFENSE FIELD ACTIVITIES

SUBJECT: Class Deviation—Section 3610 Reimbursement Requests

Effective immediately, contracting officers shall follow the guidance provided in this
class deviation when reviewing and processing contractor requests for reimbursement under
section 3610 of the Coronavirus Aid, Relief and Economic Security (CARES) Act (Pub. L. 116-
136). Section 3610 authorizes, but does not require, contracting officers to modify contracts and
other agreements, without consideration, to reimburse contractors for paid leave a contractor
provides to keep its employees or subcontractors in a ready state, including to protect the life and
safety of Government and contractor personnel during the public health emergency declared on
January 31, 2020, for Coronavirus Disease 2019 (COVID-19). Class Deviation 2020-O0013,
CARES Act Section 3610 Implementation, issued on April 8, 2020, and revised on August 17,
2020, established DFARS 231.205-79, CARES Act Section 3610 - Implementation, as a
framework for contracting officers to use when implementing the authority of section 3610.

In accordance with Office of Management and Budget Memorandum M-20-27,
Additional Guidance on Federal Contracting Resiliency in the Fight Against the Coronavirus
Disease (COVID-19), dated July 14, 2020, the effective date of section 3610 is March 27, 2020,
which is the date the CARES Act was enacted into law. Section 3610 does not contain language
to provide retroactive coverage, as a matter of law; therefore, the authority conferred by section
3610 does not apply to reimbursements for paid leave provided prior to March 27, 2020.

Section 3610 does not prohibit the Department from reimbursing a contractor for paid
leave prior to March 27, 2020, using contract authorities otherwise available to the Department;
therefore, contracting officers may, at their discretion, consider reimbursing such paid leave
costs as other COVID-19 related costs. For additional guidance on the reimbursement of other
COVID-19 related costs not authorized under section 3610, refer to Defense Pricing and
Contracting (DPC) Memorandum, Guidance for Assessment of Other COVID-19 Related
Impacts and Costs, dated July 2, 2020. Any reimbursement for paid leave provided prior to March 27, 2020, should not be identified as a payment made under section 3610 for purposes of tracking and reporting.

A. Notice of Intent to Request Reimbursement under Section 3610: Early Engagement

If a contractor contacts a contracting officer about its intent to submit a request for reimbursement under section 3610, early discussions may be beneficial. These early engagements may be used to review the requirements of this guidance and which of the attached checklists is appropriate to use in conjunction with the contractor’s section 3610 reimbursement request. These early engagements may also address the following:

- The information required by the class deviation, including the checklist(s);
- The requirement that the contractor’s status as an affected contractor must be established by the contracting officer in writing, in order for the contractor to receive reimbursement under section 3610;
- Whether funding is available for the section 3610 reimbursement request;
- What costs are and are not authorized in a section 3610 reimbursement request;
- The expected submission frequency of the section 3610 reimbursement requests; and
- The contractor’s estimate of the amount of its section 3610 reimbursement request.

No section 3610 reimbursements shall be made to a contractor unless and until funds are available for reimbursement of section 3610 costs. That funds may be legally available for reimbursement under section 3610, among other purposes, does not imply or require that such funds must be used for section 3610 reimbursements. Until such time as a section 3610 reimbursement request is submitted by the contractor and evaluated by the contracting officer, any discussion of the availability of funds is notional and for planning purposes only.

A final decision of affected contractor status and the amount of section 3610 reimbursement, if any, will be made only after submission and analysis of each section 3610 reimbursement request, including subsequent requests.

B. Submission of Requests for Reimbursement under Section 3610

A contractor may submit a section 3610 reimbursement request for a single contract, multiple contracts, or an entire business unit (or segment) level. Notwithstanding to whom a contractor submits its request, the Department may choose to address a section 3610 reimbursement request at any level in any DoD Component for any reason, including administrative convenience. Further, the Department may unilaterally decide to group together separate requests.

Three checklists are provided in the attachments to this class deviation to provide the type of information the contracting officer may need to assess a contractor’s section 3610 reimbursement request. These checklists provide guidance for processing reimbursement requests and may be tailored, at the contracting officer’s discretion, to fit specific circumstances. For example, a contracting officer may require a contractor to provide additional information.
necessary to assess its eligibility to receive a reimbursement under section 3610, verify the accuracy and allocability of incurred costs, or ensure that the contractor is not paid or reimbursed for the same costs via any other source.

The attached checklists are:

- **Abbreviated Reimbursement Checklist** (Attachment 1). Guidance for section 3610 reimbursement requests when the request applies only to reimbursement under a single contract of direct charged employees provided with paid leave, and the amount of reimbursement requested is below $2,000,000 in total. This checklist may also be used in conjunction with either the multipurpose or global reimbursement checklist for subcontractor reimbursement requests that meet the conditions of this checklist. Section 3610 reimbursement requests meeting these conditions should be provided to the contracting officer.

- **Multipurpose Reimbursement Checklist** (Attachment 2). Guidance for section 3610 reimbursement requests that apply to a single contract, when Attachment 1 is not applicable, or to multiple contracts when Attachment 3 is not being used. Section 3610 reimbursement requests using this checklist should include homogeneous groups of contracts, such as contracts for a single program or with a single contracting activity or DoD Component. Section 3610 reimbursement requests meeting these conditions should be provided to a contracting officer in the applicable contracting activity or Component. At their discretion, when multiple contracts are involved, contracting activities or DoD Components may appoint a lead contracting officer to ensure consistency and efficiency in considering the section 3610 reimbursement request.

- **Global Reimbursement Checklist** (Attachment 3). Guidance for section 3610 reimbursement requests that seek a global reimbursement at a business unit (or segment) level (see Attachment 3). Section 3610 reimbursement requests meeting these conditions should be provided to the contractor’s assigned Cognizant Federal Agency Official (CFAO).

A contractor may also choose to submit subsequent section 3610 reimbursement requests for additional paid leave costs incurred after the initial section 3610 reimbursement request, so long as the paid leave was provided no later than September 30, 2020. Contractors should use a consistent methodology in calculating the quantum of the section 3610 reimbursement request. In no event should a contractor receive multiple reimbursements for the same incurred costs.

Section 3610 reimbursement requests may be inclusive of both cost-type and fixed-price contracts. The contractor is responsible to properly support the impacts to each contract included in any section 3610 reimbursement request. A contractor’s initial section 3610 reimbursement request should cover the period from the latter of the date that the contractor began providing paid leave reimbursable under section 3610 or March 27, 2020, through the close of the latest accounting cycle prior to the contractor’s section 3610 reimbursement request. For example, if a company began providing section 3610 paid leave on March 27, 2020, and incurs paid leave costs through July 31, 2020, the company should provide sufficient information for the costs
incurred from March 27, 2020, through July 31, 2020, to support an initial section 3610 reimbursement request in August 2020. Subsequent section 3610 reimbursement requests should be coordinated with the contracting officer, prior to submission, and submitted in a similar manner to the initial section 3610 reimbursement request.

Reimbursements under section 3610 are limited to the costs incurred by the contractor allocable to its DoD contracts, including applicable subcontractor costs allocable to DoD contracts. Reimbursements under section 3610 shall not include costs incurred by the contractor allocable to work performed as a subcontractor. Any requests for reimbursement of section 3610 paid leave costs incurred as a subcontractor should be submitted to the appropriate prime contractor.

A contractor’s section 3610 reimbursement request should include any of its subcontractors’ section 3610 reimbursement requests for the same time period for the same contracts. Contracting officers shall only consider subcontractor section 3610 reimbursement requests that are submitted through the prime contractor. The contracting officer should require the prime contractor to evaluate each subcontractor’s section 3610 reimbursement request and provide, with its own section 3610 reimbursement request, an opinion as to whether the subcontractor is an affected contractor and, if so, its analysis of the subcontractor’s paid leave costs allowable under section 3610.

The contracting officer should review the contractor’s evaluation of each subcontractor’s submission requesting section 3610 reimbursement, and the contractor should provide, with its own section 3610 reimbursement request, an opinion to the contracting officer as to whether the subcontractor is an affected contractor and, if so, its analysis of the subcontractor’s paid leave costs allowable under section 3610. If the subcontractor does not routinely provide similar information to the contractor, the subcontractor should provide the amount of section 3610 reimbursement it is requesting to the contractor for inclusion in the contractor’s section 3610 reimbursement request and submit all other supporting information directly to the contracting officer under separate cover.

A contractor is required to segregate and report the actual amounts of section 3610 paid leave costs within its accounting system to support any requests for reimbursement. Contracting officers should advise contractors that the Government may audit the billed section 3610 costs in order to ensure the accuracy and compliance with section 3610. Additionally, contractors must comply with Cost Accounting Standards (CAS) for CAS-covered contracts, or FAR 31.203 for non-CAS covered contracts, in order to be reimbursed for section 3610 costs. Contracting officers may verify a contractor’s compliance with CAS in order to properly determine the Department’s share of the paid leave costs and the amounts allocable to Department contracts and subcontracts to which the costs are allocable.

Contracting officers shall require contractors to provide a representation with each section 3610 reimbursement request, as follows:

- All paid leave included in the request for reimbursement was specifically paid to keep the employees and/or subcontractors in a ready state;
The contractor segregated and reported the actual costs of the section 3610 paid leave payments, traceable to the individual employee charges;

The section 3610 reimbursement request excludes any paid leave costs associated with the contractor’s work as a subcontractor to another contractor;

All impacted subcontractors have been afforded an opportunity to submit a request for reimbursement of section 3610 paid leave costs, and eligible subcontractor section 3610 reimbursement requests received and as appropriate are incorporated into the contractor’s section 3610 reimbursement request for the contractor to pay to the subcontractor;

The section 3610 reimbursement request has been reduced by any applicable credits or loan forgiveness the contractor has received that is/are specifically identifiable to the public health emergency declared on January 31, 2020, for COVID-19;

The costs included in the section 3610 reimbursement request have not been requested elsewhere in another section 3610 reimbursement request; and

The section 3610 reimbursement request is made in good faith, and the supporting data is accurate and complete to the best of the contractor’s knowledge.

Any exceptions a contractor makes to the content of the above representations should be explained within its section 3610 reimbursement request. The representation should be dated and include the signature and title of a designated individual within the company with the authority to sign and commit on behalf of the contractor. Any subcontractors included in a contractor’s section 3610 reimbursement request should also provide to the contractor the same representations with its reimbursement request. Contracting officers shall document their reliance on the contractor’s representation in the contract file.

C. Affected Contractor

In accordance with Class Deviation 2020-O0013, contracting officers shall establish, in writing, a contractor’s status as an affected contractor prior to authorizing the reimbursement of paid leave costs under the authority of section 3610 for a particular contract and a specific time period. The contracting officer shall establish whether the contractor has incurred costs to provide paid leave for its employees or subcontractors to maintain its workforce in a ready state and otherwise meets all of the requirements of section 3610. The time period for reimbursement of paid leave for an affected contractor under section 3610 is March 27, 2020, through September 30, 2020.

In order to verify that a contractor is an affected contractor, contracting officers must be able to conclude, upon review of a contractor’s section 3610 reimbursement request, the following:

- The contractor has provided paid leave to its employees or subcontractors to maintain a ready state, including to protect the life and safety of Government and contractor
personnel, during the public health emergency declared on January 31, 2020, for COVID-19. Any paid leave provided prior to March 27, 2020, is ineligible for reimbursement under section 3610. All paid leave costs requested for reimbursement under section 3610 must have been incurred by the contractor or subcontractor and paid by the employer to the employee during the period of the reimbursement request.

- The reimbursement request does not include paid leave to which an employee was otherwise entitled (e.g., leave that the employee has earned or is provided through company policy, employment contract, or labor agreement);

- The section 3610 paid leave was provided to, and taken by, the employees no earlier than March 27, 2020, and no later than September 30, 2020;

- The leave was paid to contractor employees or subcontractor employees who could not perform work due to facility closures or other restrictions (e.g., quarantine due to exposure to persons infected with COVID-19 or travel restrictions when travel is required for contract performance) during the public health emergency declared for COVID-19;

- The contractor employees or subcontractor employees were unable to telework, because their job duties could not be performed remotely; and

- The section 3610 reimbursement request does not result in a total of paid work and paid leave charges for any contractor or subcontractor employee exceeding an average of 40 hours per week per employee.

Contracting officers shall document the basis for establishing that a contractor is an affected contractor in the contract file and include an affirmative statement of the contractor’s affected status in the contract modification (see section F below).

D. Determination of Reimbursement Amount

The determination of the reimbursement amount shall be based on the contracting officer’s review of the information provided in the contractor’s section 3610 reimbursement request and the criteria in this class deviation and Class Deviation 2020-O0013.

In no event shall a reimbursement under section 3610 include profit or fee on any contractor or subcontractor paid leave costs. Reimbursement shall be made at the appropriate rates for the work performed under the contract. The contracting officer shall document the rationale for the amount eligible for section 3610 reimbursement, including any limitations due to available funding, in the contract file.

The maximum reimbursement a contractor is authorized to receive under section 3610 shall be reduced by the amount of loan forgiveness a contractor receives pursuant to division G of the Families First Coronavirus Response Act (Pub. L. 116–127) or under the CARES Act (Pub. L. 116-136), or any other credit allowed by law that is specifically identifiable with the
public health emergency declared on January 31, 2020, for COVID–19. See also FAR 31.201-5 and section G below.

E. **Availability of Funds for Reimbursement under Section 3610**

Any reimbursement provided under the authority of section 3610 is subject to the availability of funds. Section 3610 reimbursements need not be funded only with CARES Act appropriations. Funds that are otherwise legally available for use under a contract may be used to fund a section 3610 reimbursement under that contract. The decision to provide available funds for section 3610 reimbursement is at the Department’s discretion. The Department may choose not to provide funds for section 3610 reimbursement under any particular contract, in which case no reimbursement will be made under such contract.

F. **Contract Modifications**

Once a contracting officer has established that a contractor is an affected contractor, determined the amount eligible for reimbursement, and validated availability of funds, the contracting officer shall modify the affected contract(s) to provide for the section 3610 reimbursement.

Regardless of the type of contract, a section 3610 bilateral contract modification shall:

- Cite section 3610 of the CARES Act as authority for the modification;

- Include the following (or similar) statement in the preamble of the modification “Because I have established that the contractor is an ‘affected contractor’ for the period of [insert inclusive dates] in accordance with section 3610, Federal Contractor Authority, of the Coronavirus Aid, Relief, and Economic Security (CARES) Act (Pub. L. 116-136), the contract is modified as follows”;

- Specify the time period for which section 3610 paid leave costs are being reimbursed;

- If subcontractor leave is included in the section 3610 reimbursement, specify the amount to be reimbursed to each affected subcontractor; and

- Incorporate the contract clause provided in Attachment 4 of this class deviation, which requires the contractor to notify the contracting officer of any credits or loan forgiveness the contractor receives for the same paid leave costs being reimbursed in the modification.

To ensure traceability, it is critical that the contract and supporting documentation clearly identify reimbursement costs paid to contractors under the authority of section 3610, as well as how such costs are identified, segregated, recorded, invoiced, and reimbursed. Guidance on the requirement to create dedicated line items to ensure proper tracking and reporting of section 3610 reimbursements can be found in the DPC memorandum, Implementation Guidance for Section 3610 of the Coronavirus Aid, Relief, and Economic Security Act, dated April 9, 2020.
In executing the contract modification, contracting officers may create a firm-fixed price line item for section 3610 reimbursement to allow the contractor to immediately invoice for the full price of the line item. If a firm-fixed price line item is created for section 3610 reimbursement, the contracting officer shall insert in paragraph (b) of Defense Federal Acquisition Regulation Supplement (DFARS) clause 252.232-7006, Wide Area WorkFlow Payment Instructions, “Invoice 2in1” (Services Only) as the applicable invoice and receiving report for the contractor to use when invoicing for its section 3610 reimbursement costs.

If a cost type line item (to include time and material and labor hour line items) is created for section 3610 reimbursement, the contractor will use a cost voucher when invoicing for section 3610 reimbursement costs, in accordance with DFARS clause 252.232-7006.

G. **Duplicate Reimbursements Related to COVID-19**

The contractor is required to notify the contracting officer within 30 days of receiving any credits or loan forgiveness for the same paid leave costs reimbursed under section 3610.

Should the timing of any applicable credits or loan forgiveness be such that the contractor is unable to provide notification to the contracting officer prior to execution of a contract modification resulting from the contractor’s section 3610 reimbursement request, the contractor must notify the contracting officer in writing within 30 days of receipt of the credit or loan forgiveness and agree to execute a modification reducing the reimbursed amount under section 3610 by the amount received by the other means, up to the entire section 3610 reimbursement amount.

H. **Additional Information**


This class deviation remains in effect until rescinded. My point of contact is Greg Snyder, who is available by telephone at 703-614-0719 or by email at gregory.d.snyder.civ@mail.mil.

Kim Herrington  
Acting Principal Director,  
Defense Pricing and Contracting
Abbreviated Reimbursement Checklist

Applicability:

This abbreviated reimbursement checklist applies to contractor requests and/or requests on behalf of its subcontractor(s) for reimbursement for paid leave provided to employees, pursuant to section 3610 of the CARES Act, for direct charged employees on a single contract, in which the amount of the requested reimbursement is below $2,000,000 in total. This checklist may also be used in conjunction with either the multipurpose or global reimbursement checklists for subcontractor reimbursement requests that meet the criteria of this checklist. This checklist also provides guidance for reimbursements and may be tailored at contracting officer’s discretion to fit specific circumstances.

A contractor that is not submitting a section 3610 reimbursement request on its own account may request a section 3610 reimbursement on behalf of its subcontractor(s), if the subcontractor(s) is/are established to be an affected contractor, by the contracting officer. If a subcontractor submits a section 3610 reimbursement request through the prime contractor, the subcontractor’s submission should include the information below.

Any section 3610 reimbursement is subject to the availability of funds. In addition, the contracting officer shall also establish, in writing, that the contractor is an affected contractor prior to authorizing the reimbursement of paid leave costs under the authority of section 3610.

Contractors using the guidance in this abbreviated checklist to request section 3610 reimbursement for direct charge employees on a single contract cannot subsequently use the multi-purpose checklist to request reimbursement for indirect employees if the reimbursement would be allocable to that same contract.

A contractor’s initial section 3610 reimbursement request should cover the period from the latter of the date that the contractor began providing paid leave reimbursable under section 3610 or March 27, 2020, through the close of the latest accounting cycle prior to the contractor’s section 3610 reimbursement request. The initial section 3610 reimbursement request and any subsequent section 3610 reimbursement request should be coordinated with the contracting officer prior to submission, and submitted in a similar manner to the initial section 3610 reimbursement request using the same methodology.

Section A, “Notice of Intent to Request Reimbursement under Section 3610: Early Engagement,” of this class deviation memorandum outlines early engagement discussions between the contractor and the contracting officer to coordinate a request for reimbursement.
1. **Contractor Identification and Contract Information.**

   The contracting officer should require section 3610 reimbursement requests to include the following information:

   (a) Contract/Task Order/Delivery Order Number(s).

   (b) Contractor Name.

   (c) Contractor Address.

   (d) Contractor Commercial and Government Entity (CAGE) Code, Taxpayer Identification Number (TIN), and Unique Entity Identifier.

   (e) Time Period Addressed by the Section 3610 Reimbursement Request.

2. **Section 3610 Circumstances Narrative and Information on Affected Contractor Status.**

   (a) The contracting officer should require the contractor to provide a request to be established as an affected contractor with a narrative supporting its request. The contractor should identify the circumstances that impacted it as a result of the public health emergency declared for COVID-19, and why it decided to provide paid leave to its employees and/or subcontractors to keep them in a ready state for which it is requesting section 3610 reimbursement. The circumstances addressed in this narrative should be specific to the single contract/task order/delivery order for which the contractor is requesting section 3610 reimbursement. The narrative should include—

   (1) An explanation as to why it was necessary to provide paid leave to its employees and/or subcontractor(s) to maintain a ready state under this contract/task order/delivery order;

   (2) That the paid leave does not include paid leave for which an employee was otherwise paid (e.g., leave that is provided through company policy, employment contract, or labor agreement);

   (3) That the paid leave was provided to, and taken by, the employee(s) and/or subcontractor(s) no earlier than March 27, 2020, and no later than September 30, 2020;

   (4) Identification of facility closures or restrictions that precluded employees and/or subcontractor(s) from performing at their normal work location(s), including closure/restriction date range(s) and specifics;

   (5) An explanation of why job duties could not be performed remotely for labor categories provided paid leave for which the contractor is seeking reimbursement under section 3610; and
(6) That the section 3610 reimbursement request does not result in a total of paid work and paid leave charges that exceed an average of 40 hours per week per employee.

(b) If requested, contractors should provide the contracting officer with a copy of any contractor telework policies and procedures.

3. Contractor Submission of Section 3610 Reimbursement Requests.

(a) The contracting officer should require the contractor to provide the following information to the contracting officer, as appropriate for the circumstances, with sufficient detail to support any audit of costs incurred, for this contract/task order/delivery order. The Government may also audit the billed costs in order to ensure accuracy and compliance with the law. Include the following—

(1) How section 3610 paid leave costs are segregated within the contractor’s accounting system and reported;

(2) A description of the contractor’s—

(i) Methodology to develop the amount requested for section 3610 reimbursement, as well as how the contractor has ensured that requested costs are not part of any other reimbursement request, either as a prime contractor or subcontractor;

(ii) Methodology to develop the appropriate rates included in the section 3610 reimbursement request and what is included in the appropriate rates (appropriate rates can include labor rates, overhead, and G&A, but may not include profit or fees);

(iii) Normal accounting treatment of leave costs (policies and procedures, indirect pools/allocation bases, disclosure statements, etc.);

(3) Any contractor company-specific guidance on the reimbursement of paid leave under section 3610; and

(4) Identification of the contractor’s non-Government commercial work over the period covered by the section 3610 reimbursement request, and a description of the allocation method the contractor used to allocate section 3610 paid leave costs between the Government and commercial customers and the resulting cost allocation.

(b) The contracting officer should require the contractor to identify the eligible hours for which it is requesting reimbursement under section 3610 (i.e., those hours meeting the criteria identified in DFARS 231.205-79(a)(1)(ii) under Class Deviation 2020-O0013) for this contract/task order/delivery order.

(1) Reimbursement for paid leave may not be requested in excess of an average of 40 hours/week/employee for full-time employees.
(2) Reimbursement for paid leave provided to part-time employees is limited to the average hours the part-time employees typically worked per week (prior to the public health emergency declared on January 31, 2020, for COVID-19).

(c) The contracting officer should require the contractor to identify all employees for whom the contractor is requesting reimbursement for section 3610 paid leave, as well as the number of paid leave hours for which reimbursement is requested, as follows:

(1) Upon request of the contracting officer, by labor category (including skill level) and by pay period.

(2) By average hours worked, by employee, by contract/task order/delivery order, for the three months prior to the public health emergency declared on January 31, 2020, for COVID-19.

(3) For employees for whom the contractor is requesting section 3610 reimbursement, any hours actually worked during the period for which section 3610 reimbursement is sought and the hourly rate the contractor charged the contract/task order/delivery order for the employee hours worked.

(d) Contractors are not entitled to section 3610 reimbursement for paid leave hours or other paid absence taken by employees during the claimed period that the employee was entitled to receive absent the public health emergency declared on January 31, 2020, for COVID-19 (e.g., leave that the employee has earned or is provided through company policy, employment contract, or labor agreement, including other extended medical leave). These hours must be excluded from any section 3610 reimbursement requests.

(e) Actual Paid Labor Rates.

(1) The contracting officer should require the contractor to provide the actual, unburdened hourly rates being paid to all personnel for whom the contractor is requesting section 3610 reimbursement. Reimbursement shall be made at the appropriate rates for the work performed under the contract.

(2) Upon request of the contracting officer, contractors should provide payroll records to support the labor rates included in the section 3610 reimbursement request.

(f) Financial Records. Upon the contracting officer’s request, the contractor should provide the financial records it used in developing the section 3610 reimbursement request.

4. Subcontractor Reimbursement Requests.

(a) Supporting Information. For all subcontractor section 3610 reimbursement requests, the prime contractor should be directed to provide, for each subcontractor, the same supporting information/documentation that is required from the prime contractor. If the subcontractor does not routinely provide such information to the prime contractor (e.g., due to competition or
proprietary data concerns), the subcontractor should provide the amount of its section 3610 reimbursement request to the prime contractor, for inclusion in the prime contractor’s section 3610 reimbursement request, and submit all other supporting information directly to the contracting officer under separate cover.

(b) Affected Contractor. The contracting officer should require the contractor to evaluate each subcontractor’s section 3610 reimbursement request submission and provide, with its own section 3610 reimbursement request, an opinion as to whether the subcontractor is an affected contractor and, if so, its analysis of whether the subcontractor’s paid leave costs are allowable under section 3610. The prime contractor shall not commingle subcontractor information with its own.

(c) Representations. Subcontractor section 3610 reimbursement requests included in a prime contractor’s section 3610 reimbursement request shall provide all of the representations in section 7, below.

5. Reimbursement Request Submission Format.

The contracting officer should require the contractor to submit the section 3610 reimbursement request in a format acceptable to the contracting officer, including the calculations of the requested section 3610 reimbursement amount, traceable to the supporting data submitted in accordance with the above. Any data, documentation, and information provided to support the contractor’s section 3610 reimbursement request should be provided in electronic format, whenever possible.

6. Identification of Other Credits that will Reduce Relief Provided under Section 3610.

(a) Contractors are eligible for other sources of funds that may result in credits or loan forgiveness. The maximum reimbursement a contractor is authorized to receive under section 3610 shall be reduced by the amount of loan forgiveness a contractor receives pursuant to division G of the Families First Coronavirus Response Act (Pub. L. 116–127) or under the CARES Act (Pub. L. 116-136), or any other credit allowed by law that is specifically identifiable with the public health emergency declared on January 31, 2020, for COVID–19.

(b) The contracting officer should require contractors to reduce any section 3610 reimbursement amount requested and any section 3610 reimbursement received upon receipt of credits or loan forgiveness, outlined above. If the contractor receives any applicable credit or loan forgiveness subsequent to its submission of a section 3610 reimbursement request, the contractor must notify the contracting officer within 30 days of receipt of the credit or loan forgiveness and must agree to a modification reducing the amount of section 3610 reimbursement by the amount of the credit or loan forgiveness received.

7. Representations.

(a) The contracting officer shall require contractors to provide the following representations with section 3610 reimbursement requests—
(1) All paid leave included in the request for reimbursement was specifically paid to keep the employees and/or subcontractors in a ready state;

(2) The contractor segregated and reported the actual costs of the section 3610 paid leave payments, traceable to the individual employee charges;

(3) The section 3610 reimbursement request excludes any paid leave costs associated with the contractor’s work as a subcontractor to another contractor;

(4) All impacted subcontractors have been afforded an opportunity to submit a request for reimbursement of section 3610 paid leave costs, and eligible subcontractor section 3610 reimbursement requests received and as appropriate are incorporated into the contractor’s section 3610 reimbursement request for the contractor to pay to the subcontractor;

(5) The section 3610 reimbursement request has been reduced by any applicable credit or loan forgiveness the contractor has received that is/are specifically identifiable to the public health emergency declared on January 31, 2020, for COVID-19;

(6) The costs included in the section 3610 reimbursement request have not been requested elsewhere in another section 3610 reimbursement request; and

(7) The section 3610 reimbursement request is made in good faith, and the supporting data is accurate and complete to the best of the contractor’s knowledge.

(b) The representations should be dated and include the signature and title of a designated individual within the company with the authority to sign and commit on behalf of the contractor. The contractor should explain any exceptions to these representations within its section 3610 reimbursement request.
**Multipurpose Reimbursement Checklist**

**Applicability:**

This multipurpose reimbursement checklist applies to contractor requests for reimbursement, pursuant to section 3610 of the CARES Act, for a single contract or multiple contracts for which the contractor is not using the global settlement checklist and cannot utilize the abbreviated checklist. If a contractor submits section 3610 reimbursement requests for multiple contracts using this checklist, the submission should be for a homogeneous group of contracts, such as contracts for a single program or with a single contracting activity or DoD Component. This checklist provides guidance to the contracting officer for reimbursements meeting these criteria and may be tailored at contracting officer’s discretion to fit specific circumstances.

A contractor that is not submitting a 3610 reimbursement request, on its own account, may request section 3610 reimbursement on behalf of its subcontractor(s), if the subcontractor(s) is/are determined, by the contracting officer, to be an affected contractor(s). If a subcontractor submits a section 3610 reimbursement request through the prime contractor, the subcontractor’s submission should include the information below.

Any section 3610 reimbursement is subject to the availability of funds. In addition, the contracting officer shall also establish, in writing, that the contractor is an affected contractor prior to authorizing the reimbursement of paid leave costs under the authority of section 3610.

Section 3610 reimbursement requests that utilize the guidance in this checklist should be provided to a contracting officer in the applicable contracting activity or DoD Component (Military Department, Defense Agency, Defense Field Activity). At their discretion, when multiple contracts are involved, contracting activities or DoD Components may appoint a lead contracting officer to ensure consistency and efficiency in considering the section 3610 reimbursement request.

A contractor’s initial section 3610 reimbursement request should cover the period from the latter of the date that the contractor began providing paid leave reimbursable under section 3610 or March 27, 2020, through the close of the latest accounting cycle prior to the contractor’s section 3610 reimbursement request. The initial section 3610 reimbursement request and any subsequent section 3610 reimbursement request should be coordinated with the contracting officer prior to submission, and submitted in a similar manner to the initial section 3610 reimbursement request using the same methodology.

Section A, “Notice of Intent to Request Reimbursement under Section 3610: Early Engagement,” of this class deviation memorandum outlines early engagement discussions between the contractor and the contracting officer to coordinate a request for reimbursement.
1. **Contractor Identification.**

   The contracting officer should require contractor section 3610 reimbursement requests for a single contract or multiple contracts, to include the following information:

   (a) Contractor Name.

   (b) Contractor Address.

   (c) Contractor Commercial And Government Entity (CAGE) code, Taxpayer Identification Number (TIN), and Unique Entity Identifier.

2. **Contractor Organization.**

   The contracting officer should require section 3610 reimbursement requests to include:

   (a) Whether the contractor is a parent, subsidiary, division, segment, or otherwise affiliated with another company.

   (b) If requests for affiliated companies are being submitted separately, how the contractor is ensuring that duplicate payments for the same costs are not being requested.

   (c) Whether the contractor is submitting section 3610 reimbursement requests to other contracting officers or Federal agencies. If so, the contracting officer should require a list of all section 3610 reimbursement requests being submitted.

3. **Contracts/Task Orders/Delivery Orders.**

   The contracting officer should require the contractor to provide a list of all contracts/task orders/delivery orders under which the contractor is requesting section 3610 reimbursement from DoD and other Federal Agencies, to provide the following:

   (a) Each section 3610 reimbursement request should include the timeframe for which each contract is impacted, by contract/task order/delivery order, for which the contractor is requesting section 3610 reimbursement.

   (b) Contract type(s) for each contract/task order/delivery order for which the contractor is requesting section 3610 reimbursement.

   (c) The list should be sortable and also include the DoD Component, buying activity, contracting officer, CAGE code, TIN, and Unique Entity Identifier.

   (d) Identification of the contractor’s non-Government commercial work over the period covered by the section 3610 reimbursement request, and a description of the allocation method the contractor used to allocate section 3610 paid leave costs between the Government and commercial customers and the resulting cost allocation.
4. Section 3610 Circumstances Narrative and Information on Affected Contractor Status.

(a) The contracting officer should require the contractor to provide a request to be established as an affected contractor with a narrative supporting its request. The contractor should identify the circumstances that impacted it as a result of the public health emergency declared for COVID-19, and why it decided to provide paid leave to its employees and/or subcontractor(s) to keep them in a ready state for which it is requesting section 3610 reimbursement. The circumstances addressed in this narrative should be specific to the single contract/task order/delivery order or multiple contracts for which the contractor is requesting section 3610 reimbursement. The narrative should include—

(1) An explanation as to why it was necessary to provide paid leave to its employees and/or subcontractor(s) to maintain a ready state under each contract/task order/delivery order;

(2) That the paid leave does not include paid leave for which an employee was otherwise paid (e.g., leave that is provided through company policy, employment contract, or labor agreement);

(3) That the paid leave was provided to, and taken by, the employee(s) and/or subcontractor(s) no earlier than March 27, 2020, and no later than September 30, 2020;

(4) Identification of facility closures or restrictions that precluded employees and/or subcontractor(s) from performing at their normal work location(s), including closure/restriction date range(s) and specifics;

(5) An explanation of why job duties could not be performed remotely for labor categories provided paid leave for which the contractor is seeking reimbursement under section 3610; and

(6) That the section 3610 reimbursement request does not result in a total of paid work and paid leave charges that exceed an average of 40 hours per week per employee.

(b) If requested, contractors should provide the contracting officer with a copy of any contractor telework policies and procedures.

5. Contractor Submission of Section 3610 Reimbursement Requests.

(a) The contracting officer should require the contractor to provide the following information to the contracting officer, as appropriate for the circumstances, with sufficient detail to support any audit of costs incurred, for this contract/task order/delivery order. The Government may also audit the billed costs in order to ensure accuracy and compliance with the law. Include the following—

(1) How section 3610 paid leave costs are segregated within the contractor’s accounting system and reported.
(2) A description of the contractor’s—

(i) Methodology to develop the amount requested for section 3610 reimbursement. This methodology must be consistent across all contracts/task orders/delivery orders and section 3610 reimbursement requests. The contracting officer should require the contractor to ensure that requested section 3610 costs are not part of any other reimbursement request, either as a prime or subcontractor;

(ii) Methodology to develop the appropriate rates included in the section 3610 reimbursement request and what is included in the appropriate rates. Appropriate rates can include labor rates and appropriate indirect rates such as overhead and G&A, but may not include profit or fees; and

(iii) Normal accounting treatment of leave costs (e.g., policies and procedures, indirect pools/allocation bases, disclosure statements).

(3) The current status of the contractor’s accounting system for Government contracting purposes, whether: Approved; Adequate; Not Evaluated; Not Applicable; or Disapproved. If the accounting system is disapproved, the contractor should also list the identified deficiencies of the accounting system, and if applicable, the date of the last accounting system approval and any changes since that approval.

(4) Any contractor company-specific guidance on the reimbursement of paid leave under section 3610.

(b) The contracting officer may require the contractor to provide the financial records used in developing its section 3610 reimbursement request.

(c) To keep an employee in a ready state, all paid leave costs in the section 3610 reimbursement request must have been incurred by the contractor or subcontractor and paid by the employer to the employee during the period of the section 3610 reimbursement request.

(1) The contracting officer should require the contractor to identify the eligible hours for which it is requesting reimbursement under section 3610 (i.e., those hours meeting the criteria identified in this class deviation) for each contract/task order/delivery order, broken out by labor category/skill level and by pay period.

(i) Reimbursement for paid leave may not be requested in excess of an average of 40 hours/week/employee for full-time employees.

(ii) Reimbursement for paid leave provided to part-time employees is limited to the average hours the part-time employees typically worked per week (prior to the public health emergency declared on January 31, 2020, for COVID-19).
(2) When requesting reimbursement for employees who are typically charged indirectly, the contractor should provide a detailed explanation of how:

(i) Each individual indirect employee meets the criteria addressed in this class deviation; and

(ii) Obtaining reimbursement for these indirect employees’ paid leave under section 3610 will not result in a duplication of costs.

(3) The contractor should identify all employees for whom the contractor is requesting section 3610 reimbursement as well as the number of paid leave hours for which reimbursement is requested, as follows:

(i) By labor category and skill level, upon request;

(ii) By average hours worked, by employee, by contract/task order/delivery order, for the three months prior to the public health emergency declared on January 31, 2020, for COVID-19; indicating whether each employee is charged direct assigned to a single contract/task order/delivery order, direct supporting multiple contracts, or indirect;

(iii) For employees for whom the contractor is requesting section 3610 reimbursement, any hours actually worked during the period for which section 3610 reimbursement is sought and the rate the contractor charged for each employee’s hours worked;

(d) Contractors are not entitled to section 3610 reimbursement for paid leave hours or other paid absence taken by employees during the claimed period that the employee was entitled to receive absent the public health emergency declared on January 31, 2020, for COVID-19 (e.g., leave that the employee has earned or is provided through company policy, employment contract, or labor agreement, including other extended medical leave). These hours must be excluded from any section 3610 reimbursement requests. Contractors also may not be reimbursed for paid leave costs for salaried employees to the extent that the salaried employee is paid whether working or not.

(e) The contracting officer should require the contractor to identify the average sick leave hours budgeted for and included in any forward pricing for the period claimed in the section 3610 reimbursement request. This will assist the Department in determining how much sick leave is already included in indirect rates and whether there is any potential duplication of hours in the section 3610 reimbursement request.

(f) Actual Paid Labor Rates.

(1) The contracting officer should require the contractor to provide the actual, unburdened hourly rates being paid to all personnel for whom the contractor is requesting section 3610 reimbursement. Reimbursement shall be made at the appropriate rates for the work performed under the contract.
(2) Upon request of the contracting officer, contractors should provide payroll records to support the labor rates included in the section 3610 reimbursement request.

(g) **Applicable Billing Rates.** The contractor shall identify the Forward Pricing Rate Proposal (FPRP), Forward Pricing Rate Agreement (FPRA), Defense Contract Management Agency Forward Pricing Rate Recommendation (FPRR), or appropriate billing rates, as applicable, in place covering the period of time in the section 3610 reimbursement request.

(1) The contractor should explain and document how it developed the applicable indirect rate(s) prior to the public health emergency declared on January 31, 2020, for COVID-19; and

(2) The contractor should show the calculations it used to remove the indirect employees’ paid leave charges included in its section 3610 reimbursement request from its indirect rate calculation; the contractor should provide the revised indirect rate(s).

(h) **Certified Cost or Pricing Data.** In accordance with FAR 15.403-4(a)(1)(iii), when the value of a price adjustment associated with an individual contract or subcontract included in a contractor’s overarching section 3610 reimbursement request exceeds the threshold for obtaining certified cost or pricing data at FAR 15.403-4(a)(1), when applicable, certified cost or pricing data shall be obtained for only those individual contracts or subcontracts in accordance with FAR 15.403-4.

6. **Subcontractor Reimbursement Requests.**

(a) **Supporting Information.** For all subcontractor section 3610 reimbursement requests, the contracting officer should require the contractor to provide, for each subcontractor, the same supporting information/documentation that is required from the prime contractor. However, if they meet the criteria, subcontractors may use the abbreviated checklist instead. If the subcontractor does not routinely provide such information to the prime contractor (e.g., due to competition or proprietary data concerns), the subcontractor should provide the amount of its section 3610 reimbursement request to the prime contractor, for inclusion in the prime contractor’s section 3610 reimbursement request, and submit all other supporting information directly to the contracting officer under separate cover.

(b) **Affected Contractor.** The contracting officer should require the prime contractor to evaluate each subcontractor’s section 3610 reimbursement request submission and provide, with its own section 3610 reimbursement request, an opinion as to whether the subcontractor is an affected contractor and, if so, its analysis of whether the subcontractor’s paid leave costs are allowable under section 3610. The prime contractor must not commingle subcontractor information with its own.

(c) **Representations.** Subcontractor section 3610 reimbursement requests included in a prime contractor’s section 3610 reimbursement request shall provide all of the representations in section 9, below.
7. Reimbursement Request Submission Format.

The contracting officer should require the contractor to submit the section 3610 reimbursement request in a format acceptable to the contracting officer, including the calculations of the requested section 3610 reimbursement amount, traceable to the supporting data submitted in accordance with the above. Any data, documentation, and information provided to support the contractor’s section 3610 reimbursement request should be provided in electronic format, whenever possible.

8. Identification of Other Credits that will Reduce Relief Provided under Section 3610.

(a) Contractors are eligible for other sources of funds that may result in credits or loan forgiveness. The maximum reimbursement a contractor is authorized to receive under section 3610 shall be reduced by the amount of loan forgiveness a contractor receives pursuant to division G of the Families First Coronavirus Response Act (Pub. L. 116–127) or under the CARES Act (Pub. L. 116-136), or any other credit allowed by law that is specifically identifiable with the public health emergency declared on January 31, 2020 for COVID–19.

(b) The contracting officer should require contractors to reduce any section 3610 reimbursement amount requested and any section 3610 reimbursement received upon receipt of credits or loan forgiveness, outlined above. If the contractor receives any applicable credit or loan forgiveness subsequent to its submission of a section 3610 reimbursement request, the contractor must notify the contracting officer within 30 days of receipt of the credit or loan forgiveness and must agree to a modification reducing the amount of section 3610 reimbursement by the amount of the credit or loan forgiveness received.

9. Representations.

(a) The contracting officer shall require contractors to provide the following representations with section 3610 reimbursement requests—

(1) All paid leave included in the request for reimbursement was specifically paid to keep the employees and/or subcontractors in a ready state;

(2) The contractor segregated and reported the actual costs of the section 3610 paid leave payments, traceable to the individual employee charges;

(3) The section 3610 reimbursement request excludes any paid leave costs associated with the contractor’s work as a subcontractor to another contractor;

(4) All impacted subcontractors have been afforded an opportunity to submit a request for reimbursement of section 3610 paid leave costs, and eligible subcontractor section 3610 reimbursement requests received and as appropriate are incorporated into the contractor’s section 3610 reimbursement request for the contractor to pay to the subcontractor;
(5) The section 3610 reimbursement request has been reduced by any applicable credit or loan forgiveness the contractor has received that is/are specifically identifiable to the public health emergency declared on January 31, 2020, for COVID-19;

(6) The costs included in the section 3610 reimbursement request have not been requested elsewhere in another section 3610 reimbursement request; and

(7) The section 3610 reimbursement request is made in good faith, and the supporting data is accurate and complete to the best of the contractor’s knowledge.

(b) The representations should be dated and include the signature and title of a designated individual within the company with the authority to sign and commit on behalf of the contractor. The contractor should explain any exceptions to these representations within its section 3610 reimbursement request.
Global Reimbursement Checklist

Applicability:

This global checklist applies to contractor requests for reimbursement, pursuant to section 3610 of the CARES Act, that seek a global reimbursement at a business unit (or segment) level when the Defense Contract Management Agency (DCMA) is acting as the Cognizant Federal Agency Official (CFAO) on behalf of the Department (unless another DoD organization retains the CFAO responsibilities for the contractor business unit (or segment)). For the purposes of this checklist, the term CFAO is recognized as the Administrative Contracting Officer (ACO) or component contracting officer responsible for the duties identified in FAR 42.302(a)(5), (a)(9), (a)(11), and (a)(12) at a contractor business unit (or segment) level. A business unit (or segment) is understood to mean the organizational level in a company where settlement can be reached by a Corporate or Divisional ACO (for the largest contractors) or an ACO or component contracting officer (for other contractors).

Early engagement efforts will minimize the data necessary to establish a rough order of magnitude (ROM) cost impact due to section 3610 paid leave costs and provide the contracting officer with the information needed to pursue funding. The CFAO will advise the contractor if funding may be available.

If funds are potentially available, the contractor may submit a request to be established as an affected contractor and for reimbursement under section 3610 in accordance with this guidance. Section 3610 reimbursement requests are limited to incurred costs only and should not include projected estimates. Section 3610 reimbursement to a contractor will be limited to the paid leave costs incurred by the contractor and allocable to its DoD contracts, including applicable subcontractor costs under its contracts. Section 3610 reimbursement shall not include paid leave costs incurred by the contractor allocable to any subcontracts. Any section 3610 reimbursement requests for paid leave costs incurred while performing as a subcontractor should be submitted to the appropriate prime contractor.

The initial section 3610 reimbursement request and any subsequent section 3610 reimbursement requests should be coordinated with the CFAO prior to submission, and submitted in a similar manner to the initial section 3610 reimbursement request.
1. Notice of Intent to Request Reimbursement under Section 3610: Early Engagement.

   (a) A contractor may provide a ROM of its paid leave costs that will be included in its section 3610 reimbursement request (covered paid leave costs) to the CFAO. The intent of the ROM is to allow the CFAO to check if funds are available.

   (b) The data in the ROM should include, but is not limited to—

   (1) Total covered paid leave costs incurred to date for the contractor’s employees of a business unit (or segment) only (excluding its subcontractor’s covered paid leave costs);

   (2) ROM of covered paid leave costs for its subcontractors;

   (3) ROM breakdown of the contractor’s total business base between DoD contracts, other Government contracts, subcontracts performed by contractor under DoD and other Government contracts, and all other commercial business (expressed by percentage);

   (4) ROM breakdown of contract type (cost reimbursable and firm-fixed-price) for—

      (i) The contractor’s DoD contracts;

      (ii) Other Government contracts; and

      (iii) Subcontracts performed by the contractor under other contractor’s DoD and other Government contracts (expressed by percentage of contract values or allocation base or other appropriate measure);

   (5) ROM breakdown of the contractor’s DoD component (Military Department, Defense Agency, Defense Field Activity), and other Government contracts (expressed by percentage of contract values or allocation base or other appropriate measure); and

   (6) As discussed during early engagement, any other high-level data the CFAO would need to assess the ROM for funding purposes.

   (c) The CFAO will notify the contractor of the funds availability status. Once the CFAO determines that funds may be available, the process will move forward to establish the contractor’s affected contractor status and for the contractor to submit its section 3610 reimbursement request(s).


   The CFAO should require the contractor to provide a narrative supporting its assertion that it is an affected contractor, and require contractor section 3610 requests for global reimbursement to provide a list of all contracts/task orders/delivery orders impacted during the period for which the contractor seeks affected contractor status. CFAOs should require inclusion of the following information for the listed items:
(a) Contract/Task Order/Delivery Order Number(s).

(b) Commercial and Government Entity (CAGE) code(s).

(c) Contract Type(s).

(d) Awarding DoD Component(s).

(e) Primary Agency Point(s) of Contact (i.e., Contracting Officer(s)).

(f) Time Period Covered by the Section 3610 Reimbursement Request.

3. Section 3610 Circumstances Narrative and Information on Affected Contractor Status.

The contractor should provide a request to be established as an affected contractor, with a narrative supporting its request. The contractor should identify the circumstances that impacted it as a result of the public health emergency declared for COVID-19, and why it decided to provide paid leave to its employees and/or subcontractors to keep them in a ready state for which it is requesting section 3610 reimbursement. The narrative should include—

(a) An explanation as to why it was necessary to provide paid leave to its employees and/or subcontractor(s) to maintain a ready state;

(b) That the covered paid leave costs do not include leave for which an employee was otherwise paid (e.g., leave that is provided through company policy, employment contract, or labor agreement);

(c) That covered paid leave was provided to, and taken by, the employees and/or subcontractor(s) no earlier than March 27, 2020, and no later than September 30, 2020;

(d) Identification of facility closures or restrictions that precluded employees and/or subcontractors from performing at their normal work location(s), including closure/restriction date range(s) and specifics;

(e) An explanation of why job duties could not be performed remotely for labor categories provided paid leave for which the contractor is seeking reimbursement under section 3610;

(f) That the section 3610 reimbursement request does not result in a total of paid work and paid leave charges that exceed an average of 40 hours per week per employee; and

(g) That the company business unit (or segment) has not requested to be established as an affected contractor by any other DoD contracting officer.

4. Contractor Submission of Global Section 3610 Reimbursement Requests.
(a) The CFAO should require the contractor to provide information to support any audit of costs incurred, for each contract/task order/delivery order when requesting section 3610 reimbursement. The Government may audit the billed costs in order to ensure accuracy and compliance with the law. The CFAO should require the contractor to ensure that requested costs are not part of any other submission, either as a prime contractor or subcontractor.

(b) The section 3610 reimbursement request should include the following information at a contract/task order/delivery order level (the CFAO may request detailed supporting documentation be tailored to adequately address specific circumstances)—

1. The total amount of paid leave costs requested by the contractor for section 3610 reimbursement by DoD;

2. The cost accounting practice(s) used by the business unit (or segment) to allocate section 3610 costs to cost objectives (whether existing, disclosed practices, or new ones);

3. A sufficiently detailed breakdown of the section 3610 costs incurred by the business unit (or segment) supporting the amount allocable to each affected contract/task order/delivery order;

4. The identification of any impacts to direct labor rates;

5. For section 3610 costs classified as direct, the amount charged to each contract/task order/delivery order, including the following:

   i. Identification of eligible hours (i.e., those hours meeting the criteria identified in DFARS 231.205-79(a)(1)(ii) under Class Deviation 2020-O0013) for each affected contract/task order/delivery order;

   ii. When requested by the CFAO, sample data to support the hours by employee to determine labor category, actual hours actually worked, etc.; and

   iii. Why direct labor job duties could not be performed remotely for labor categories subject to section 3610 paid leave.

6. Inclusion of subcontractor(s) section 3610 reimbursement requests (see section (c), below, for more details of necessary supporting information);

7. For section 3610 costs classified as indirect—

   i. A calculation of the relevant pool(s), allocation base(s), and rate(s) used to allocate the cost to cost objective(s);

   ii. Identification/description of DoD, other Government, and commercial participation in the allocation base(s);
(iii) The allocation of the section 3610 costs to each contract/task order/delivery order (in a format similar to an incurred cost proposal schedule or cumulative allowable cost worksheet); and

(iv) Why indirect labor job duties could not be performed remotely for labor categories subject to section 3610 paid leave; and

(8) Company-specific guidance on section 3610 or COVID-19 related paid leave.

(c) Subcontractor Reimbursement Requests.

(1) Supporting Information. For all subcontractor section 3610 reimbursement requests, the CFAO should require the prime contractor to provide, for each subcontractor, the same supporting information/documentation as outlined above in paragraph 4(b). However, if they meet the criteria, subcontractors may use the abbreviated checklist. If the subcontractor does not routinely provide such information to the prime contractor (e.g., due to competition or proprietary data concerns), the subcontractor should provide the amount of its section 3610 reimbursement request to the prime contractor, for inclusion in the prime contractor’s section 3610 reimbursement request, and submit all other supporting information directly to the CFAO under separate cover.

(2) List of Impacted Subcontractors. The CFAO should require the prime contractor’s section 3610 reimbursement request to include a listing of all subcontractor(s) requesting section 3610 reimbursement. The list should include the following information for the listed items:

(i) Subcontract Number(s).

(ii) CAGE Code(s).

(iii) Subcontract Type(s).

(iv) Associated Prime Contract Number(s).

(v) Time Period Covered by the Subcontractor Section 3610 Reimbursement Request.

(vi) Contractor Proposed Amount for Subcontractor Section 3610 Reimbursement.

(3) Affected Contractor. The CFAO should require the prime contractor to evaluate each subcontractor’s section 3610 reimbursement request submission and provide, with its own section 3610 reimbursement request, an opinion to the CFAO as to whether the subcontractor is an affected contractor and, if so, its analysis of whether the subcontractor’s paid leave costs are allowable under section 3610. The prime contractor must not commingle subcontractor information with its own.
(4) **Representations.** The CFAO shall require that subcontractor section 3610 reimbursement requests included in a prime contractor’s section 3610 reimbursement request provide all of the representations in section 8, below.

5. **Certified Cost or Pricing Data.**

   In accordance with FAR 15.403-4(a)(1)(iii), when the value of a price adjustment associated with an individual contract or subcontract included in a contractor’s overarching section 3610 reimbursement request exceeds the threshold for obtaining certified cost or pricing data at FAR 15.403-4(a)(1), when applicable, certified cost or pricing data shall be obtained for only those individual contracts or subcontracts in accordance with FAR 15.403-4.

6. **Reimbursement Request Submission Format.**

   The contractor should submit the section 3610 reimbursement request in a format acceptable to the CFAO, including the calculations of the requested section 3610 reimbursement amount, traceable to the supporting data submitted in accordance with the above. Any data, documentation, and information provided to support the contractor’s section 3610 reimbursement request should be provided in electronic format, whenever possible.

7. **Identification of Other Credits that May Reduce Relief Provided under Section 3610.**

   (a) Contractors are eligible for other sources of funds that may result in credits or loan forgiveness. The maximum reimbursement a contractor is authorized to receive under section 3610 shall be reduced by the amount of loan forgiveness a contractor receives pursuant to division G of the Families First Coronavirus Response Act (Pub. L. 116–127) or under the CARES Act (Pub. L. 116–136), or any other credit allowed by law that is specifically identifiable with the public health emergency declared on January 31, 2020, for COVID–19.

   (b) The CFAO should require contractors to reduce any section 3610 reimbursement amount requested and any section 3610 reimbursement received upon receipt of credits or loan forgiveness, outlined above. If the contractor receives any applicable credit or loan forgiveness subsequent to its submission of a section 3610 reimbursement request, the contractor must notify the CFAO within 30 days of receipt of the credit or loan forgiveness and must agree to a modification reducing the amount of section 3610 reimbursement by the amount of the credit or loan forgiveness received.

8. **Representations.**

   (a) The CFAO shall require contractors to provide the following representations with section 3610 reimbursement requests:

      (1) All paid leave included in the request for reimbursement was specifically paid to keep the employees and/or subcontractors in a ready state;
(2) The contractor segregated and reported the actual costs of the section 3610 paid leave payments, traceable to the individual employee charges;

(3) The section 3610 reimbursement request excludes any paid leave costs associated with the contractor’s work as a subcontractor to another contractor;

(4) All impacted subcontractors have been afforded an opportunity to submit a request for reimbursement of section 3610 paid leave costs, and eligible subcontractor section 3610 reimbursement requests received and as appropriate are incorporated into the contractor’s section 3610 reimbursement request for the contractor to pay to the subcontractor;

(5) The section 3610 reimbursement request has been reduced by any applicable credit or loan forgiveness the contractor has received that is/are specifically identifiable to the public health emergency declared on January 31, 2020, for COVID-19;

(6) The costs included in the section 3610 reimbursement request have not been requested elsewhere in another section 3610 reimbursement request; and

(7) The section 3610 reimbursement request is made in good faith, and the supporting data is accurate and complete to the best of the contractor’s knowledge.

(b) The representations should be dated and include the signature and title of a designated individual within the company with the authority to sign and commit on behalf of the contractor. The contractor should explain any exceptions to these representations within its section 3610 reimbursement request.
252.243-7999 Section 3610 Reimbursement. (DEVIATION 2020-O0021)

Use the following clause when modifying contracts, task orders, or delivery orders, including those using part 12 procedures for the acquisition of commercial items, to provide for the reimbursement of paid leave to an affected contractor pursuant to Class Deviation 2020-O0021.

SECTION 3610 REIMBURSEMENT (DEVIATION 2020-O0021) (AUG 2020)

(a) Definitions. As used in this clause—

“Affected contractor” means a contractor that has incurred costs to provide paid leave for its employees or subcontractors to maintain its workforce in a ready state and otherwise meets all the requirements of section 3610 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) (Pub. L. 116–136).

(b) Reduction for credits or loan forgiveness.

(1) Section 3610 of the CARES Act requires that the maximum reimbursement to affected contractors authorized by section 3610 shall be reduced by the amount of any credits received pursuant to Division G of Public Law 116-127 and any applicable credits a contractor is allowed under the CARES Act. The Contracting Officer will reduce the amount of the funds authorized under section 3610 and provided by modification, commensurate with the amount of any credits or loan forgiveness received.

(2) Should the timing of any other reimbursements be such that the Contractor is unable to provide notification to the contracting officer prior to execution of a contract modification resulting from the Contractor’s section 3610 reimbursement request, the Contractor shall notify the contracting officer, as provided in paragraph (c), and agrees that the Government will modify the contract to reduce the reimbursed amount by the credit or loan forgiveness amount received.

(c) Notice of receipt of credits or loan forgiveness.

(1) The Contractor shall notify the Contracting Officer in writing within 30 days of receiving—

(i) Loan forgiveness pursuant to—

(A) Division G of the Families First Coronavirus Response Act (Pub. L. 116–127); or
(B) The Coronavirus Aid, Relief, and Economic Security Act (CARES Act) (Pub. L. 116–136); and

(ii) Any other credit allowed by law (including State and local laws that are specifically identifiable with the public health emergency declared on January 31, 2020, for COVID-19).

(2) Include in the notice to the Contracting Officer the amount of any credits or loan forgiveness received along with supporting information necessary to facilitate calculation of the required reductions of reimbursement provided under any contract modification pursuant to section 3610 reimbursement to offset credits or loan forgiveness received under paragraph (c)(1).

(d) Audit. The Government reserves the right to audit the Contractor's billed costs reimbursed under section 3610 of the CARES Act to ensure accuracy and compliance with law and any applicable regulations.

(e) Subcontracts. The Contractor shall insert the substance of this clause, including this paragraph (e), in any subcontract modification that involves the reimbursement of paid leave under section 3610 of the CARES Act to affected subcontractors, including subcontracts for the acquisition of commercial items.

(End of clause)
MEMORANDUM FOR COMMANDER, UNITED STATES SPECIAL OPERATIONS COMMAND (ATTN: ACQUISITION EXECUTIVE)  
COMMANDER, UNITED STATES TRANSPORTATION COMMAND (ATTN: ACQUISITION EXECUTIVE)  
COMMANDER, UNITED STATES CYBER COMMAND (ATTN: ACQUISITION EXECUTIVE)  
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE  
DEPUTY ASSISTANT SECRETARY OF THE ARMY (PROCUREMENT), ASA (ALT)  
DEPUTY ASSISTANT SECRETARY OF THE NAVY (ACQUISITION & LOGISTICS MANAGEMENT), ASN (RDA)  
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE (CONTRACTING), SAF/AQC  
DIRECTORS, DEFENSE AGENCIES  
DIRECTORS, DEFENSE FIELD ACTIVITIES

SUBJECT: Class Deviation—Section 890 Pilot Program to Accelerate Contracting and Pricing Processes

Effective immediately, this class deviation rescinds and supersedes Class Deviation 2019-O0008, dated April 1, 2019, to further implement the pilot program authority provided by section 890 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115-232), as amended by section 825 of the NDAA for FY 2020 (Pub. L. 116-92). For contract actions (e.g. solicitation of offers for contract award or contract modifications) approved by the Director, Defense Pricing and Contracting (DPC)/Pricing and Contracting Initiatives (PCI) for participation in the pilot program, the contracting officer may strategically establish the extent, structure, and level of detail of the historical actual cost data the contractor will be required to submit in lieu of providing complete certified cost or pricing data.

Section 890, as amended, authorizes DoD to conduct a pilot program for contract actions in excess of $50 million, which allows price reasonableness determinations to be based on actual cost and pricing data for purchases of the same or similar products for the DoD, and a reduction of the cost and pricing data to be submitted in accordance with 10 U.S.C. 2306a. Contract actions must be approved by the Director, DPC/PCI, to participate in the Section 890 pilot program prior to the issuance of a solicitation. Contracting officers may request approval to participate in the pilot program by completing and submitting the attached application template (Attachment 1) to osd.pentagon.ousd-a-s-mbx.dpc-pci@mail.mil. Participating contract actions must have an anticipated value of $50 million or more. Contract actions best suited for the pilot
program are those of a recurring nature, for which there is reliable, historical actual cost data. It is preferable to conduct these pilots with companies that have approved business systems. Additionally, while not a condition for participation, use of a fixed-price-incentive contract type can reduce the cost risk for the participating parties and provide measurable results at the conclusion of the acquisition in relation to a target cost.

For those contract actions approved by the Director, DPC/PCI, the contracting officers shall—

- Use the deviation provision provided in Attachment 2, in lieu of the basic or alternate of the provision at DFARS 252.215-7010, Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data, and detail the subset of cost or pricing data and format to be required from the offeror and subcontractors to which the Section 890 pilot is flowed down, in lieu of complete cost or pricing data as defined at FAR 2.101;

- Use the deviation clause provided in Attachment 3, which will apply to modifications approved for the Section 890 pilot in lieu of FAR 52.215-21, Requirements for Certified Cost of Pricing Data—Modifications, and detail in the request for proposal for the modification the specific cost or pricing data required to be submitted by the contractor and subcontractors to which the section 890 authority is flowed down;

- Use the deviation clause 252.215-7998, Pilot Program to Accelerate Contracting and Pricing Processes, provided in Attachment 4 to ensure the contractor provides information necessary to evaluate the efficacy of the pilot program; and

- Make price reasonableness determinations based primarily on contractor actual cost data on prior acquisitions, in combination with more traditional certified cost or pricing data that may be required to support aspects of the current acquisition for which the contractor’s historical cost experience may not be adequately representative of the current requirement.

The contracting officer may strategically establish the extent, structure, and level of detail of the historical actual cost data the contractor will be required to submit in lieu of complete certified cost or pricing data. It will be crucial for the contracting officer and contractor to have a detailed dialogue regarding the certified cost or pricing data that will be required under the authority of the pilot, to ensure that the contractor understands the contracting officer’s expectations with regard to the data necessary to support a price reasonableness determination, and the traceability of that data to the contractor’s proposal. Depending on the type and level of detail of certified cost or pricing data to be required in support of specific subcontracts to which the pilot authority is flowed down, the same discussion should take place between the contracting officer, the prime contractor, and the applicable subcontractors.

Measurement of pilot results will be provided at two junctures, as described at 252.215-7998, Pilot Program to Accelerate Contracting and Pricing Processes (see Attachment 4). The first will be within three months after the contract action approved for participation in the pilot is placed on contract. The second will be upon completion of performance of the contract action,
to measure how closely the actual cost of performance aligned with the acquisition team’s anticipated cost. Contracting officers shall submit both sets of results to osd.pentagon.ousd-a-s-mbx.dpc-pci@mail.mil as they become available.

This class deviation remains in effect until January 2, 2023, or until otherwise rescinded. My point of contact is Ms. Sara Higgins, who is available at (703) 220-4952 or by email at sara.a.higgins2.civ@mail.mil.

Kim Herrington
Acting Principal Director,
Defense Pricing and Contracting

Attachments:
As stated
Application to Participate in the Pilot Program Authorized under Section 890 of the FY19 National Defense Authorization Act (NDAA), as amended by Section 825 of the FY20 NDAA, for contract actions that exceed $50 million.

I. Program/Contract Information

Program Name: ________________________________________________________________

Cognizant Contracting Activity: ____________________________
(Buying office, Command, Department or Agency)

Description of Requirement: ______________________________________________________
(Product, quantity, period of performance)

Estimated value of the current requirement: _________________________________

Anticipated contract type: ____________________________________________________

List of relevant prior acquisitions to be used as the basis for projecting costs of the current acquisition under the pilot program:

Acquisition 1: ________________________________
(Name, customer, product, quantity, period of performance, contract value, contract type)

Acquisition 2: ________________________________
(Name, customer, product, quantity, period of performance, contract value, contract type)

List the same information for additional acquisitions as appropriate.

Please discuss the extent of commonality between current and prior acquisitions. Does the current acquisition include work not required in the prior acquisitions? Did the prior acquisitions include work not required in the current buy? Are there any significant requirement changes? Were actuals from previous buys requested on these listed acquisitions? If so, how were they used in proposal evaluation and/or negotiations?

__________________________________________________________________________
__________________________________________________________________________
__________________________________________________________________________
__________________________________________________________________________

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II. Prime Contractor Information

Contractor Name and Location: ___________________________________________________________

Contractor CAGE Code: _________________________________________________________________

Status of Contractor’s Accounting System as shown in CBAR: ________________________________

III. Notional Approach to Data Requirements for the Bill of Materials

Please complete this section if the contracting officer plans to flow down the pilot authority to some or all first tier or lower tier subcontracts.

For each of the relevant prior acquisitions listed in Section I, above, please provide the total considered negotiated material and subcontract cost, in dollars and as a percentage of the total considered negotiated cost line.

Acquisition 1: _________________________________________________________________________
  (Name, considered negotiated material/subcontract cost, in dollars and as a percent of the negotiated cost line)

Acquisition 2: _________________________________________________________________________
  (Name, considered negotiated material/subcontract cost, in dollars and as a percent of the negotiated cost line)

List the same information for additional acquisitions as appropriate.

Please discuss any significant issues or challenges relating to material or subcontracts which were experienced in the context of the above-listed historical acquisitions.

_____________________________________________________________________________________
_____________________________________________________________________________________
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_____________________________________________________________________________________

Please discuss the extent of commonality between current and prior acquisitions with respect to the Bill of Materials. Does the current acquisition include significant subcontracted effort not required in the prior acquisitions? Did the prior acquisitions include significant subcontract effort not required in the current buy? Are there any significant requirement changes with respect to subcontracted items? Were actuals from previous buys requested for major subcontracts? If so, how were they used in the Government’s proposal evaluation and/or negotiations with the prime contractor? _________________

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Please describe the contracting officer’s planned approach for flowing down the Section 890 pilot authority to subcontracts. Please indicate whether the intent is to apply the authority to some or all first tier subcontracts subject to the Truth in Negotiations Act; the type and extent of data to be required; and whether the authority will be flowed down to lower tier subcontracts. If the type and extent of data to be required is expected to be scaled based on subcontract dollar value or other considerations, please explain.

IV. Acquisition Team Information

Contracting Officer name and contact information: _________________________________________

Buyer/Contract specialist name and contact information: ____________________________________

Considerations with Respect to Type and Extent of Certified Cost or Pricing Data to Be Required

The intent of this implementation of the Section 890 pilot program is to provide the flexibility for contracting officers to strategically identify and require submission of the specific cost or pricing data, including actual cost history details, which are expected to be most relevant in establishing a fair and reasonable price for the recurring costs associated with a product which has meaningful price history under DoD acquisitions. Contracting officers requesting approval to utilize this pilot program authority should be prepared to develop a strategy which will facilitate analysis of the contractor’s proposal for the current requirement, including any non-recurring or unique aspects. Considerations may include the following:

Actual costs for relevant prior acquisitions for which performance is not complete: If any of the prior acquisitions to be used to establish price reasonableness for the current requirement are not physically complete as of the date of issuance of the solicitation, the contracting officer should require the contractor to provide and support their estimate to complete (ETC). (Document the requirement in the deviation version of 252.215-7010 or the request for proposal for a contract modification in accordance with 252.215-7XXX, as applicable.) Additionally, for incomplete efforts at both the prime and the subcontract level, the contractor/subcontractor should be required to provide a data refresh prior to commencement of negotiations and prior to conclusion of negotiations between the Government and the prime. Contractor refusals to disclose ETC values should be elevated through the management chain as described in DFARS PGI 215.404-1(a)(i)(A).
Non-recurring effort: The contracting officer will need to consider non-recurring effort from two perspectives. First, the contractor should be required to separately identify the non-recurring activity performed in prior acquisitions, and provide adequate actual cost details to ensure exclusion of that cost from cost estimates for the current requirement. Secondly, the contracting officer will need to work with the contractor to identify non-recurring requirements which are part of the current acquisition. The CO must then determine the type and extent of certified cost or pricing data required to support establishment of a fair and reasonable price for that portion of the effort.

Fixed vs variable cost: Where there are quantity differences between the current requirement and the prior acquisitions to be used to establish price reasonableness, it is critical that the contracting officer take into account the impact of fixed vs variable costs. The contractor should be required to separately identify the fixed and variable components of the historical actuals, and provide the cost of each at a level of detail that will support the Government’s appropriate use of the historical actuals in the evaluation of the proposed cost for the current requirement.

Changed requirements: If there are significant requirement changes between the prior acquisitions and the current requirement, the contracting officer must develop an appropriate approach for segregating the costs associated with tasks performed in the prior acquisitions that are not required in the instant effort, to ensure those costs are not projected into estimates for the current requirements. Additionally, the contracting officer must determine what cost or pricing data will be required to support new work not required or performed under the prior acquisitions.

Labor: The contracting officer will need to ensure that the contractor provides adequate insight into the composition of the historical labor actuals to inform the Government’s evaluation of the proposal for the current requirement. For example, the prior actuals may need to show hours by labor category by task. Where labor hours included in the historical acquisitions were proposed based on factors, and the contractor’s proposal for the current requirement is expected to use the same or similar factors, it may be useful to compare proposed factors for prior acquisitions to actual outcomes for those efforts.

Subcontracts subject to the Truth in Negotiations Act (TINA): For the purposes of this pilot, the authority provided under Section 890 of the FY19 NDAA may be flowed down to first-tier or lower-tier subcontracts subject to TINA, at the discretion of the contracting officer. This means that, for those subcontracts for which the pilot authority is flowed down, the contracting officer for acquisitions approved for participation in the pilot will need to establish the extent, structure, and level of detail of the historical actual cost data which subcontractors will be required to submit in lieu of traditional certified cost or pricing data, and must ensure that the actuals are presented in a manner that will support efficient and effective evaluation of the subcontract proposal for the current requirement. It may be useful to stratify the covered subcontracts by proposed dollar value; for a subset of the subcontracts (generally, the major subcontracts), the contracting officer may find it appropriate to require submission of actuals at a level of detail similar to the types of breakout required for the prime contractor’s prior actuals. For some subcontracts it may be appropriate to obtain only limited insight into the total actuals, e.g., total cost, total labor dollars/hours, and total material. For lower dollar subcontracts, it may be appropriate to either require submission of the subcontractor’s recurring actual cost for specified prior acquisitions in support of DoD contracts, or simply obtain the prime’s purchase order history for the specified prior acquisitions. The contracting officer’s insight into the quality of the
prime’s negotiated vendor pricing in the context of the historical acquisitions may come into play in making this decision. For those subcontracts for which the pilot authority is flowed down, consideration should be given to obtaining subcontract cost breakouts segregating recurring and non-recurring effort, at a minimum. If there are significant quantity variations between the prior subcontracts and the current requirement, it may also be prudent to gain insight into the breakout of fixed and variable costs under the subcontract. Cost implications of requirement changes between the prior subcontracts and the current requirement must be considered: the cost of work performed under prior subcontracts but not currently required must be segregated in the historical actuals, while new requirements must be adequately supported in the subcontract proposal, since the cost history of prior subcontracts will not be informative with respect to the new work. The contracting officer may wish to consider whether there is benefit in requiring submission of the prime’s cost analyses for select subcontracts, as these become available. In addition to the historical actuals, the contracting officer should also consider requiring the prime contractor and its subcontractors to disclose suppliers’ quotes, offers, and agreed-to vendor pricing for the current requirement as those data become available.

**Material and subcontracts below the TINA threshold or meeting a TINA exception:** The deviation provision DFARS 252.215-7010(d)(5) and deviation clause 252.215-7XXX(c)(5) in support of this pilot address expectations with respect to subcontracts not subject to TINA. The Government has no entitlement to incurred cost data for these subcontracts. The PCO will need to consider whether data in addition to the prime contractor’s purchase order history will be needed to support proposed pricing for these items. In particular, where the prime contractor has made a commerciality assertion with regard to a subcontractor, the contracting officer will need to consider whether data other than certified cost or pricing data will be required, and if so, the type and extent of data.

**Interdivisional transfers:** For interdivisional transfers subject to TINA, the PCO will need to determine the appropriate level of detail for supporting cost or pricing data. Considerations may include the dollar value of the interdivisional transfer and the complexity of the effort.

**ODCs:** While discrete ODCs are often proposed based on judgmental estimates, the contracting officer should consider whether the historical ODC cost experience from the prior acquisitions may provide an appropriate basis for projection of ODC cost for the current effort. The concepts of recurring vs non-recurring costs and fixed vs variable, discussed above, may also come into play.

**Rates and factors:** It may be useful to compare proposed rates and factors for prior acquisitions to actual outcomes, especially with respect to estimating factors which are not the subject of an FPRA or an FPRR. However, contracting officers would generally be expected to use prospective DCMA rate positions, when available, in the pricing of the current requirement.

**Format and content of the proposal for the current requirement:** The contracting officer should consider what traditional proposal content will still be required under the auspices of the Section 890 pilot, if the actual cost detail from prior acquisitions is provided, and what typical proposal content may be foregone. For example, the contractor should still be expected to submit a cost element summary at the CLIN level and in the aggregate, a priced bill of materials, and a time-phased breakdown of labor hours and rates by category. Labor basis of estimate (BOE) sheets may not be needed to support that portion of the current requirement which is identical to the requirements of prior buys, whereas the contractor should be expected to submit BOEs to support non-recurring effort which is not represented...
in the prior actuals. The contracting officer may elect to require submission of some prime cost analyses of subcontract proposals, while perhaps choosing to rely on the prime’s PO history or the subcontractor’s submission of prior actuals for other subcontracts. While the specifics will vary according to the circumstances of each pilot program acquisition, it is critical for the contracting officer to have a proposal evaluation plan in place in order to ensure that the optimal subset of data is obtained to permit efficient and effective proposal evaluation, negotiation, and establishment of a fair and reasonable price.
252.215-7010 Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data. (DEVIATION 2020-O0020)

Use the following deviation provision, in lieu of the basic or alternate of the provision at 252.215-7010, in solicitations that the Director, Pricing and Contracting Initiatives/Defense Pricing and Contracting, has authorized for participation in the pilot program implementing section 890 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115-232), as amended by section 825 of the NDAA for FY 2020 (Pub. L. 116-92).

REQUIREMENTS FOR CERTIFIED COST OR PRICING DATA AND DATA OTHER THAN CERTIFIED COST OR PRICING DATA (DEVIATION 2020-O0020) (AUG 2020)

(a) Definitions. As used in this provision—

“Market prices” means current prices that are established in the course of ordinary trade between buyers and sellers free to bargain and that can be substantiated through competition or from sources independent of the offerors.

“Non-Government sales” means sales of the supplies or services to non-Governmental entities for purposes other than governmental purposes.

“Relevant sales data” means information provided by an offeror on sales of the same or similar items that can be used to establish price reasonableness taking into consideration the age, volume, and nature of the transactions (including any related discounts, refunds, rebates, offsets, or other adjustments).

“Sufficient non-Government sales” means relevant sales data that reflects market pricing and contains enough information to make adjustments covered by FAR 15.404-1(b)(2)(ii)(B).

“Uncertified cost data” means the subset of “data other than certified cost or pricing data” (see FAR 2.101) that relates to cost.

(b) Exceptions from certified cost or pricing data.

(1) In lieu of submitting certified cost or pricing data, the Offeror may submit a written request for exception by submitting the information described in paragraphs (b)(1)(i) and (ii) of this provision. The Contracting Officer may require additional supporting information, but only to the extent necessary to determine whether an exception should be granted and whether the price is fair and reasonable.
(i) Exception for price set by law or regulation - Identification of the law or regulation establishing the price offered. If the price is controlled under law by periodic rulings, reviews, or similar actions of a governmental body, attach a copy of the controlling document, unless it was previously submitted to the contracting office.

(ii) Commercial item exception. For a commercial item exception, the Offeror shall submit, at a minimum, information that is adequate for evaluating the reasonableness of the price for this acquisition, including prices at which the same item or similar items have been sold in the commercial market. Such information shall include—

(A) For items previously determined to be commercial, the contract number and military department, defense agency, or other DoD component that rendered such determination, and if available, a Government point of contact;

(B) For items priced based on a catalog—

   (1) A copy of or identification of the Offeror’s current catalog showing the price for that item; and

   (2) If the catalog pricing provided with this proposal is not consistent with all relevant sales data, a detailed description of differences or inconsistencies between or among the relevant sales data, the proposed price, and the catalog price (including any related discounts, refunds, rebates, offsets, or other adjustments);

(C) For items priced based on market pricing, a description of the nature of the commercial market, the methodology used to establish a market price, and all relevant sales data. The description shall be adequate to permit DoD to verify the accuracy of the description;

(D) For items included on an active Federal Supply Service Multiple Award Schedule contract, proof that an exception has been granted for the schedule item; or

(E) For items provided by nontraditional defense contractors, a statement that the entity is not currently performing and has not performed, for at least the 1-year period preceding the solicitation of sources by DoD for the procurement or transaction, any contract or subcontract for DoD that is subject to full coverage under the cost accounting standards prescribed pursuant to 41 U.S.C. 1502 and the regulations implementing such section.
(2) The Offeror grants the Contracting Officer or an authorized representative the right to examine, at any time before award, books, records, documents, or other directly pertinent records to verify any request for an exception under this provision, and to determine the reasonableness of price.

(c) Requirements for certified cost or pricing data. This acquisition is accomplished under the authority of section 890 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115-232), as amended by section 825 of the NDAA for FY 2020 (Pub. L. 116-92). The intent of this pilot program is to test the efficacy of basing price reasonableness determinations primarily on actual costs of performance for prior purchases of the same or similar products for the Department of Defense. If the Offeror is not granted an exception from the requirement to submit certified cost or pricing data, the following applies:

(1) In lieu of providing complete cost or pricing data, as defined in FAR 2.101, the Offeror shall submit a subset of cost or pricing data and supporting attachments as follows: [Contracting Officer shall list the specific cost or pricing data deemed necessary to establish price reasonableness for this acquisition, and describe the required submission format for each type of data. At a minimum, the Contracting Officer shall identify the specific prior DoD purchases of the same or similar products for which the Offeror is required to submit the actual cost of performance. The Offeror is not required to submit cost or pricing data that is not listed within this provision. If the Contracting Officer finds that additional cost or pricing data are needed in order to determine that the price is fair and reasonable, the Contracting Officer shall issue an amendment to the solicitation, revising this paragraph as needed to require the submission of the additional data.]

(2)(i) As soon as practicable after agreement on price, but before contract award (except for unpriced actions such as letter contracts), the Offeror shall submit a Certificate of Current Cost or Pricing Data, using the following language:

Certificate of Current Cost or Pricing Data for Acquisitions Accomplished under the Authority of Section 890 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019, as amended by Section 825 of the NDAA for FY 2020

This is to certify that, to the best of my knowledge and belief, the cost or pricing data required by the provision at 252.215-7010, Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data (DEVIATION 2020-00020) of the Request for Proposal for this action, and submitted either actually or by specific identification in writing, to the Contracting Officer or to the Contracting Officer’s Representative in support of ________* are accurate, complete, and current as of ________**. This certification includes the cost or pricing data supporting any advance
agreements and forward pricing rate agreements between the Offeror and the Government that are part of the proposal.

Firm _____________________________________________

Signature _________________________________________

Name ____________________________________________

Title _____________________________________________

Date of execution***________________________________

* Identify the proposal involved, giving the appropriate identifying number (e.g., RFP No.).

** Insert the day, month, and year when price negotiations were concluded and price agreement was reached or, if applicable, an earlier date agreed upon between the parties that is as close as practicable to the date of agreement on price.

***Insert the day, month, and year of signing, which should be as close as practicable to the date when the price negotiations were concluded and the contract price was agreed to.

(ii) The certificate does not constitute a representation as to the accuracy of the Offeror’s judgment on the estimate of future costs or projections. It applies to the data upon which the judgment or estimate was based. This distinction between fact and judgment should be clearly understood. With respect to the certified cost or pricing data required by paragraphs (c)(1) or (e) of this provision (as revised by solicitation amendment, if applicable), if the Offeror had information reasonably available at the time of agreement showing that the negotiated price was not based on accurate, complete, and current data, the Offeror’s responsibility is not limited by any lack of personal knowledge of the information on the part of its negotiators.

(iii) The Contracting Officer and Offeror are encouraged to reach a prior agreement on criteria for establishing closing or cutoff dates when appropriate in order to minimize delays associated with proposal updates. Closing or cutoff dates applicable to the certified cost or pricing data required by paragraphs (c)(1) or (e) of this provision should be included as part of the data submitted with the proposal and, before agreement on price, data should be updated by the contractor to the latest closing or cutoff dates for which the data are available. Use of cutoff dates coinciding with reports is acceptable, as certain data may not be reasonably available before normal periodic closing dates (e.g., actual indirect costs). Data within the Offeror’s or a subcontractor’s
organization on matters significant to contractor management and to the Government will be treated as reasonably available, if that data was required to be submitted by paragraph (c)(1) or (e) of this provision. What is significant depends upon the circumstances of each acquisition.

(iv) Possession of a Certificate of Current Cost or Pricing Data is not a substitute for examining and analyzing the Offeror’s proposal.

(v) If certified cost or pricing data are requested by the Government and submitted by the Offeror, but an exception is later found to apply, the data shall not be considered certified cost or pricing data and shall not be certified in accordance with this subsection.

(3) The Offeror is responsible for determining whether a subcontractor qualifies for an exception from the requirement for submission of certified cost or pricing data on the basis of adequate price competition, i.e., two or more responsible offerors, competing independently, submit priced offers that satisfy the Government’s expressed requirement in accordance with FAR 15.403-1(c)(1).

(d) Requirements for data other than certified cost or pricing data.

(1) Data other than certified cost or pricing data submitted in accordance with this provision shall include all data necessary to permit a determination that the proposed price is fair and reasonable, to include the requirements in DFARS 215.402(a)(i) and 215.404-1(b).

(2) In cases in which uncertified cost data is required, the information shall be provided in the form in which it is regularly maintained by the Offeror or prospective subcontractor in its business operations.

(3) The Offeror shall provide information described as follows: [Insert description of the data and the format that are required, including access to records necessary to permit an adequate evaluation of the proposed price in accordance with FAR 15.403-3].

(4) Within 10 days of a written request from the Contracting Officer for additional information to support proposal analysis, the Offeror shall provide either the requested information, or a written explanation for the inability to fully comply.

(5) Subcontract price evaluation.
(i) The Offeror shall obtain from subcontractors the minimum information necessary to support a determination of price reasonableness, as described in FAR part 15 and DFARS part 215.

(ii) No cost information may be required from a prospective subcontractor in any case in which there are sufficient non-Government sales of the same item to establish reasonableness of price.

(iii) If the Offeror relies on relevant sales data for similar items to determine the price is reasonable, the Offeror shall obtain only that technical information necessary—

   (A) To support the conclusion that items are technically similar; and

   (B) To explain any technical differences that account for variances between the proposed prices and the sales data presented, but excluding paragraph (c), in all subcontracts exceeding the simplified acquisition threshold defined in FAR part 2.

(e) Subcontracts.

   (1) For subcontracts above the threshold for submission of certified cost or pricing data in FAR 15.403-4 to which the authority of the Section 890 pilot has been flowed down, in lieu of the requirements in paragraphs (a) and (b) of the clause at 52.215-12, Subcontractor Certified Cost or Pricing Data, of this solicitation, the Offeror shall require the subcontractor to submit a subset of cost or pricing data (actually or by specific identification in writing) as follows:

   (i)(A) Contracting Officer shall add paragraphs as necessary to identify each first-tier subcontract to which the authority of the Section 890 pilot has been flowed down, and the specific certified cost or pricing data required for each subcontract. Contracting Officer shall list the specific cost or pricing data deemed necessary to determine that the price is fair and reasonable for each subcontract, and describe the required submission format for each type of data. The type and extent of data required may differ based on the dollar value of the subcontract proposal, or other appropriate considerations. At a minimum, the Contracting Officer shall identify the specific prior subcontracts awarded in support of the DoD purchases of the same or similar products for which the subcontractor is required to submit the actual cost of performance. The Contracting Officer shall specify whether the authority of the Section 890 pilot is further flowed down to any lower-tier subcontract pertaining to each first-tier subcontract. Where the pilot authority is flowed down to lower-tier subcontracts, the Contracting Officer shall describe the specific certified cost or pricing data that is to be provided by each affected lower-tier subcontractor. The subcontractor and lower tier subcontractors to which the pilot authority is flowed down are not required to submit certified cost or
pricing data that is not listed within this provision. If the Contracting Officer finds that additional certified cost or pricing data are needed in order to determine that the price is fair and reasonable, the Contracting Officer shall issue an amendment to the solicitation, revising this paragraph as needed to require the submission of the additional data.]

(ii) In the event a subcontractor denies the Offeror access to the data described in paragraph (e)(1)(i) of this provision, the data may be provided directly to the Contracting Officer.

(iii) If a subcontractor is unable to provide the extent of historical actual cost experience required by paragraph (e)(1)(i), then the Offeror shall require the subcontractor to provide certified cost or pricing data in accordance with paragraph (e)(2) of this clause.

(iv) The Offeror shall require the subcontractor to certify in substantially the form prescribed in paragraph (c)(2) of this provision that, to the best of its knowledge and belief, the data submitted under paragraph (e)(1)(i) of this provision were accurate, complete, and current as of the date of agreement on the negotiated price of the subcontract.

(2) For subcontracts above the threshold for submission of certified cost or pricing data in FAR 15.403-4 to which the authority of the Section 890 pilot has not been flowed down, the Offeror shall require the subcontractor to provide certified cost or pricing data in accordance with the clause at 52.215-12, Subcontractor Certified Cost or Pricing Data, of this solicitation and shall require the subcontractor to certify in substantially the form prescribed in FAR 15.406-2 that, to the best of its knowledge and belief, the data submitted under paragraph (a) of the clause at 52.215-12 were accurate, complete, and current as of the date of agreement on the negotiated price of the subcontract.

(End of provision)
252.215-7997 Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data—Modifications—Section 890 Pilot Program. (DEVIATION 2020-O0020)

Use the following deviation clause for contract modifications that the Director, Defense Pricing and Contracting/Pricing and Contracting Initiatives, has authorized for participation in the pilot program implementing section 890 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115-232), as amended by section 825 of the NDAA for FY 2020 (Pub. L. 116-92). This deviation clause will apply to the modification in lieu of the basic or alternate I or IV of the clause at FAR 52.215-21.

REQUIREMENTS FOR CERTIFIED COST OR PRICING DATA AND DATA OTHER THAN CERTIFIED COST OR PRICING DATA—MODIFICATIONS—SECTION 890 PILOT PROGRAM (DEVIATION 2020-O0020) (AUG 2020)

This deviation clause is only applicable to contract modifications that have been approved by the Director, Defense Pricing and Contracting (DPC)/Pricing and Contracting Initiatives (PCI) for participation in the pilot program implementing section 890 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115-232), as amended by section 825 of the NDAA for FY 2020 (Pub. L. 116-92). The intent of this pilot program is to test the efficacy of basing price reasonableness determinations primarily on actual costs of performance for prior purchases of the same or similar products for the Department of Defense.

(a) Exceptions from certified cost or pricing data.

(1) In lieu of submitting certified cost or pricing data for modifications under this contract, for price adjustments expected to exceed the threshold set forth in Federal Acquisition Regulation (FAR) 15.403-4(a)(1) on the date of the agreement on price or the date of the award, whichever is later, the Contractor may submit a written request for exception by submitting the information described in paragraphs (a)(1)(i) and (ii) of this clause. If the threshold for submission of certified cost or pricing data specified in FAR 15.403-4(a)(1) is adjusted for inflation as set forth in FAR 1.109(a), then pursuant to FAR 1.109(d) the changed threshold applies throughout the remaining term of the contract, unless there is a subsequent threshold adjustment. The Contracting Officer may require additional supporting information, but only to the extent necessary to determine whether an exception should be granted, and whether the price is fair and reasonable—

(i) Identification of the law or regulation establishing the price offered. If the price is controlled under law by periodic rulings, reviews, or similar actions of a
governmental body, attach a copy of the controlling document, unless it was previously submitted to the contracting office.

(ii) Information on modifications of contracts or subcontracts for commercial items.

(A) If—

(1) The original contract or subcontract was granted an exception from certified cost or pricing data requirements because the price agreed upon was based on adequate price competition or prices set by law or regulation, or was a contract or subcontract for the acquisition of a commercial item; and

(2) The modification (to the contract or subcontract) is not exempted based on one of these exceptions, then the Contractor may provide information to establish that the modification would not change the contract or subcontract from a contract or subcontract for the acquisition of a commercial item to a contract or subcontract for the acquisition of an item other than a commercial item.

(B) For a commercial item exception, the Contractor shall provide, at a minimum, information on prices at which the same item or similar items have previously been sold that is adequate for evaluating the reasonableness of the price of the modification. Such information may include—

(1) For catalog items, a copy of or identification of the catalog and its date, or the appropriate pages for the offered items, or a statement that the catalog is on file in the buying office to which the proposal is being submitted. Provide a copy or describe current discount policies and price lists (published or unpublished), e.g., wholesale, original equipment manufacturer, or reseller. Also explain the basis of each offered price and its relationship to the established catalog price, including how the proposed price relates to the price of recent sales in quantities similar to the proposed quantities.

(2) For market-priced items, the source and date or period of the market quotation or other basis for market price, the base amount, and applicable discounts. In addition, describe the nature of the market.

(3) For items included on an active Federal Supply Service Multiple Award Schedule contract, proof that an exception has been granted for the schedule item.

(2) The Contractor grants the Contracting Officer or an authorized representative the right to examine, at any time before award, books, records,
documents, or other directly pertinent records to verify any request for an exception under this clause, and the reasonableness of price. For items priced using catalog or market prices, or law or regulation, access does not extend to cost or profit information or other data relevant solely to the Contractor’s determination of the prices to be offered in the catalog or marketplace.

(b) Requirements for certified cost or pricing data. If the Contractor is not granted an exception from the requirement to submit certified cost or pricing data, the following applies:

(1) In lieu of providing complete cost or pricing data in accordance with the clause at FAR 52.215-21 of this contract, the Contractor shall submit a subset of cost or pricing data, data other than certified cost or pricing data, and supporting attachments as specified by the Contracting Officer in the request for proposal for the modification. The Contracting Officer will list the specific cost or pricing data deemed necessary to establish price reasonableness for this contract modification, and describe the required submission format for each type of data. At a minimum, the Contracting Officer will identify the specific prior DoD purchases of the same or similar products for which the contractor is required to submit the actual cost of performance. The Contractor is not required to submit cost or pricing data that is not listed within the request for proposal for the modification. If the Contracting Officer finds that additional cost or pricing data are needed in order to determine that the price is fair and reasonable, the Contracting Officer will issue an amendment to the request for proposal, and the Contractor will be required to submit the additional data.

(2)(i) As soon as practicable after agreement on price, but before award (except for unpriced actions), the Contractor shall submit a Certificate of Current Cost or Pricing Data, using the following language:

Certificate of Current Cost or Pricing Data for Contract Modifications Accomplished under the Authority of Section 890 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019, as amended by Section 825 of the NDAA for FY 2020

This is to certify that, to the best of my knowledge and belief, the cost or pricing data required for this contract modification, in accordance with the request for proposal for this contract modification and the deviation clause at 252.215-7997, Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data—Modifications—Section 890 Pilot Program (DEVIATION 2020-O0020), and submitted either actually or by specific identification in writing, to the Contracting Officer or to the Contracting Officer's Representative in support of ______* are accurate, complete, and current as of ______**. This certification includes the cost or pricing data supporting any advance agreements and forward pricing rate agreements between the Contractor and the Government that are part of the proposal.
Firm _____________________________________________

Signature _________________________________________

Name ____________________________________________

Title _____________________________________________

Date of execution***________________________________

* Identify the proposal involved, giving the appropriate identifying number (e.g., RFP No.).

** Insert the day, month, and year when price negotiations were concluded and price agreement was reached or, if applicable, an earlier date agreed upon between the parties that is as close as practicable to the date of agreement on price.

*** Insert the day, month, and year of signing, which should be as close as practicable to the date when the price negotiations were concluded and the contract price was agreed to.

(ii) The certificate does not constitute a representation as to the accuracy of the Contractor’s judgment on the estimate of future costs or projections. It applies to the data upon which the judgment or estimate was based. This distinction between fact and judgment should be clearly understood. With respect to the certified cost or pricing data required by paragraphs (b) or (d) of this clause, if the Contractor had information reasonably available at the time of agreement showing that the negotiated price was not based on accurate, complete, and current data, the Contractor’s responsibility is not limited by any lack of personal knowledge of the information on the part of its negotiators.

(iii) The Contracting Officer and Contractor are encouraged to reach a prior agreement on criteria for establishing closing or cutoff dates when appropriate in order to minimize delays associated with proposal updates. Closing or cutoff dates applicable to the certified cost or pricing data required by paragraphs (b)(1) or (d) of this clause should be included as part of the data submitted with the proposal and, before agreement on price, data should be updated by the contractor to the latest closing or cutoff dates for which the data are available. Use of cutoff dates coinciding with reports is acceptable, as certain data may not be reasonably available before normal periodic closing dates (e.g., actual indirect costs). Data within the Contractor’s or a subcontractor’s organization on matters significant to contractor management and to the Government will be treated as reasonably available, if that data was required to be
submitted by paragraph (b)(1) or (d)(1) and (d)(2) of this clause. What is significant depends upon the circumstances of each acquisition.

(iv) Possession of a Certificate of Current Cost or Pricing Data is not a substitute for examining and analyzing the Contractor’s proposal.

(v) If certified cost or pricing data are requested by the Government and submitted by the Contractor, but an exception is later found to apply, the data shall not be considered certified cost or pricing data and shall not be certified in accordance with this subsection.

(3) The Contractor is responsible for determining whether a subcontractor qualifies for an exception from the requirement for submission of certified cost or pricing data on the basis of adequate price competition, i.e., two or more responsible offerors, competing independently, submit priced offers that satisfy the Government’s expressed requirement in accordance with FAR 15.403-1(c)(1).

(c) Requirements for data other than certified cost or pricing data.

(1) Data other than certified cost or pricing data submitted in accordance with this clause shall include all data necessary to permit a determination that the proposed price is fair and reasonable, to include the requirements in Defense Federal Acquisition Regulation Supplement (DFARS) 215.402(a)(i) and 215.404-1(b).

(2) In cases in which uncertified cost data is required, the information shall be provided in the form in which it is regularly maintained by the Contractor or prospective subcontractor in its business operations.

(3) The Contractor shall provide information described as follows: [Insert description of the data and the format that are required, including access to records necessary to permit an adequate evaluation of the proposed price in accordance with FAR 15.403-3].

(4) Within 10 days of a written request from the Contracting Officer for additional information to support proposal analysis, the Contractor shall provide either the requested information, or a written explanation for the inability to fully comply.

(5) Subcontract price evaluation.

(i) The Contractor shall obtain from subcontractors the information necessary to support a determination of price reasonableness, as described in FAR part 15 and DFARS part 215.
(ii) No cost information may be required from a prospective subcontractor in any case in which there are sufficient non-Government sales of the same item to establish reasonableness of price.

(iii) If the Contractor relies on relevant sales data for similar items to determine the price is reasonable, the Contractor shall obtain only that technical information necessary—

(A) To support the conclusion that items are technically similar; and

(B) To explain any technical differences that account for variances between the proposed prices and the sales data presented.

(d) Subcontracts. The Contractor shall insert the substance of this clause, including this paragraph (d), but excluding paragraph (b), in all subcontracts exceeding the simplified acquisition threshold defined in FAR part 2.

(1) For subcontracts above the threshold for submission of certified cost or pricing data in FAR 15.403-4 to which the authority of the Section 890 pilot has been flowed down, in lieu of the requirements in paragraphs (a) and (b) of the clause at 52.215-13, Subcontractor Certified Cost or Pricing Data—Modifications, of this contract, the Contractor shall require the subcontractor to submit a subset of cost or pricing data (actually or by specific identification in writing) as specified in the request for proposal for the modification.

(i) The Contracting Officer will add paragraphs in the request for proposal as necessary to identify each first-tier subcontract to which the authority of the Section 890 pilot has been flowed down, and the specific certified cost or pricing data required for each subcontract. Contracting Officer will list the specific cost or pricing data deemed necessary to determine that the price is fair and reasonable for each subcontract, and describe the required submission format for each type of data. The type and extent of data required may differ based on the dollar value of the subcontract proposal, or other appropriate considerations. At a minimum, the Contracting Officer will identify the specific prior subcontracts awarded in support of the DoD purchases of the same or similar products for which the subcontractor is required to submit the actual cost of performance. The Contracting Officer will specify whether the authority of the Section 890 pilot is further flowed down to any lower-tier subcontract pertaining to each first-tier subcontract. Where the pilot authority is flowed down to lower-tier subcontracts, the Contracting Officer will describe the specific certified cost or pricing data that is to be provided by each affected lower-tier subcontractor. The subcontractor and lower tier subcontractors to which the pilot authority is flowed down are not required to submit certified cost or pricing data that is not listed within the request for proposal.
(ii) In the event a subcontractor denies the Contractor access to the data described in paragraph (d)(1)(i) of this clause, the data may be provided directly to the Contracting Officer.

(iii) If a subcontractor is unable to provide the extent of historical actual cost experience required by paragraph (d)(1)(i), then the Contractor shall require the subcontractor to provide certified cost or pricing data in accordance with paragraph (d)(2) of this clause.

(iv) The Contractor shall require the subcontractor to certify in substantially the form prescribed in paragraph (b)(2) of this clause that, to the best of its knowledge and belief, the data submitted under paragraph (d)(1)(i) of this clause were accurate, complete, and current as of the date of agreement on the negotiated price of the subcontract or subcontract modification.

(2) For subcontracts above the threshold for submission of certified cost or pricing data in FAR 15.403-4 to which the authority of the Section 890 pilot has not been flowed down, the Contractor shall require the subcontractor to provide certified cost or pricing data in accordance with the clause at 52.215-13, Subcontractor Certified Cost or Pricing Data—Modifications, of this contract and shall require the subcontractor to certify in substantially the form prescribed in FAR 15.406-2 that, to the best of its knowledge and belief, the data submitted under paragraph (a) of this clause were accurate, complete, and current as of the date of agreement on the negotiated price of the subcontract or subcontract modification.

(End of clause)
252.215-7998  Pilot Program to Accelerate Contracting and Pricing Processes. (DEVIATION 2020-O0020)

Use the following deviation clause in solicitations and resulting contracts or in a contract with a contract modification that the Director, Defense Pricing and Contracting/Pricing and Contracting Initiatives, has authorized for participation in the pilot program implementing Section 890 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115-232), as amended by Section 825 of the NDAA for FY 2020 (Pub. L. 116-92).

PILOT PROGRAM TO ACCELERATE CONTRACTING AND PRICING PROCESSES (DEVIATION 2020-O0020) (AUG 2020)

(a) One or more contract actions under this acquisition is accomplished under the authority of section 890 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115-232), as amended by section 825 of the NDAA for FY 2020 (Pub. L. 116-92). The intent of this pilot program is to test the efficacy of basing price reasonableness determinations primarily on actual costs of performance for prior purchases of the same or similar products for the Department of Defense.

(b) As a condition of participating in this pilot program, the Contractor shall submit to the Contracting Officer the following:

(1) Verifiable data documenting any proposal preparation and negotiation support savings (time and money) achieved as a result of this pilot program. This data shall be provided—

   (i) For contracts that are subject to the pilot program, within 3 months after contract award; or

   (ii) For contract modifications that are subject to the pilot program, within 3 months after execution of the modification.

(2) The actual cost of performance for the contract action that was subject to the pilot program. This information shall be provided within 3 months after completion of performance of the part of the contract action that was subject to the pilot program.

(End of clause)
MEMORANDUM FOR

COMMANDER, UNITED STATES SPECIAL OPERATIONS COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES TRANSPORTATION COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES CYBER COMMAND (ATTN: ACQUISITION EXECUTIVE)
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE
DEPUTY ASSISTANT SECRETARY OF THE ARMY (PROCUREMENT), ASA (ALT)
DEPUTY ASSISTANT SECRETARY OF THE NAVY (ACQUISITION & LOGISTICS MANAGEMENT), ASN (RDA)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE (CONTRACTING), SAF/AQC
DIRECTORS, DEFENSE AGENCIES
DIRECTORS, DEFENSE FIELD ACTIVITIES

SUBJECT: Class Deviation—Section 890 Pilot Program to Accelerate Contracting and Pricing Processes

Effective immediately, this class deviation rescinds and supersedes Class Deviation 2019-O0008, dated April 1, 2019, to further implement the pilot program authority provided by section 890 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115-232), as amended by section 825 of the NDAA for FY 2020 (Pub. L. 116-92). For contract actions (e.g. solicitation of offers for contract award or contract modifications) approved by the Director, Defense Pricing and Contracting (DPC)/Pricing and Contracting Initiatives (PCI) for participation in the pilot program, the contracting officer may strategically establish the extent, structure, and level of detail of the historical actual cost data the contractor will be required to submit in lieu of providing complete certified cost or pricing data.

Section 890, as amended, authorizes DoD to conduct a pilot program for contract actions in excess of $50 million, which allows price reasonableness determinations to be based on actual cost and pricing data for purchases of the same or similar products for the DoD, and a reduction of the cost and pricing data to be submitted in accordance with 10 U.S.C. 2306a. Contract actions must be approved by the Director, DPC/PCI, to participate in the Section 890 pilot program prior to the issuance of a solicitation. Contracting officers may request approval to participate in the pilot program by completing and submitting the attached application template (Attachment 1) to osd.pentagon.ousd-a-s-mbx.dpc-pci@mail.mil. Participating contract actions must have an anticipated value of $50 million or more. Contract actions best suited for the pilot
program are those of a recurring nature, for which there is reliable, historical actual cost data. It is preferable to conduct these pilots with companies that have approved business systems. Additionally, while not a condition for participation, use of a fixed-price-incentive contract type can reduce the cost risk for the participating parties and provide measurable results at the conclusion of the acquisition in relation to a target cost.

For those contract actions approved by the Director, DPC/PCI, the contracting officers shall—

- Use the deviation provision provided in Attachment 2, in lieu of the basic or alternate of the provision at DFARS 252.215-7010, Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data, and detail the subset of cost or pricing data and format to be required from the offeror and subcontractors to which the Section 890 pilot is flowed down, in lieu of complete cost or pricing data as defined at FAR 2.101;

- Use the deviation clause provided in Attachment 3, which will apply to modifications approved for the Section 890 pilot in lieu of FAR 52.215-21, Requirements for Certified Cost of Pricing Data—Modifications, and detail in the request for proposal for the modification the specific cost or pricing data required to be submitted by the contractor and subcontractors to which the section 890 authority is flowed down;

- Use the deviation clause 252.215-7998, Pilot Program to Accelerate Contracting and Pricing Processes, provided in Attachment 4 to ensure the contractor provides information necessary to evaluate the efficacy of the pilot program; and

- Make price reasonableness determinations based primarily on contractor actual cost data on prior acquisitions, in combination with more traditional certified cost or pricing data that may be required to support aspects of the current acquisition for which the contractor’s historical cost experience may not be adequately representative of the current requirement.

The contracting officer may strategically establish the extent, structure, and level of detail of the historical actual cost data the contractor will be required to submit in lieu of complete certified cost or pricing data. It will be crucial for the contracting officer and contractor to have a detailed dialogue regarding the certified cost or pricing data that will be required under the authority of the pilot, to ensure that the contractor understands the contracting officer’s expectations with regard to the data necessary to support a price reasonableness determination, and the traceability of that data to the contractor’s proposal. Depending on the type and level of detail of certified cost or pricing data to be required in support of specific subcontracts to which the pilot authority is flowed down, the same discussion should take place between the contracting officer, the prime contractor, and the applicable subcontractors.

Measurement of pilot results will be provided at two junctures, as described at 252.215-7998, Pilot Program to Accelerate Contracting and Pricing Processes (see Attachment 4). The first will be within three months after the contract action approved for participation in the pilot is placed on contract. The second will be upon completion of performance of the contract action,
to measure how closely the actual cost of performance aligned with the acquisition team’s anticipated cost. Contracting officers shall submit both sets of results to osd.pentagon.ousd-a-s-mbx.dpc-pci@mail.mil as they become available.

This class deviation remains in effect until January 2, 2023, or until otherwise rescinded. My point of contact is Ms. Sara Higgins, who is available at (703) 220-4952 or by email at sara.a.higgins2.civ@mail.mil.

Kim Herrington
Acting Principal Director,
Defense Pricing and Contracting

Attachments:
As stated
Application to Participate in the Pilot Program Authorized under Section 890 of the FY19 National Defense Authorization Act (NDAA), as amended by Section 825 of the FY20 NDAA, for contract actions that exceed $50 million.

I. Program/Contract Information

Program Name: ________________________________________________________________

Cognizant Contracting Activity: ________________________________________________
(Buying office, Command, Department or Agency)

Description of Requirement: _____________________________________________________
(Product, quantity, period of performance)

Estimated value of the current requirement: _______________________________________

Anticipated contract type: ________________________________________________________

List of relevant prior acquisitions to be used as the basis for projecting costs of the current acquisition under the pilot program:

Acquisition 1: _________________________________________________________________
(Name, customer, product, quantity, period of performance, contract value, contract type)

Acquisition 2: _________________________________________________________________
(Name, customer, product, quantity, period of performance, contract value, contract type)

List the same information for additional acquisitions as appropriate.

Please discuss the extent of commonality between current and prior acquisitions. Does the current acquisition include work not required in the prior acquisitions? Did the prior acquisitions include work not required in the current buy? Are there any significant requirement changes? Were actuals from previous buys requested on these listed acquisitions? If so, how were they used in proposal evaluation and/or negotiations?

_____________________________________________________________________________
_____________________________________________________________________________
_____________________________________________________________________________
_____________________________________________________________________________
II. Prime Contractor Information

Contractor Name and Location: ___________________________________________________________

Contractor CAGE Code: _________________________________________________________________

Status of Contractor’s Accounting System as shown in CBAR: ______________________________

III. Notional Approach to Data Requirements for the Bill of Materials

*Please complete this section if the contracting officer plans to flow down the pilot authority to some or all first tier or lower tier subcontracts.*

For each of the relevant prior acquisitions listed in Section I, above, please provide the total considered negotiated material and subcontract cost, in dollars and as a percentage of the total considered negotiated cost line.

Acquisition 1: _______________________________________________________________________

(Name, considered negotiated material/subcontract cost, in dollars and as a percent of the negotiated cost line)

Acquisition 2: _______________________________________________________________________

(Name, considered negotiated material/subcontract cost, in dollars and as a percent of the negotiated cost line)

List the same information for additional acquisitions as appropriate.

Please discuss any significant issues or challenges relating to material or subcontracts which were experienced in the context of the above-listed historical acquisitions.

_____________________________________________________________________________________

_____________________________________________________________________________________

_____________________________________________________________________________________

_____________________________________________________________________________________

_____________________________________________________________________________________

Please discuss the extent of commonality between current and prior acquisitions with respect to the Bill of Materials. Does the current acquisition include significant subcontracted effort not required in the prior acquisitions? Did the prior acquisitions include significant subcontract effort not required in the current buy? Are there any significant requirement changes with respect to subcontracted items? Were actuals from previous buys requested for major subcontracts? If so, how were they used in the Government’s proposal evaluation and/or negotiations with the prime contractor? _________________

_____________________________________________________________________________________

_____________________________________________________________________________________

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_____________________________________________________________________________________
Please describe the contracting officer’s planned approach for flowing down the Section 890 pilot authority to subcontracts. Please indicate whether the intent is to apply the authority to some or all first tier subcontracts subject to the Truth in Negotiations Act; the type and extent of data to be required; and whether the authority will be flowed down to lower tier subcontracts. If the type and extent of data to be required is expected to be scaled based on subcontract dollar value or other considerations, please explain.

____________________________________________________________________________________

____________________________________________________________________________________

____________________________________________________________________________________

____________________________________________________________________________________

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IV. Acquisition Team Information

Contracting Officer name and contact information: ________________________________

Buyer/Contract specialist name and contact information: ____________________________

Considerations with Respect to Type and Extent of Certified Cost or Pricing Data to Be Required

The intent of this implementation of the Section 890 pilot program is to provide the flexibility for contracting officers to strategically identify and require submission of the specific cost or pricing data, including actual cost history details, which are expected to be most relevant in establishing a fair and reasonable price for the recurring costs associated with a product which has meaningful price history under DoD acquisitions. Contracting officers requesting approval to utilize this pilot program authority should be prepared to develop a strategy which will facilitate analysis of the contractor’s proposal for the current requirement, including any non-recurring or unique aspects. Considerations may include the following:

Actual costs for relevant prior acquisitions for which performance is not complete: If any of the prior acquisitions to be used to establish price reasonableness for the current requirement are not physically complete as of the date of issuance of the solicitation, the contracting officer should require the contractor to provide and support their estimate to complete (ETC). (Document the requirement in the deviation version of 252.215-7010 or the request for proposal for a contract modification in accordance with 252.215-7XXX, as applicable.) Additionally, for incomplete efforts at both the prime and the subcontract level, the contractor/subcontractor should be required to provide a data refresh prior to commencement of negotiations and prior to conclusion of negotiations between the Government and the prime. Contractor refusals to disclose ETC values should be elevated through the management chain as described in DFARS PGI 215.404-1(a)(i)(A).
Non-recurring effort: The contracting officer will need to consider non-recurring effort from two perspectives. First, the contractor should be required to separately identify the non-recurring activity performed in prior acquisitions, and provide adequate actual cost details to ensure exclusion of that cost from cost estimates for the current requirement. Secondly, the contracting officer will need to work with the contractor to identify non-recurring requirements which are part of the current acquisition. The CO must then determine the type and extent of certified cost or pricing data required to support establishment of a fair and reasonable price for that portion of the effort.

Fixed vs variable cost: Where there are quantity differences between the current requirement and the prior acquisitions to be used to establish price reasonableness, it is critical that the contracting officer take into account the impact of fixed vs variable costs. The contractor should be required to separately identify the fixed and variable components of the historical actuals, and provide the cost of each at a level of detail that will support the Government’s appropriate use of the historical actuals in the evaluation of the proposed cost for the current requirement.

Changed requirements: If there are significant requirement changes between the prior acquisitions and the current requirement, the contracting officer must develop an appropriate approach for segregating the costs associated with tasks performed in the prior acquisitions that are not required in the instant effort, to ensure those costs are not projected into estimates for the current requirements. Additionally, the contracting officer must determine what cost or pricing data will be required to support new work not required or performed under the prior acquisitions.

Labor: The contracting officer will need to ensure that the contractor provides adequate insight into the composition of the historical labor actuals to inform the Government’s evaluation of the proposal for the current requirement. For example, the prior actuals may need to show hours by labor category by task. Where labor hours included in the historical acquisitions were proposed based on factors, and the contractor’s proposal for the current requirement is expected to use the same or similar factors, it may be useful to compare proposed factors for prior acquisitions to actual outcomes for those efforts.

Subcontracts subject to the Truth in Negotiations Act (TINA): For the purposes of this pilot, the authority provided under Section 890 of the FY19 NDAA may be flowed down to first-tier or lower-tier subcontracts subject to TINA, at the discretion of the contracting officer. This means that, for those subcontracts for which the pilot authority is flowed down, the contracting officer for acquisitions approved for participation in the pilot will need to establish the extent, structure, and level of detail of the historical actual cost data which subcontractors will be required to submit in lieu of traditional certified cost or pricing data, and must ensure that the actuals are presented in a manner that will support efficient and effective evaluation of the subcontract proposal for the current requirement. It may be useful to stratify the covered subcontracts by proposed dollar value; for a subset of the subcontracts (generally, the major subcontracts), the contracting officer may find it appropriate to require submission of actuals at a level of detail similar to the types of breakout required for the prime contractor’s prior actuals. For some subcontracts it may be appropriate to obtain only limited insight into the total actuals, e.g., total cost, total labor dollars/hours, and total material. For lower dollar subcontracts, it may be appropriate to either require submission of the subcontractor’s recurring actual cost for specified prior acquisitions in support of DoD contracts, or simply obtain the prime’s purchase order history for the specified prior acquisitions. The contracting officer’s insight into the quality of the
prime’s negotiated vendor pricing in the context of the historical acquisitions may come into play in making this decision. For those subcontracts for which the pilot authority is flowed down, consideration should be given to obtaining subcontract cost breakouts segregating recurring and non-recurring effort, at a minimum. If there are significant quantity variations between the prior subcontracts and the current requirement, it may also be prudent to gain insight into the breakout of fixed and variable costs under the subcontract. Cost implications of requirement changes between the prior subcontracts and the current requirement must be considered: the cost of work performed under prior subcontracts but not currently required must be segregated in the historical actuals, while new requirements must be adequately supported in the subcontract proposal, since the cost history of prior subcontracts will not be informative with respect to the new work. The contracting officer may wish to consider whether there is benefit in requiring submission of the prime’s cost analyses for select subcontracts, as these become available. In addition to the historical actuals, the contracting officer should also consider requiring the prime contractor and its subcontractors to disclose suppliers’ quotes, offers, and agreed-to vendor pricing for the current requirement as those data become available.

**Material and subcontracts below the TINA threshold or meeting a TINA exception:** The deviation provision DFARS 252.215-7010(d)(5) and deviation clause 252.215-7XXX(c)(5) in support of this pilot address expectations with respect to subcontracts not subject to TINA. The Government has no entitlement to incurred cost data for these subcontracts. The PCO will need to consider whether data in addition to the prime contractor’s purchase order history will be needed to support proposed pricing for these items. In particular, where the prime contractor has made a commerciality assertion with regard to a subcontractor, the contracting officer will need to consider whether data other than certified cost or pricing data will be required, and if so, the type and extent of data.

**Interdivisional transfers:** For interdivisional transfers subject to TINA, the PCO will need to determine the appropriate level of detail for supporting cost or pricing data. Considerations may include the dollar value of the interdivisional transfer and the complexity of the effort.

**ODCs:** While discrete ODCs are often proposed based on judgmental estimates, the contracting officer should consider whether the historical ODC cost experience from the prior acquisitions may provide an appropriate basis for projection of ODC cost for the current effort. The concepts of recurring vs non-recurring costs and fixed vs variable, discussed above, may also come into play.

**Rates and factors:** It may be useful to compare proposed rates and factors for prior acquisitions to actual outcomes, especially with respect to estimating factors which are not the subject of an FPRA or an FPRR. However, contracting officers would generally be expected to use prospective DCMA rate positions, when available, in the pricing of the current requirement.

**Format and content of the proposal for the current requirement:** The contracting officer should consider what traditional proposal content will still be required under the auspices of the Section 890 pilot, if the actual cost detail from prior acquisitions is provided, and what typical proposal content may be foregone. For example, the contractor should still be expected to submit a cost element summary at the CLIN level and in the aggregate, a priced bill of materials, and a time-phased breakdown of labor hours and rates by category. Labor basis of estimate (BOE) sheets may not be needed to support that portion of the current requirement which is identical to the requirements of prior buys, whereas the contractor should be expected to submit BOEs to support non-recurring effort which is not represented...
in the prior actuals. The contracting officer may elect to require submission of some prime cost analyses of subcontract proposals, while perhaps choosing to rely on the prime’s PO history or the subcontractor’s submission of prior actuals for other subcontracts. While the specifics will vary according to the circumstances of each pilot program acquisition, it is critical for the contracting officer to have a proposal evaluation plan in place in order to ensure that the optimal subset of data is obtained to permit efficient and effective proposal evaluation, negotiation, and establishment of a fair and reasonable price.
252.215-7010 Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data. (DEVIATION 2020-O0020)

Use the following deviation provision, in lieu of the basic or alternate of the provision at 252.215-7010, in solicitations that the Director, Pricing and Contracting Initiatives/Defense Pricing and Contracting, has authorized for participation in the pilot program implementing section 890 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115-232), as amended by section 825 of the NDAA for FY 2020 (Pub. L. 116-92).

REQUIREMENTS FOR CERTIFIED COST OR PRICING DATA AND DATA OTHER THAN CERTIFIED COST OR PRICING DATA (DEVIATION 2020-O0020) (AUG 2020)

(a) Definitions. As used in this provision—

“Market prices” means current prices that are established in the course of ordinary trade between buyers and sellers free to bargain and that can be substantiated through competition or from sources independent of the offerors.

“Non-Government sales” means sales of the supplies or services to non-Governmental entities for purposes other than governmental purposes.

“Relevant sales data” means information provided by an offeror on sales of the same or similar items that can be used to establish price reasonableness taking into consideration the age, volume, and nature of the transactions (including any related discounts, refunds, rebates, offsets, or other adjustments).

“Sufficient non-Government sales” means relevant sales data that reflects market pricing and contains enough information to make adjustments covered by FAR 15.404-1(b)(2)(ii)(B).

“Uncertified cost data” means the subset of “data other than certified cost or pricing data” (see FAR 2.101) that relates to cost.

(b) Exceptions from certified cost or pricing data.

(1) In lieu of submitting certified cost or pricing data, the Offeror may submit a written request for exception by submitting the information described in paragraphs (b)(1)(i) and (ii) of this provision. The Contracting Officer may require additional supporting information, but only to the extent necessary to determine whether an exception should be granted and whether the price is fair and reasonable.
(i) Exception for price set by law or regulation - Identification of the law or regulation establishing the price offered. If the price is controlled under law by periodic rulings, reviews, or similar actions of a governmental body, attach a copy of the controlling document, unless it was previously submitted to the contracting office.

(ii) Commercial item exception. For a commercial item exception, the Offeror shall submit, at a minimum, information that is adequate for evaluating the reasonableness of the price for this acquisition, including prices at which the same item or similar items have been sold in the commercial market. Such information shall include—

(A) For items previously determined to be commercial, the contract number and military department, defense agency, or other DoD component that rendered such determination, and if available, a Government point of contact;

(B) For items priced based on a catalog—

(1) A copy of or identification of the Offeror’s current catalog showing the price for that item; and

(2) If the catalog pricing provided with this proposal is not consistent with all relevant sales data, a detailed description of differences or inconsistencies between or among the relevant sales data, the proposed price, and the catalog price (including any related discounts, refunds, rebates, offsets, or other adjustments);

(C) For items priced based on market pricing, a description of the nature of the commercial market, the methodology used to establish a market price, and all relevant sales data. The description shall be adequate to permit DoD to verify the accuracy of the description;

(D) For items included on an active Federal Supply Service Multiple Award Schedule contract, proof that an exception has been granted for the schedule item; or

(E) For items provided by nontraditional defense contractors, a statement that the entity is not currently performing and has not performed, for at least the 1-year period preceding the solicitation of sources by DoD for the procurement or transaction, any contract or subcontract for DoD that is subject to full coverage under the cost accounting standards prescribed pursuant to 41 U.S.C. 1502 and the regulations implementing such section.
(2) The Offeror grants the Contracting Officer or an authorized representative the right to examine, at any time before award, books, records, documents, or other directly pertinent records to verify any request for an exception under this provision, and to determine the reasonableness of price.

(c) Requirements for certified cost or pricing data. This acquisition is accomplished under the authority of section 890 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115-232), as amended by section 825 of the NDAA for FY 2020 (Pub. L. 116-92). The intent of this pilot program is to test the efficacy of basing price reasonableness determinations primarily on actual costs of performance for prior purchases of the same or similar products for the Department of Defense. If the Offeror is not granted an exception from the requirement to submit certified cost or pricing data, the following applies:

(1) In lieu of providing complete cost or pricing data, as defined in FAR 2.101, the Offeror shall submit a subset of cost or pricing data and supporting attachments as follows: [Contracting Officer shall list the specific cost or pricing data deemed necessary to establish price reasonableness for this acquisition, and describe the required submission format for each type of data. At a minimum, the Contracting Officer shall identify the specific prior DoD purchases of the same or similar products for which the Offeror is required to submit the actual cost of performance. The Offeror is not required to submit cost or pricing data that is not listed within this provision. If the Contracting Officer finds that additional cost or pricing data are needed in order to determine that the price is fair and reasonable, the Contracting Officer shall issue an amendment to the solicitation, revising this paragraph as needed to require the submission of the additional data.]

(2)(i) As soon as practicable after agreement on price, but before contract award (except for unpriced actions such as letter contracts), the Offeror shall submit a Certificate of Current Cost or Pricing Data, using the following language:

Certificate of Current Cost or Pricing Data for Acquisitions Accomplished under the Authority of Section 890 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019, as amended by Section 825 of the NDAA for FY 2020

This is to certify that, to the best of my knowledge and belief, the cost or pricing data required by the provision at 252.215-7010, Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data (DEVIATION 2020-00020) of the Request for Proposal for this action, and submitted either actually or by specific identification in writing, to the Contracting Officer or to the Contracting Officer’s Representative in support of ________* are accurate, complete, and current as of ________**. This certification includes the cost or pricing data supporting any advance
agreements and forward pricing rate agreements between the Offeror and the Government that are part of the proposal.

Firm _____________________________________________

Signature _________________________________________

Name ____________________________________________

Title _____________________________________________

Date of execution***________________________________

* Identify the proposal involved, giving the appropriate identifying number (e.g., RFP No.).

** Insert the day, month, and year when price negotiations were concluded and price agreement was reached or, if applicable, an earlier date agreed upon between the parties that is as close as practicable to the date of agreement on price.

*** Insert the day, month, and year of signing, which should be as close as practicable to the date when the price negotiations were concluded and the contract price was agreed to.

(ii) The certificate does not constitute a representation as to the accuracy of the Offeror's judgment on the estimate of future costs or projections. It applies to the data upon which the judgment or estimate was based. This distinction between fact and judgment should be clearly understood. With respect to the certified cost or pricing data required by paragraphs (c)(1) or (e) of this provision (as revised by solicitation amendment, if applicable), if the Offeror had information reasonably available at the time of agreement showing that the negotiated price was not based on accurate, complete, and current data, the Offeror's responsibility is not limited by any lack of personal knowledge of the information on the part of its negotiators.

(iii) The Contracting Officer and Offeror are encouraged to reach a prior agreement on criteria for establishing closing or cutoff dates when appropriate in order to minimize delays associated with proposal updates. Closing or cutoff dates applicable to the certified cost or pricing data required by paragraphs (c)(1) or (e) of this provision should be included as part of the data submitted with the proposal and, before agreement on price, data should be updated by the contractor to the latest closing or cutoff dates for which the data are available. Use of cutoff dates coinciding with reports is acceptable, as certain data may not be reasonably available before normal periodic closing dates (e.g., actual indirect costs). Data within the Offeror's or a subcontractor's
organization on matters significant to contractor management and to the Government will be treated as reasonably available, if that data was required to be submitted by paragraph (c)(1) or (e) of this provision. What is significant depends upon the circumstances of each acquisition.

(iv) Possession of a Certificate of Current Cost or Pricing Data is not a substitute for examining and analyzing the Offeror’s proposal.

(v) If certified cost or pricing data are requested by the Government and submitted by the Offeror, but an exception is later found to apply, the data shall not be considered certified cost or pricing data and shall not be certified in accordance with this subsection.

(3) The Offeror is responsible for determining whether a subcontractor qualifies for an exception from the requirement for submission of certified cost or pricing data on the basis of adequate price competition, i.e., two or more responsible offerors, competing independently, submit priced offers that satisfy the Government’s expressed requirement in accordance with FAR 15.403-1(c)(1).

(d) Requirements for data other than certified cost or pricing data.

(1) Data other than certified cost or pricing data submitted in accordance with this provision shall include all data necessary to permit a determination that the proposed price is fair and reasonable, to include the requirements in DFARS 215.402(a)(i) and 215.404-1(b).

(2) In cases in which uncertified cost data is required, the information shall be provided in the form in which it is regularly maintained by the Offeror or prospective subcontractor in its business operations.

(3) The Offeror shall provide information described as follows: [Insert description of the data and the format that are required, including access to records necessary to permit an adequate evaluation of the proposed price in accordance with FAR 15.403-3].

(4) Within 10 days of a written request from the Contracting Officer for additional information to support proposal analysis, the Offeror shall provide either the requested information, or a written explanation for the inability to fully comply.

(5) Subcontract price evaluation.
(i) The Offeror shall obtain from subcontractors the minimum information necessary to support a determination of price reasonableness, as described in FAR part 15 and DFARS part 215.

(ii) No cost information may be required from a prospective subcontractor in any case in which there are sufficient non-Government sales of the same item to establish reasonableness of price.

(iii) If the Offeror relies on relevant sales data for similar items to determine the price is reasonable, the Offeror shall obtain only that technical information necessary—

(A) To support the conclusion that items are technically similar; and

(B) To explain any technical differences that account for variances between the proposed prices and the sales data presented, but excluding paragraph (c), in all subcontracts exceeding the simplified acquisition threshold defined in FAR part 2.

(e) Subcontracts.

(1) For subcontracts above the threshold for submission of certified cost or pricing data in FAR 15.403-4 to which the authority of the Section 890 pilot has been flowed down, in lieu of the requirements in paragraphs (a) and (b) of the clause at 52.215-12, Subcontractor Certified Cost or Pricing Data, of this solicitation, the Offeror shall require the subcontractor to submit a subset of cost or pricing data (actually or by specific identification in writing) as follows:

(i)(A) [Contracting Officer shall add paragraphs as necessary to identify each first-tier subcontract to which the authority of the Section 890 pilot has been flowed down, and the specific certified cost or pricing data required for each subcontract. Contracting Officer shall list the specific cost or pricing data deemed necessary to determine that the price is fair and reasonable for each subcontract, and describe the required submission format for each type of data. The type and extent of data required may differ based on the dollar value of the subcontract proposal, or other appropriate considerations. At a minimum, the Contracting Officer shall identify the specific prior subcontracts awarded in support of the DoD purchases of the same or similar products for which the subcontractor is required to submit the actual cost of performance. The Contracting Officer shall specify whether the authority of the Section 890 pilot is further flowed down to any lower-tier subcontract pertaining to each first-tier subcontract. Where the pilot authority is flowed down to lower-tier subcontracts, the Contracting Officer shall describe the specific certified cost or pricing data that is to be provided by each affected lower-tier subcontractor. The subcontractor and lower tier subcontractors to which the pilot authority is flowed down are not required to submit certified cost or]
pricing data that is not listed within this provision. If the Contracting Officer finds that additional certified cost or pricing data are needed in order to determine that the price is fair and reasonable, the Contracting Officer shall issue an amendment to the solicitation, revising this paragraph as needed to require the submission of the additional data.]

(ii) In the event a subcontractor denies the Offeror access to the data described in paragraph (e)(1)(i) of this provision, the data may be provided directly to the Contracting Officer.

(iii) If a subcontractor is unable to provide the extent of historical actual cost experience required by paragraph (e)(1)(i), then the Offeror shall require the subcontractor to provide certified cost or pricing data in accordance with paragraph (e)(2) of this clause.

(iv) The Offeror shall require the subcontractor to certify in substantially the form prescribed in paragraph (c)(2) of this provision that, to the best of its knowledge and belief, the data submitted under paragraph (e)(1)(i) of this provision were accurate, complete, and current as of the date of agreement on the negotiated price of the subcontract.

(2) For subcontracts above the threshold for submission of certified cost or pricing data in FAR 15.403-4 to which the authority of the Section 890 pilot has not been flowed down, the Offeror shall require the subcontractor to provide certified cost or pricing data in accordance with the clause at 52.215-12, Subcontractor Certified Cost or Pricing Data, of this solicitation and shall require the subcontractor to certify in substantially the form prescribed in FAR 15.406-2 that, to the best of its knowledge and belief, the data submitted under paragraph (a) of the clause at 52.215-12 were accurate, complete, and current as of the date of agreement on the negotiated price of the subcontract.

(End of provision)
252.215-7997  Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data—Modifications—Section 890 Pilot Program. (DEVIATION 2020-O0020)

Use the following deviation clause for contract modifications that the Director, Defense Pricing and Contracting/Pricing and Contracting Initiatives, has authorized for participation in the pilot program implementing section 890 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115-232), as amended by section 825 of the NDAA for FY 2020 (Pub. L. 116-92). This deviation clause will apply to the modification in lieu of the basic or alternate I or IV of the clause at FAR 52.215-21.

REQUIREMENTS FOR CERTIFIED COST OR PRICING DATA AND DATA OTHER THAN CERTIFIED COST OR PRICING DATA—MODIFICATIONS—SECTION 890 PILOT PROGRAM (DEVIATION 2020-O0020) (AUG 2020)

This deviation clause is only applicable to contract modifications that have been approved by the Director, Defense Pricing and Contracting (DPC)/Pricing and Contracting Initiatives (PCI) for participation in the pilot program implementing section 890 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115-232), as amended by section 825 of the NDAA for FY 2020 (Pub. L. 116-92). The intent of this pilot program is to test the efficacy of basing price reasonableness determinations primarily on actual costs of performance for prior purchases of the same or similar products for the Department of Defense.

(a) Exceptions from certified cost or pricing data.

(1) In lieu of submitting certified cost or pricing data for modifications under this contract, for price adjustments expected to exceed the threshold set forth in Federal Acquisition Regulation (FAR) 15.403-4(a)(1) on the date of the agreement on price or the date of the award, whichever is later, the Contractor may submit a written request for exception by submitting the information described in paragraphs (a)(1)(i) and (ii) of this clause. If the threshold for submission of certified cost or pricing data specified in FAR 15.403-4(a)(1) is adjusted for inflation as set forth in FAR 1.109(a), then pursuant to FAR 1.109(d) the changed threshold applies throughout the remaining term of the contract, unless there is a subsequent threshold adjustment. The Contracting Officer may require additional supporting information, but only to the extent necessary to determine whether an exception should be granted, and whether the price is fair and reasonable—

(i) Identification of the law or regulation establishing the price offered. If the price is controlled under law by periodic rulings, reviews, or similar actions of a
governmental body, attach a copy of the controlling document, unless it was previously submitted to the contracting office.

(ii) Information on modifications of contracts or subcontracts for commercial items.

(A) If—

(1) The original contract or subcontract was granted an exception from certified cost or pricing data requirements because the price agreed upon was based on adequate price competition or prices set by law or regulation, or was a contract or subcontract for the acquisition of a commercial item; and

(2) The modification (to the contract or subcontract) is not exempted based on one of these exceptions, then the Contractor may provide information to establish that the modification would not change the contract or subcontract from a contract or subcontract for the acquisition of a commercial item to a contract or subcontract for the acquisition of an item other than a commercial item.

(B) For a commercial item exception, the Contractor shall provide, at a minimum, information on prices at which the same item or similar items have previously been sold that is adequate for evaluating the reasonableness of the price of the modification. Such information may include—

(1) For catalog items, a copy of or identification of the catalog and its date, or the appropriate pages for the offered items, or a statement that the catalog is on file in the buying office to which the proposal is being submitted. Provide a copy or describe current discount policies and price lists (published or unpublished), e.g., wholesale, original equipment manufacturer, or reseller. Also explain the basis of each offered price and its relationship to the established catalog price, including how the proposed price relates to the price of recent sales in quantities similar to the proposed quantities.

(2) For market-priced items, the source and date or period of the market quotation or other basis for market price, the base amount, and applicable discounts. In addition, describe the nature of the market.

(3) For items included on an active Federal Supply Service Multiple Award Schedule contract, proof that an exception has been granted for the schedule item.

(2) The Contractor grants the Contracting Officer or an authorized representative the right to examine, at any time before award, books, records,
documents, or other directly pertinent records to verify any request for an exception under this clause, and the reasonableness of price. For items priced using catalog or market prices, or law or regulation, access does not extend to cost or profit information or other data relevant solely to the Contractor’s determination of the prices to be offered in the catalog or marketplace.

(b) **Requirements for certified cost or pricing data.** If the Contractor is not granted an exception from the requirement to submit certified cost or pricing data, the following applies:

1. In lieu of providing complete cost or pricing data in accordance with the clause at FAR 52.215-21 of this contract, the Contractor shall submit a subset of cost or pricing data, data other than certified cost or pricing data, and supporting attachments as specified by the Contracting Officer in the request for proposal for the modification. The Contracting Officer will list the specific cost or pricing data deemed necessary to establish price reasonableness for this contract modification, and describe the required submission format for each type of data. At a minimum, the Contracting Officer will identify the specific prior DoD purchases of the same or similar products for which the contractor is required to submit the actual cost of performance. The Contractor is not required to submit cost or pricing data that is not listed within the request for proposal for the modification. If the Contracting Officer finds that additional cost or pricing data are needed in order to determine that the price is fair and reasonable, the Contracting Officer will issue an amendment to the request for proposal, and the Contractor will be required to submit the additional data.

2. (i) As soon as practicable after agreement on price, but before award (except for unpriced actions), the Contractor shall submit a Certificate of Current Cost or Pricing Data, using the following language:

   **Certificate of Current Cost or Pricing Data for Contract Modifications Accomplished under the Authority of Section 890 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019, as amended by Section 825 of the NDAA for FY 2020**

   This is to certify that, to the best of my knowledge and belief, the cost or pricing data required for this contract modification, in accordance with the request for proposal for this contract modification and the deviation clause at 252.215-7997, Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data—Modifications—Section 890 Pilot Program (DEVIATION 2020-O0020), and submitted either actually or by specific identification in writing, to the Contracting Officer or to the Contracting Officer’s Representative in support of ______* are accurate, complete, and current as of ______**. This certification includes the cost or pricing data supporting any advance agreements and forward pricing rate agreements between the Contractor and the Government that are part of the proposal.
Firm _____________________________________________

Signature _________________________________________

Name ____________________________________________

Title _____________________________________________

Date of execution***________________________________

* Identify the proposal involved, giving the appropriate identifying number (e.g., RFP No.).

** Insert the day, month, and year when price negotiations were concluded and price agreement was reached or, if applicable, an earlier date agreed upon between the parties that is as close as practicable to the date of agreement on price.

*** Insert the day, month, and year of signing, which should be as close as practicable to the date when the price negotiations were concluded and the contract price was agreed to.

(ii) The certificate does not constitute a representation as to the accuracy of the Contractor’s judgment on the estimate of future costs or projections. It applies to the data upon which the judgment or estimate was based. This distinction between fact and judgment should be clearly understood. With respect to the certified cost or pricing data required by paragraphs (b) or (d) of this clause, if the Contractor had information reasonably available at the time of agreement showing that the negotiated price was not based on accurate, complete, and current data, the Contractor’s responsibility is not limited by any lack of personal knowledge of the information on the part of its negotiators.

(iii) The Contracting Officer and Contractor are encouraged to reach a prior agreement on criteria for establishing closing or cutoff dates when appropriate in order to minimize delays associated with proposal updates. Closing or cutoff dates applicable to the certified cost or pricing data required by paragraphs (b)(1) or (d) of this clause should be included as part of the data submitted with the proposal and, before agreement on price, data should be updated by the contractor to the latest closing or cutoff dates for which the data are available. Use of cutoff dates coinciding with reports is acceptable, as certain data may not be reasonably available before normal periodic closing dates (e.g., actual indirect costs). Data within the Contractor’s or a subcontractor’s organization on matters significant to contractor management and to the Government will be treated as reasonably available, if that data was required to be
submitted by paragraph (b)(1) or (d)(1) and (d)(2) of this clause. What is significant depends upon the circumstances of each acquisition.

(iv) Possession of a Certificate of Current Cost or Pricing Data is not a substitute for examining and analyzing the Contractor's proposal.

(v) If certified cost or pricing data are requested by the Government and submitted by the Contractor, but an exception is later found to apply, the data shall not be considered certified cost or pricing data and shall not be certified in accordance with this subsection.

(3) The Contractor is responsible for determining whether a subcontractor qualifies for an exception from the requirement for submission of certified cost or pricing data on the basis of adequate price competition, i.e., two or more responsible offerors, competing independently, submit priced offers that satisfy the Government's expressed requirement in accordance with FAR 15.403-1(c)(1).

(c) Requirements for data other than certified cost or pricing data.

(1) Data other than certified cost or pricing data submitted in accordance with this clause shall include all data necessary to permit a determination that the proposed price is fair and reasonable, to include the requirements in Defense Federal Acquisition Regulation Supplement (DFARS) 215.402(a)(i) and 215.404-1(b).

(2) In cases in which uncertified cost data is required, the information shall be provided in the form in which it is regularly maintained by the Contractor or prospective subcontractor in its business operations.

(3) The Contractor shall provide information described as follows: [Insert description of the data and the format that are required, including access to records necessary to permit an adequate evaluation of the proposed price in accordance with FAR 15.403-3].

(4) Within 10 days of a written request from the Contracting Officer for additional information to support proposal analysis, the Contractor shall provide either the requested information, or a written explanation for the inability to fully comply.

(5) Subcontract price evaluation.

(i) The Contractor shall obtain from subcontractors the information necessary to support a determination of price reasonableness, as described in FAR part 15 and DFARS part 215.
(ii) No cost information may be required from a prospective subcontractor in any case in which there are sufficient non-Government sales of the same item to establish reasonableness of price.

(iii) If the Contractor relies on relevant sales data for similar items to determine the price is reasonable, the Contractor shall obtain only that technical information necessary—

(A) To support the conclusion that items are technically similar; and

(B) To explain any technical differences that account for variances between the proposed prices and the sales data presented.

(d) **Subcontracts.** The Contractor shall insert the substance of this clause, including this paragraph (d), but excluding paragraph (b), in all subcontracts exceeding the simplified acquisition threshold defined in FAR part 2.

(1) For subcontracts above the threshold for submission of certified cost or pricing data in FAR 15.403-4 to which the authority of the Section 890 pilot has been flowed down, in lieu of the requirements in paragraphs (a) and (b) of the clause at 52.215-13, Subcontractor Certified Cost or Pricing Data—Modifications, of this contract, the Contractor shall require the subcontractor to submit a subset of cost or pricing data (actually or by specific identification in writing) as specified in the request for proposal for the modification.

(i) The Contracting Officer will add paragraphs in the request for proposal as necessary to identify each first-tier subcontract to which the authority of the Section 890 pilot has been flowed down, and the specific certified cost or pricing data required for each subcontract. Contracting Officer will list the specific cost or pricing data deemed necessary to determine that the price is fair and reasonable for each subcontract, and describe the required submission format for each type of data. The type and extent of data required may differ based on the dollar value of the subcontract proposal, or other appropriate considerations. At a minimum, the Contracting Officer will identify the specific prior subcontracts awarded in support of the DoD purchases of the same or similar products for which the subcontractor is required to submit the actual cost of performance. The Contracting Officer will specify whether the authority of the Section 890 pilot is further flowed down to any lower-tier subcontract pertaining to each first-tier subcontract. Where the pilot authority is flowed down to lower-tier subcontracts, the Contracting Officer will describe the specific certified cost or pricing data that is to be provided by each affected lower-tier subcontractor. The subcontractor and lower tier subcontractors to which the pilot authority is flowed down are not required to submit certified cost or pricing data that is not listed within the request for proposal.
(ii) In the event a subcontractor denies the Contractor access to the data described in paragraph (d)(1)(i) of this clause, the data may be provided directly to the Contracting Officer.

(iii) If a subcontractor is unable to provide the extent of historical actual cost experience required by paragraph (d)(1)(i), then the Contractor shall require the subcontractor to provide certified cost or pricing data in accordance with paragraph (d)(2) of this clause.

(iv) The Contractor shall require the subcontractor to certify in substantially the form prescribed in paragraph (b)(2) of this clause that, to the best of its knowledge and belief, the data submitted under paragraph (d)(1)(i) of this clause were accurate, complete, and current as of the date of agreement on the negotiated price of the subcontract or subcontract modification.

(2) For subcontracts above the threshold for submission of certified cost or pricing data in FAR 15.403-4 to which the authority of the Section 890 pilot has not been flowed down, the Contractor shall require the subcontractor to provide certified cost or pricing data in accordance with the clause at 52.215-13, Subcontractor Certified Cost or Pricing Data–Modifications, of this contract and shall require the subcontractor to certify in substantially the form prescribed in FAR 15.406-2 that, to the best of its knowledge and belief, the data submitted under paragraph (a) of this clause were accurate, complete, and current as of the date of agreement on the negotiated price of the subcontract or subcontract modification.

(End of clause)
252.215-7998  Pilot Program to Accelerate Contracting and Pricing Processes. (DEVIATION 2020-O0020)

Use the following deviation clause in solicitations and resulting contracts or in a contract with a contract modification that the Director, Defense Pricing and Contracting/Pricing and Contracting Initiatives, has authorized for participation in the pilot program implementing Section 890 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115-232), as amended by Section 825 of the NDAA for FY 2020 (Pub. L. 116-92).

PILOT PROGRAM TO ACCELERATE CONTRACTING AND PRICING PROCESSES (DEVIATION 2020-O0020) (AUG 2020)

(a) One or more contract actions under this acquisition is accomplished under the authority of section 890 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115-232), as amended by section 825 of the NDAA for FY 2020 (Pub. L. 116-92). The intent of this pilot program is to test the efficacy of basing price reasonableness determinations primarily on actual costs of performance for prior purchases of the same or similar products for the Department of Defense.

(b) As a condition of participating in this pilot program, the Contractor shall submit to the Contracting Officer the following:

(1) Verifiable data documenting any proposal preparation and negotiation support savings (time and money) achieved as a result of this pilot program. This data shall be provided—

(i) For contracts that are subject to the pilot program, within 3 months after contract award; or

(ii) For contract modifications that are subject to the pilot program, within 3 months after execution of the modification.

(2) The actual cost of performance for the contract action that was subject to the pilot program. This information shall be provided within 3 months after completion of performance of the part of the contract action that was subject to the pilot program.

(End of clause)
MEMORANDUM FOR COMMANDER, UNITED STATES CYBER
COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES SPECIAL OPERATIONS
COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES TRANSPORTATION
COMMAND (ATTN: ACQUISITION EXECUTIVE)
DEPUTY ASSISTANT SECRETARY OF THE ARMY
(PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE NAVY
(PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE
(CONTRACTING)
DIRECTORS, DEFENSE AGENCIES
DIRECTORS, DEFENSE FIELD ACTIVITIES

SUBJECT: Class Deviation—United States-Mexico-Canada Agreement

Effective immediately, this class deviation revises and supersedes the class deviation issued on July 1, 2020. The revision is necessary to make the deviation to FAR clause 52.222-19 provided in attachment 1 applicable when used in conjunction with FAR clause 52.213-4, Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items).

Therefore, effective immediately, contracting officers shall comply with this class deviation, which implements the United States-Mexico-Canada Agreement (USMCA), as enacted by Congress in the United States-Mexico-Canada Agreement Implementation Act (Pub. L. 116-113). The USMCA supersedes the North American Free Trade Agreement (NAFTA). Chapter 13 of the USMCA (government procurement) applies only to the United States and Mexico; as a result, Canada is no longer a Free Trade Agreement country.

Contracting officers shall comply with the following deviations from the Federal Acquisition Regulation (FAR) and the Defense Federal Acquisition Regulation Supplement (DFARS) that implement the USMCA:

- References in the FAR and DFARS to NAFTA and 19 U.S.C. 3301 note are replaced by references to the USMCA and 19 U.S.C. chapter 29 (sections 4501-4732), respectively.

- “Canada” is removed from all listings of Free Trade Agreement countries in the FAR and DFARS, to include Table 1 at FAR 25.402(b), where Canada’s unique threshold of $25,000 is no longer applicable.

Contracting officers shall use the provisions and clauses in attachments 1 through 7, as prescribed in the attachments of this deviation in lieu of the following FAR and DFARS provisions and clauses:

- FAR 52.222-19, Child Labor—Cooperation with Authorities and Remedies (see attachment 1).
• FAR 52.225-11, Buy American—Construction Materials Under Trade Agreements (Basic and Alternate I) (see attachment 2).
• DFARS 252.225-7013, Duty-Free Entry (see attachment 3).
• DFARS 252.225-7021, Trade Agreements (Basic and Alternate II) (see attachment 5).
• DFARS 252.225-7035, Buy American—Free Trade Agreements—Balance of Payments Program Certificate (Basic and Alternates II, IV, and V), and DFARS 2252.225-7036, Buy American—Free Trade Agreements—Balance of Payments Program (Basic and Alternates II, IV, and V) (see attachment 6).
• DFARS 252.225-7045, Balance of Payments Program—Construction Material Under Trade Agreements (Basic and Alternates I, II, and III) (see attachment 7).

Contracting officers shall not use the following clauses:

• DFARS 252.225-7035, Buy American—Free Trade Agreements—Balance of Payments Program Certificate—Alternates I and III; and
• DFARS 252.225-7036, Buy American—Free Trade Agreements—Balance of Payments Program—Alternates I and III.

In lieu of the threshold at FAR 22.1503(b)(1), the requirements of FAR subpart 22.15 that result from the appearance of any end product on the List of Products Requiring Contractor Certification as to Forced or Indentured Child Labor (www.dol.gov/ilab/) do not apply to a solicitation or contract if the identified country of origin on the List is Canada, and the anticipated value of the acquisition is $182,000 or more.

The requirements of FAR 27.204-1, Patented Technology under the North American Free Trade Agreement, and the associated emergency acquisition flexibility at FAR 18.120 are no longer applicable or authorized. Contracting officers are advised to consult with legal counsel when questions arise with regard to the use of patented technology under the USMCA.

This class deviation remains in effect until incorporated in the FAR and DFARS or otherwise rescinded. My point of contact is Ms. Amy Williams, who is available by telephone at 571-372-6106 or by email at amy.g.williams.civ@mail.mil.

HERRINGTON.KIM.150771931
IM.150771931

Kim Herrington
Acting Principal Director,
Defense Pricing and Contracting

Attachments:
As stated
52.222-19 Child Labor—Cooperation with Authorities and Remedies. (DEVIATION 2020-O0019)

Use the following clause in all solicitations and contracts for the acquisition of supplies that are expected to exceed the micro-purchase threshold.

- When using the clause at FAR 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items, as prescribed in 12.301(b)(4), in lieu of checking the box at paragraph (b)(28) to indicate that FAR clause 52.222-19, Child Labor—Cooperation with Authorities and Remedies, is applicable to the contract and incorporated by reference, insert the following clause in full text.

- When using the clause at FAR 52.213-4, Terms and Conditions—Simplified Acquisitions (Other than Commercial Items), as prescribed in 13.302-5(d), in lieu of incorporating by reference when applicable the clause at paragraph (b)(1)(ii), 52.222-19, Child Labor—Cooperation with Authorities and Remedies, insert the following clause in full text in contracts for supplies exceeding the micro-purchase threshold.

CHILD LABOR—COOPERATION WITH AUTHORITIES AND REMEDIES (DEVIATION 2020-O0019) (JUL 2020)

(a) Applicability. This clause does not apply to the extent that the Contractor is supplying end products mined, produced, or manufactured in—

(1) Israel, and the anticipated value of the acquisition is $50,000 or more;

(2) Mexico, and the anticipated value of the acquisition is $83,099 or more; or

(3) Armenia, Aruba, Australia, Austria, Belgium, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Italy, Japan, Korea, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Montenegro, Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Taiwan, Ukraine, or the United Kingdom and the anticipated value of the acquisition is $182,000 or more.

(b) Cooperation with Authorities. To enforce the laws prohibiting the manufacture or importation of products mined, produced, or manufactured by forced or indentured child labor, authorized officials may need to conduct investigations to determine whether forced or indentured child labor was used to mine, produce, or manufacture any product furnished under this contract. If the solicitation includes the provision 52.222-18, Certification Regarding Knowledge of Child Labor for Listed End Products, or the equivalent at 52.212-3(i), the Contractor agrees to cooperate fully with authorized officials of the contracting agency, the Department of the Treasury, or the Department of Justice by providing reasonable access to
records, documents, persons, or premises upon reasonable request by the authorized officials.

(c) Violations. The Government may impose remedies set forth in paragraph (d) for the following violations:

(1) The Contractor has submitted a false certification regarding knowledge of the use of forced or indentured child labor for listed end products.

(2) The Contractor has failed to cooperate, if required, in accordance with paragraph (b) of this clause, with an investigation of the use of forced or indentured child labor by an Inspector General, Attorney General, or the Secretary of the Treasury.

(3) The Contractor uses forced or indentured child labor in its mining, production, or manufacturing processes.

(4) The Contractor has furnished under the contract end products or components that have been mined, produced, or manufactured wholly or in part by forced or indentured child labor. (The Government will not pursue remedies at paragraph (d)(2) or paragraph (d)(3) of this clause unless sufficient evidence indicates that the Contractor knew of the violation.)

(d) Remedies.

(1) The Contracting Officer may terminate the contract.

(2) The suspending official may suspend the Contractor in accordance with procedures in FAR Subpart 9.4.

(3) The debarring official may debar the Contractor for a period not to exceed 3 years in accordance with the procedures in FAR Subpart 9.4.

(End of clause)
52.225-11 Buy American—Construction Materials Under Trade Agreements. (DEVIATION 2020-O0019)

As prescribed in 25.1102(c), insert the following clause:

BUY AMERICAN—CONSTRUCTION MATERIALS UNDER TRADE AGREEMENTS (DEVIAITON 2020-O0019) (JUL 2020)

(a) Definitions. As used in this clause—

Caribbean Basin country construction material means a construction material that—

(1) Is wholly the growth, product, or manufacture of a Caribbean Basin country; or

(2) In the case of a construction material that consists in whole or in part of materials from another country, has been substantially transformed in a Caribbean Basin country into a new and different construction material distinct from the materials from which it was transformed.

Commercially available off-the-shelf (COTS) item—

(1) Means any item of supply (including construction material) that is—

(i) A commercial item (as defined in paragraph (1) of the definition at FAR 2.101);

(ii) Sold in substantial quantities in the commercial marketplace; and

(iii) Offered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace; and

(2) Does not include bulk cargo, as defined in 46 U.S.C. 40102(4), such as agricultural products and petroleum products.

Component means an article, material, or supply incorporated directly into a construction material.

Construction material means an article, material, or supply brought to the construction site by the Contractor or subcontractor for incorporation into the building or work. The term also includes an item brought to the site preassembled
from articles, materials, or supplies. However, emergency life safety systems, such as emergency lighting, fire alarm, and audio evacuation systems, that are discrete systems incorporated into a public building or work and that are produced as complete systems, are evaluated as a single and distinct construction material regardless of when or how the individual parts or components of those systems are delivered to the construction site. Materials purchased directly by the Government are supplies, not construction material.

**Cost of components** means—

(1) For components purchased by the Contractor, the acquisition cost, including transportation costs to the place of incorporation into the construction material (whether or not such costs are paid to a domestic firm), and any applicable duty (whether or not a duty-free entry certificate is issued); or

(2) For components manufactured by the Contractor, all costs associated with the manufacture of the component, including transportation costs as described in paragraph (1) of this definition, plus allocable overhead costs, but excluding profit. Cost of components does not include any costs associated with the manufacture of the construction material.

**Designated country** means any of the following countries:

(1) A World Trade Organization Government Procurement Agreement (WTO GPA) country (Armenia, Aruba, Australia, Austria, Belgium, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea (Republic of), Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Montenegro, Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Taiwan, Ukraine, or United Kingdom);

(2) A Free Trade Agreement (FTA) country (Australia, Bahrain, Chile, Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Korea (Republic of), Mexico, Morocco, Nicaragua, Oman, Panama, Peru, or Singapore);

(3) A least developed country (Afghanistan, Angola, Bangladesh, Benin, Bhutan, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Haiti, Kiribati, Laos, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mozambique, Nepal, Niger, Rwanda, Samoa, Sao Tome and Principe, Senegal, Sierra Leone, Solomon Islands, Somalia,
South Sudan, Tanzania, Timor-Leste, Togo, Tuvalu, Uganda, Vanuatu, Yemen, or Zambia); or

(4) A Caribbean Basin country (Antigua and Barbuda, Aruba, Bahamas, Barbados, Belize, Bonaire, British Virgin Islands, Curacao, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Saba, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Sint Eustatius, Sint Maarten, or Trinidad and Tobago).

**Designated country construction material** means a construction material that is a WTO GPA country construction material, an FTA country construction material, a least developed country construction material, or a Caribbean Basin country construction material.

**Domestic construction material** means—

(1) An unmanufactured construction material mined or produced in the United States;

(2) A construction material manufactured in the United States, if—

   (i) The cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. Components of foreign origin of the same class or kind for which nonavailability determinations have been made are treated as domestic; or

   (ii) The construction material is a COTS item.

**Foreign construction material** means a construction material other than a domestic construction material.

**Free Trade Agreement country construction material** means a construction material that—

(1) Is wholly the growth, product, or manufacture of a Free Trade Agreement (FTA) country; or

(2) In the case of a construction material that consists in whole or in part of materials from another country, has been substantially transformed in a FTA country into a new and different construction material distinct from the materials from which it was transformed.
Least developed country construction material means a construction material that—

(1) Is wholly the growth, product, or manufacture of a least developed country; or

(2) In the case of a construction material that consists in whole or in part of materials from another country, has been substantially transformed in a least developed country into a new and different construction material distinct from the materials from which it was transformed.

United States means the 50 States, the District of Columbia, and outlying areas.

WTO GPA country construction material means a construction material that—

(1) Is wholly the growth, product, or manufacture of a WTO GPA country; or

(2) In the case of a construction material that consists in whole or in part of materials from another country, has been substantially transformed in a WTO GPA country into a new and different construction material distinct from the materials from which it was transformed.

(b) Construction materials.

(1) This clause implements 41 U.S.C. chapter 83, Buy American, by providing a preference for domestic construction material. In accordance with 41 U.S.C. 1907, the component test of the Buy American statute is waived for construction material that is a COTS item. (See FAR 12.505(a)(2)). In addition, the Contracting Officer has determined that the WTO GPA and Free Trade Agreements (FTAs) apply to this acquisition. Therefore, the Buy American restrictions are waived for designated country construction materials.

(2) The Contractor shall use only domestic or designated country construction material in performing this contract, except as provided in paragraphs (b)(3) and (b)(4) of this clause.

(3) The requirement in paragraph (b)(2) of this clause does not apply to information technology that is a commercial item or to the construction materials or components listed by the Government as follows:

[Contracting Officer is to list applicable excepted materials or indicate “none”]
(4) The Contracting Officer may add other foreign construction material to the list in paragraph (b)(3) of this clause if the Government determines that—

(i) The cost of domestic construction material would be unreasonable. The cost of a particular domestic construction material subject to the restrictions of the Buy American statute is unreasonable when the cost of such material exceeds the cost of foreign material by more than 6 percent;

(ii) The application of the restriction of the Buy American statute to a particular construction material would be impracticable or inconsistent with the public interest; or

(iii) The construction material is not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality.

(c) Request for determination of inapplicability of the Buy American statute.

(1)(i) Any Contractor request to use foreign construction material in accordance with paragraph (b)(4) of this clause shall include adequate information for Government evaluation of the request, including—

(A) A description of the foreign and domestic construction materials;

(B) Unit of measure;

(C) Quantity;

(D) Price;

(E) Time of delivery or availability;

(F) Location of the construction project;

(G) Name and address of the proposed supplier; and

(H) A detailed justification of the reason for use of foreign construction materials cited in accordance with paragraph (b)(3) of this clause.

(ii) A request based on unreasonable cost shall include a reasonable survey of the market and a completed price comparison table in the format in paragraph (d) of this clause.
(iii) The price of construction material shall include all delivery costs to the construction site and any applicable duty (whether or not a duty-free certificate may be issued).

(iv) Any Contractor request for a determination submitted after contract award shall explain why the Contractor could not reasonably foresee the need for such determination and could not have requested the determination before contract award. If the Contractor does not submit a satisfactory explanation, the Contracting Officer need not make a determination.

(2) If the Government determines after contract award that an exception to the Buy American statute applies and the Contracting Officer and the Contractor negotiate adequate consideration, the Contracting Officer will modify the contract to allow use of the foreign construction material. However, when the basis for the exception is the unreasonable price of a domestic construction material, adequate consideration is not less than the differential established in paragraph (b)(4)(i) of this clause.

(3) Unless the Government determines that an exception to the Buy American statute applies, use of foreign construction material is noncompliant with the Buy American statute.

(d) Data. To permit evaluation of requests under paragraph (c) of this clause based on unreasonable cost, the Contractor shall include the following information and any applicable supporting data based on the survey of suppliers:

**FOREIGN AND DOMESTIC CONSTRUCTION MATERIALS PRICE COMPARISON**

<table>
<thead>
<tr>
<th>Construction material description</th>
<th>Unit of measure</th>
<th>Quantity</th>
<th>Price (dollars)¹</th>
</tr>
</thead>
<tbody>
<tr>
<td>Item 1:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Foreign construction material</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Domestic construction material</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Item 2:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Foreign construction material</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Domestic construction material</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
1Include all delivery costs to the construction site and any applicable duty (whether or not a duty-free entry certificate is issued).

List name, address, telephone number, and contact for suppliers surveyed. Attach copy of response; if oral, attach summary.

Include other applicable supporting information.

(End of clause)

Alternate I (DEVIATION 2020-O0019) (JUL 2020). As prescribed in 25.1102(c)(3), add the following definition of “Bahrainian, Mexican, or Omani construction material” to paragraph (a) of the basic clause, and substitute the following paragraphs (b)(1) and (b)(2) for paragraphs (b)(1) and (b)(2) of the basic clause:

Bahrainian, Mexican, or Omani construction material means a construction material that—

(1) Is wholly the growth, product, or manufacture of Bahrain, Mexico, or Oman; or

(2) In the case of a construction material that consists in whole or in part of materials from another country, has been substantially transformed in Bahrain, Mexico, or Oman into a new and different construction material distinct from the materials from which it was transformed.

(b) Construction materials. (1) This clause implements 41 U.S.C. chapter 83, Buy American, by providing a preference for domestic construction material. In accordance with 41 U.S.C. 1907, the component test of the Buy American statute is waived for construction material that is a COTS item. (See FAR 12.505(a)(2)). In addition, the Contracting Officer has determined that the WTO GPA and all the Free Trade Agreements except the Bahrain FTA, United States-Mexico-Canada Agreement, and the Oman FTA apply to this acquisition. Therefore, the Buy American statute restrictions are waived for designated country construction materials other than Bahrainian, Mexican, or Omani construction materials.

(2) The Contractor shall use only domestic or designated country construction material other than Bahrainian, Mexican, or Omani construction material in performing this contract, except as provided in paragraphs (b)(3) and (b)(4) of this clause.

* * * * *
252.225-7013 Duty-Free Entry. (DEVIAION 2020-O0019)

As prescribed in 225.1101(4), use the following clause:

DUTY-FREE ENTRY (DEVIAION 2020-O0019) (JUL 2020)

(a) Definitions. As used in this clause—

“Component,” means any item supplied to the Government as part of an end product or of another component.

“Customs territory of the United States” means the 50 States, the District of Columbia, and Puerto Rico.

“Eligible product” means—

(i) “Designated country end product,” as defined in the Trade Agreements (either basic or alternate) clause of this contract;

(ii) “Free Trade Agreement country end product,” other than a “Bahrainian end product,” a “Moroccan end product,” a Panamanian end product,” or a “Peruvian end product,” as defined in the Buy American—Free Trade Agreements—Balance of Payments Program (either basic or alternate II) clause of this contract, basic or its Alternate II;

(iii) “Free Trade Agreement country end product” other than a “Bahrainian end product,” “Korean end product,” “Moroccan end product,” “Panamanian end product,” or “Peruvian end product,” as defined in of the Buy American—Free Trade Agreements—Balance of Payments Program (either alternate IV or alternate V) clause of this contract.

“Qualifying country” and “qualifying country end product” have the meanings given in the Trade Agreements clause, the Buy American and Balance of Payments Program clause, or the Buy American—Free Trade Agreements—Balance of Payments Program clause of this contract, basic or alternate.

(b) Except as provided in paragraph (i) of this clause, or unless supplies were imported into the customs territory of the United States before the date of this contract or the applicable subcontract, the price of this contract shall not include any amount for duty on—

(1) End items that are eligible products or qualifying country end products;

(2) Components (including, without limitation, raw materials and intermediate assemblies) produced or made in qualifying countries, that are to be incorporated in U.S.- made end products to be delivered under this contract; or

(3) Other supplies for which the Contractor estimates that duty will exceed $300 per shipment into the customs territory of the United States.
(c) The Contractor shall—

(1) Claim duty-free entry only for supplies that the Contractor intends to deliver to the Government under this contract, either as end items or components of end items; and

(2) Pay duty on supplies, or any portion thereof, that are diverted to nongovernmental use, other than—

(i) Scrap or salvage; or

(ii) Competitive sale made, directed, or authorized by the Contracting Officer.

(d) Except as the Contractor may otherwise agree, the Government will execute duty-free entry certificates and will afford such assistance as appropriate to obtain the duty-free entry of supplies—

(1) For which no duty is included in the contract price in accordance with paragraph (b) of this clause; and

(2) For which shipping documents bear the notation specified in paragraph (e) of this clause.

(e) For foreign supplies for which the Government will issue duty-free entry certificates in accordance with this clause, shipping documents submitted to Customs shall—

(1) Consign the shipments to the appropriate—

(i) Military department in care of the Contractor, including the Contractor's delivery address; or

(ii) Military installation; and

(2) Include the following information:

(i) Prime contract number and, if applicable, delivery order number.

(ii) Number of the subcontract for foreign supplies, if applicable.

(iii) Identification of the carrier.

(iv)(A) For direct shipments to a U.S. military installation, the notation: “UNITED STATES GOVERNMENT, DEPARTMENT OF DEFENSE Duty-Free Entry to be claimed pursuant to Section XXII, Chapter 98, Subchapter VIII, Item 9808.00.30 of the Harmonized Tariff Schedule of the United States. Upon arrival of shipment at the appropriate port of entry, District Director of Customs, please release shipment under 19 CFR Part 142 and notify Commander, Defense Contract Management Agency (DCMA) New York, ATTN: Customs Team, DCMAE-3NTF, 201 Varick Street, Room 905C, New York, New York 10014, for execution of Customs Form 7501, 7501A, or 7506...
and any required duty-free entry certificates.”

(B) If the shipment will be consigned to other than a military installation, e.g., a domestic contractor's plant, the shipping document notation shall be altered to include the name and address of the contractor, agent, or broker who will notify Commander, DCMA New York, for execution of the duty-free entry certificate. (If the shipment will be consigned to a contractor's plant and no duty-free entry certificate is required due to a trade agreement, the Contractor shall claim duty-free entry under the applicable trade agreement and shall comply with the U.S. Customs Service requirements. No notification to Commander, DCMA New York, is required.)

(v) Gross weight in pounds (if freight is based on space tonnage, state cubic feet in addition to gross shipping weight).

(vi) Estimated value in U.S. dollars.

(vii) Activity address number of the contract administration office administering the prime contract, e.g., for DCMA Dayton, S3605A.

(f) Preparation of customs forms.

(1)(i) Except for shipments consigned to a military installation, the Contractor shall—

(A) Prepare any customs forms required for the entry of foreign supplies into the customs territory of the United States in connection with this contract; and

(B) Submit the completed customs forms to the District Director of Customs, with a copy to DCMA NY for execution of any required duty-free entry certificates.

(ii) Shipments consigned directly to a military installation will be released in accordance with sections 10.101 and 10.102 of the U.S. Customs regulations.

(2) For shipments containing both supplies that are to be accorded duty-free entry and supplies that are not, the Contractor shall identify on the customs forms those items that are eligible for duty-free entry.

(g) The Contractor shall—

(1) Prepare (if the Contractor is a foreign supplier), or shall instruct the foreign supplier to prepare, a sufficient number of copies of the bill of lading (or other shipping document) so that at least two of the copies accompanying the shipment will be available for use by the District Director of Customs at the port of entry;

(2) Consign the shipment as specified in paragraph (e) of this clause; and

(3) Mark on the exterior of all packages—

(i) “UNITED STATES GOVERNMENT, DEPARTMENT OF DEFENSE”;

and
(ii) The activity address number of the contract administration office administering the prime contract.

(h) The Contractor shall notify the Administrative Contracting Officer (ACO) in writing of any purchase of eligible products or qualifying country supplies to be accorded duty-free entry, that are to be imported into the customs territory of the United States for delivery to the Government or for incorporation in end items to be delivered to the Government. The Contractor shall furnish the notice to the ACO immediately upon award to the supplier and shall include in the notice—

(1) The Contractor’s name, address, and Commercial and Government Entity (CAGE) code;
(2) Prime contract number and, if applicable, delivery order number;
(3) Total dollar value of the prime contract or delivery order;
(4) Date of the last scheduled delivery under the prime contract or delivery order;
(5) Foreign supplier's name and address;
(6) Number of the subcontract for foreign supplies;
(7) Total dollar value of the subcontract for foreign supplies;
(8) Date of the last scheduled delivery under the subcontract for foreign supplies;
(9) List of items purchased;
(10) An agreement that the Contractor will pay duty on supplies, or any portion thereof, that are diverted to nongovernmental use other than—

(i) Scrap or salvage; or
(ii) Competitive sale made, directed, or authorized by the Contracting Officer;

(11) Country of origin; and
(12) Scheduled delivery date(s).

(i) This clause does not apply to purchases of eligible products or qualifying country supplies in connection with this contract if—

(1) The supplies are identical in nature to supplies purchased by the Contractor or any subcontractor in connection with its commercial business; and
(2) It is not economical or feasible to account for such supplies so as to ensure that the amount of the supplies for which duty-free entry is claimed does not exceed the amount purchased in connection with this contract.

(j) **Subcontracts.** The Contractor shall—

(1) Insert the substance of this clause, including this paragraph (j), in all subcontracts for—

(i) Qualifying country components; or

(ii) Nonqualifying country components for which the Contractor estimates that duty will exceed $200 per unit;

(2) Require subcontractors to include the number of this contract on all shipping documents submitted to Customs for supplies for which duty-free entry is claimed pursuant to this clause; and

(3) Include in applicable subcontracts—

(i) The name and address of the ACO for this contract;

(ii) The name, address, and activity address number of the contract administration office specified in this contract; and

(iii) The information required by paragraphs (h)(1), (2), and (3) of this clause.

(End of clause)
252.225-7017 Photovoltaic Devices. (DEVIATION 2020-O0019)

As prescribed in 225.7017-4(a), use the following clause:

PHOTOVOLTAIC DEVICES (DEVIATION 2020-O0019) (JUL 2020)

(a) Definitions. As used in this clause—

“Bahrainian photovoltaic device” means a photovoltaic device that—

(1) Is wholly manufactured in Bahrain; or

(2) In the case of a photovoltaic device that consists in whole or in part of materials from another country, has been substantially transformed in Bahrain into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed, provided that the photovoltaic device is not subsequently substantially transformed outside of Bahrain.

“Caribbean Basin country photovoltaic device” means a photovoltaic device that—

(1) Is wholly manufactured in a Caribbean Basin country; or

(2) In the case of a photovoltaic device that consists in whole or in part of materials from another country, has been substantially transformed in a Caribbean Basin country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed, provided that the photovoltaic device is not subsequently substantially transformed outside of a Caribbean Basin country.

“Designated country” means—

(1) A World Trade Organization Government Procurement Agreement (WTO GPA) country (Armenia, Aruba, Australia, Austria, Belgium, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea (Republic of), Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Montenegro, Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Taiwan (known in the World Trade Organization as “the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu” (Chinese Taipei)), Ukraine, or the United Kingdom);

(2) A Free Trade Agreement country (Australia, Bahrain, Chile, Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Korea (Republic of), Mexico, Morocco, Nicaragua, Panama, Peru, or Singapore);

(3) A least developed country (Afghanistan, Angola, Bangladesh, Benin, Bhutan, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Haiti, Kiribati, Laos, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mozambique, Nepal, Niger, Rwanda, Samoa, Sao Tome and Principe,
Senegal, Sierra Leone, Solomon Islands, Somalia, South Sudan, Tanzania, Timor-Leste, Togo, Tuvalu, Uganda, Vanuatu, Yemen, or Zambia); or

(4) A Caribbean Basin country (Antigua and Barbuda, Aruba, Bahamas, Barbados, Belize, Bonaire, British Virgin Islands, Curacao, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Saba, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Sint Eustatius, Sint Maarten, or Trinidad and Tobago).

“Designated country photovoltaic device” means a WTO GPA country photovoltaic device, a Free Trade Agreement country photovoltaic device, a least developed country photovoltaic device, or a Caribbean Basin country photovoltaic device.

“Domestic photovoltaic device” means a photovoltaic device that is manufactured in the United States

“Foreign photovoltaic device” means a photovoltaic device other than a domestic photovoltaic device.

“Free Trade Agreement country” means Australia, Bahrain, Chile, Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Korea (Republic of), Mexico, Morocco, Nicaragua, Panama, Peru, or Singapore.

“Free Trade Agreement country photovoltaic device” means a photovoltaic device that—

(1) Is wholly manufactured in a Free Trade Agreement country; or

(2) In the case of a photovoltaic device that consists in whole or in part of materials from another country, has been substantially transformed in a Free Trade Agreement country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed, provided that the photovoltaic device is not subsequently substantially transformed outside of a Free Trade Agreement country.

“Korean photovoltaic device” means a photovoltaic device that—

(1) Is wholly manufactured in Korea (Republic of); or

(2) In the case of a photovoltaic device that consists in whole or in part of materials from another country, has been substantially transformed in Korea (Republic of) into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed, provided that the photovoltaic device is not subsequently substantially transformed outside of Korea (Republic of).

“Least developed country photovoltaic device” means a photovoltaic device that—

(1) Is wholly manufactured in a least developed country; or

(2) In the case of a photovoltaic device that consists in whole or in part of materials from another country, has been substantially transformed in a least
developed country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed, provided that the photovoltaic device is not subsequently substantially transformed outside of a least developed country.

“Moroccan photovoltaic device” means a photovoltaic device that—

(1) Is wholly manufactured in Morocco; or

(2) In the case of a photovoltaic device that consists in whole or in part of materials from another country, has been substantially transformed in Morocco into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed, provided that the photovoltaic device is not subsequently substantially transformed outside of Morocco.

“Panamanian photovoltaic device” means a photovoltaic device that—

(1) Is wholly manufactured in Panama; or

(2) In the case of a photovoltaic device that consists in whole or in part of materials from another country, has been substantially transformed in Panama into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed, provided that the photovoltaic device is not subsequently substantially transformed outside of Panama.

“Peruvian photovoltaic device” means a photovoltaic device that—

(1) Is wholly manufactured in Peru; or

(2) In the case of a photovoltaic device that consists in whole or in part of materials from another country, has been substantially transformed in Peru into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed, provided that the photovoltaic device is not subsequently substantially transformed outside of Peru.

"Photovoltaic device" means a device that converts light directly into electricity through a solid-state, semiconductor process.

“Qualifying country” means a country with a reciprocal defense procurement memorandum of understanding or international agreement with the United States in which both countries agree to remove barriers to purchases of supplies produced in the other country or services performed by sources of the other country, and the memorandum or agreement complies, where applicable, with the requirements of section 36 of the Arms Export Control Act (22 U.S.C. 2776) and with 10 U.S.C. 2457. Accordingly, the following are qualifying countries:

Australia
Austria
Belgium
Canada
Czech Republic
Denmark
Egypt
Estonia
Finland
France
Germany
Greece
Israel
Italy
Japan
Latvia
Luxembourg
Netherlands
Norway
Poland
Portugal
Slovenia
Spain
Sweden
Switzerland
Turkey
United Kingdom of Great Britain and Northern Ireland.

“Qualifying country photovoltaic device” means a photovoltaic device manufactured in a qualifying country.

“United States” means the 50 States, the District of Columbia, and outlying areas.

“U.S.-made photovoltaic device” means a photovoltaic device that—

(1) Is manufactured in the United States; or

(2) Is substantially transformed in the United States into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed, provided that the photovoltaic device is not subsequently substantially transformed outside of the United States.

“WTO GPA country photovoltaic device” means a photovoltaic device that—

(1) Is wholly manufactured in a WTO GPA country; or

(2) In the case of a photovoltaic device that consists in whole or in part of materials from another country, has been substantially transformed in a WTO GPA country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed, provided that the photovoltaic device is not subsequently substantially transformed outside of a WTO GPA country.

(b) This clause implements section 846 of the National Defense Authorization Act for Fiscal Year 2011 (Pub. L. 111-383).
(c) *Restriction.* If the Contractor specified in its offer in the Photovoltaic Devices—Certificate provision of the solicitation that the estimated value of the photovoltaic devices to be utilized in performance of this contract would be—

(1) More than the micro-purchase threshold but less than $83,099, then the Contractor shall utilize only domestic photovoltaic devices unless, in its offer, it specified utilization of qualifying country or other foreign photovoltaic devices in paragraph (d)(2) of the Photovoltaic Devices—Certificate provision of the solicitation.

(2) $83,099 or more but less than $100,000, then the Contractor shall utilize under this contract only domestic photovoltaic devices unless, in its offer, it specified utilization of Free Trade Agreement country photovoltaic devices (other than Bahrainian, Korean, Moroccan, Panamanian, or Peruvian photovoltaic devices), qualifying country photovoltaic devices, or other foreign photovoltaic devices in paragraph (d)(4) of the Photovoltaic Devices—Certificate provision of the solicitation. If the Contractor certified in its offer that it will utilize a Free Trade Agreement country photovoltaic device (other than a Bahrainian, Korean, Moroccan, Panamanian, or Peruvian photovoltaic device) or a qualifying country photovoltaic device, then the Contractor shall utilize a Free Trade Agreement country photovoltaic device (other than a Bahrainian, Korean, Moroccan, Panamanian, or Peruvian photovoltaic device) or a qualifying country photovoltaic device; or, at the Contractor’s option, a domestic photovoltaic device;

(3) $100,000 or more but less than $182,000, then the Contractor shall utilize under this contract only domestic photovoltaic devices, unless, in its offer it specified utilization of Free Trade Agreement country photovoltaic devices (other than Bahrainian, Moroccan, Panamanian, or Peruvian photovoltaic devices), qualifying country photovoltaic devices, or other foreign photovoltaic devices in paragraph (d)(5) of the Photovoltaic Devices—Certificate provision of the solicitation. If the Contractor certified in its offer that it will utilize a Free Trade Agreement country photovoltaic device (other than a Bahrainian, Moroccan, Panamanian, or Peruvian photovoltaic device) or a qualifying country photovoltaic device, then the Contractor shall utilize a Free Trade Agreement country photovoltaic device (other than a Bahrainian, Moroccan, Panamanian, or Peruvian photovoltaic device) or a qualifying country photovoltaic device; or, at the Contractor’s option, a domestic photovoltaic device; or

(4) $182,000 or more, then the Contractor shall utilize under this contract only U.S.-made, designated country, or qualifying country photovoltaic devices.

(End of clause)

**252.225-7018 Photovoltaic Devices—Certificate. (DEVIATION 2020-O0019)**

As prescribed in 225.7017-4(b), use the following provision:

PHOTOVOLTAIC DEVICES—CERTIFICATE (DEVIATION 2020-O0019) (JULY 2020)

(a) *Definitions.* “Bahrainian photovoltaic device,” “Caribbean Basin photovoltaic device,” “designated country,” “designated country photovoltaic device,” “domestic photovoltaic device,” “foreign photovoltaic device,” “Free Trade Agreement country,”
“Free Trade Agreement photovoltaic device,” “Korean photovoltaic device,” “least developed country photovoltaic device,” “Moroccan photovoltaic device,” “Panamanian photovoltaic device,” “Peruvian photovoltaic device,” “photovoltaic device,” “qualifying country,” “qualifying country photovoltaic device,” “United States,” “U.S.-made photovoltaic device,” and “WTO GPA country photovoltaic device” have the meanings given in the Photovoltaic Devices clause of this solicitation.

(b) Restrictions. The following restrictions apply, depending on the estimated aggregate value of photovoltaic devices to be utilized under a resultant contract:

(1) If more than the micro-purchase threshold but less than $182,000, then the Government will not accept an offer specifying the use of other foreign photovoltaic devices in paragraph (d)(2)(ii), (d)(3)(ii), or (d)(4)(ii) of this provision, unless the offeror documents to the satisfaction of the Contracting Officer that the price of the foreign photovoltaic device plus 50 percent is less than the price of a comparable domestic photovoltaic device.

(2) If $182,000 or more, then the Government will consider only offers that utilize photovoltaic devices that are U.S.-made, qualifying country, or designated country photovoltaic devices.

(c) Country in which a designated country photovoltaic device was wholly manufactured or was substantially transformed. If the estimated value of the photovoltaic devices to be utilized under a resultant contract exceeds $25,000, the Offeror’s certification that such photovoltaic device (e.g., solar panel) is a designated country photovoltaic device shall be consistent with country of origin determinations by the U.S. Customs and Border Protection with regard to importation of the same or similar photovoltaic devices into the United States. If the Offeror is uncertain as to what the country of origin would be determined to be by the U.S. Customs and Border Protection, the Offeror shall request a determination from U.S. Customs and Border Protection. (See http://www.cbp.gov/trade/rulings.)

(d) Certification and identification of country of origin.

[The offeror shall check the block and fill in the blank for one of the following paragraphs, based on the estimated value and the country of origin of photovoltaic devices to be utilized in performance of the contract:]

___ (1) No photovoltaic devices will be utilized in performance of the contract, or such photovoltaic devices have an estimated value that does not exceed the micro-purchase threshold.

___ (2) If more than the micro-purchase threshold but less than $83,099—

___ (i) The offeror certifies that each photovoltaic device to be utilized in performance of the contract is a domestic photovoltaic device;

___ (ii) The offeror certifies that each photovoltaic device to be utilized in performance of the contract is a qualifying country photovoltaic device [Offeror to specify country of origin__________]; or
(iii) The foreign (other than qualifying country) photovoltaic devices to be utilized in performance of the contract are the product of ___________________. [Offeror to specify country of origin, if known, and provide documentation that the cost of a domestic photovoltaic device would be unreasonable in comparison to the cost of the proposed foreign photovoltaic device, i.e. that the price of the foreign photovoltaic device plus 50 percent is less than the price of a comparable domestic photovoltaic device.]

(3) If $83,099 or more but less than $100,000—

(i) The offeror certifies that each photovoltaic device to be utilized in performance of the contract is a domestic photovoltaic device;

(ii) The offeror certifies that each photovoltaic device to be utilized in performance of the contract is a Free Trade Agreement country photovoltaic device (other than a Bahrainian, Korean, Moroccan, Panamanian, or Peruvian photovoltaic device) or a qualifying country photovoltaic device [Offeror to specify country of origin____________]; or

(iii) The offered foreign photovoltaic devices (other than those from countries listed in paragraph (d)(4)(ii) of this provision) are the product of ____________. [Offeror to specify country of origin, if known, and provide documentation that the cost of a domestic photovoltaic device would be unreasonable in comparison to the cost of the proposed foreign photovoltaic device, i.e. that the price of the foreign photovoltaic device plus 50 percent is less than the price of a comparable domestic photovoltaic device.]

(4) If $100,000 or more but less than $182,000—

(i) The offeror certifies that each photovoltaic device to be utilized in performance of the contract is a domestic photovoltaic device;

(ii) The offeror certifies that each photovoltaic device to be utilized in performance of the contract is a Free Trade Agreement country photovoltaic device (other than a Bahrainian, Moroccan, Panamanian, or Peruvian photovoltaic device) or a qualifying country photovoltaic device [Offeror to specify country of origin____________]; or

(iii) The offered foreign photovoltaic devices (other than those from countries listed in paragraph (d)(5)(ii) of this provision) are the product of ____________. [Offeror to specify country of origin, if known, and provide documentation that the cost of a domestic photovoltaic device would be unreasonable in comparison to the cost of the proposed foreign photovoltaic device, i.e. that the price of the foreign photovoltaic device plus 50 percent is less than the price of a comparable domestic photovoltaic device.]

(5) If $182,000 or more, the Offeror certifies that each photovoltaic device to be used in performance of the contract is—

(i) A U.S.-made photovoltaic device; or

(ii) A designated country photovoltaic device or a qualifying country photovoltaic device. [Offeror to specify country of origin____________.]

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Changes to the text are indicated by a change bar in the right-hand margin.

(End of provision)
252.225-7021 Trade Agreements. (DEVIATION 2020-O0019)

Basic. As prescribed in 225.1101(6) and (6)(i), use the following clause:

TRADE AGREEMENTS—BASIC (DEVIATION 2020-O0019) (JUL 2020)

(a) Definitions. As used in this clause—

“Caribbean Basin country end product”—

(i) Means an article that—

(A) Is wholly the growth, product, or manufacture of a Caribbean Basin country; or

(B) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in a Caribbean Basin country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to its supply, provided that the value of those incidental services does not exceed the value of the product itself; and

(ii) Excludes products, other than petroleum and any product derived from petroleum, that are not granted duty-free treatment under the Caribbean Basin Economic Recovery Act (19 U.S.C. 2703(b)). These exclusions presently consist of—

(A) Textiles, apparel articles, footwear, handbags, luggage, flat goods, work gloves, leather wearing apparel, and handloomed, handmade, or folklore articles that are not granted duty-free status in the Harmonized Tariff Schedule of the United States (HTSUS);

(B) Tuna, prepared or preserved in any manner in airtight containers; and

(C) Watches and watch parts (including cases, bracelets, and straps) of whatever type, including, but not limited to, mechanical, quartz digital, or quartz analog, if such watches or watch parts contain any material that is the product of any country to which the HTSUS column 2 rates of duty (HTSUS General Note 3(b)) apply.

“Commercially available off-the-shelf (COTS) item”—

(i) Means any item of supply (including construction material) that is—

(A) A commercial item (as defined in paragraph (1) of the definition of “commercial item” in section 2.101 of the Federal Acquisition Regulation);

(B) Sold in substantial quantities in the commercial marketplace; and
(C) Offered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace; and

(ii) Does not include bulk cargo, as defined in 46 U.S.C. 40102(4), such as agricultural products and petroleum products.

“Component” means an article, material, or supply incorporated directly into an end product.

“Designated country” means—

(i) A World Trade Organization Government Procurement Agreement (WTO GPA) country (Armenia, Aruba, Australia, Austria, Belgium, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea (Republic of), Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Montenegro, Netherlands, New Zealand Norway, Poland, Portugal, Romania, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Taiwan (known in the World Trade Organization as “the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu” (Chinese Taipei)), Ukraine, or the United Kingdom);

(ii) A Free Trade Agreement country (Australia, Bahrain, Chile, Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Korea (Republic of), Mexico, Morocco, Nicaragua, Panama, Peru, or Singapore);

(iii) A least developed country (Afghanistan, Angola, Bangladesh, Benin, Bhutan, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Haiti, Kiribati, Laos, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mozambique, Nepal, Niger, Rwanda, Sao Tome and Principe, Senegal, Sierra Leone, Solomon Islands, Somalia, South Sudan, Tanzania, Timor-Leste, Togo, Tuvalu, Uganda, Vanuatu, Yemen, or Zambia); or

(iv) A Caribbean Basin country (Antigua and Barbuda, Aruba, Bahamas, Barbados, Belize, Bonaire, British Virgin Islands, Curacao, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Saba, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Sint Eustatius, Sint Maarten, or Trinidad and Tobago).

“Designated country end product” means a WTO GPA country end product, a Free Trade Agreement country end product, a least developed country end product, or a Caribbean Basin country end product.

“End product” means those articles, materials, and supplies to be acquired under this contract for public use.

“Free Trade Agreement country end product” means an article that—
(i) Is wholly the growth, product, or manufacture of a Free Trade Agreement country; or

(ii) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in a Free Trade Agreement country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to its supply, provided that the value of those incidental services does not exceed the value of the product itself.

“Least developed country end product” means an article that—

(i) Is wholly the growth, product, or manufacture of a least developed country; or

(ii) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in a least developed country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to its supply, provided that the value of those incidental services does not exceed the value of the product itself.

“Nondesignated country end product” means any end product that is not a U.S.-made end product or a designated country end product.

“Qualifying country” means a country with a reciprocal defense procurement memorandum of understanding or international agreement with the United States in which both countries agree to remove barriers to purchases of supplies produced in the other country or services performed by sources of the other country, and the memorandum or agreement complies, where applicable, with the requirements of section 36 of the Arms Export Control Act (22 U.S.C. 2776) and with 10 U.S.C. 2457. Accordingly, the following are qualifying countries:

Australia
Austria
Belgium
Canada
Czech Republic
Denmark
Egypt
Estonia
Finland
France
Germany
Greece
“Qualifying country end product” means—

(i) An unmanufactured end product mined or produced in a qualifying country; or

(ii) An end product manufactured in a qualifying country if—

(A) The cost of the following types of components exceeds 50 percent of the cost of all its components:

(1) Components mined, produced, or manufactured in a qualifying country.

(2) Components mined, produced, or manufactured in the United States.

(3) Components of foreign origin of a class or kind for which the Government has determined that sufficient and reasonably available commercial quantities of a satisfactory quality are not mined, produced, or manufactured in the United States; or

(B) The end product is a COTS item.

“United States” means the 50 States, the District of Columbia, and outlying areas.

“U.S.-made end product” means an article that—

(i) Is mined, produced, or manufactured in the United States; or

(ii) Is substantially transformed in the United States into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed.

“WTO GPA country end product” means an article that—
(i) Is wholly the growth, product, or manufacture of a WTO GPA country; or

(ii) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in a WTO GPA country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to its supply, provided that the value of those incidental services does not exceed the value of the product itself.

(b) Unless otherwise specified, this clause applies to all items in the Schedule.

(c) The Contractor shall deliver under this contract only U.S.-made, qualifying country, or designated country end products unless—

(1) In its offer, the Contractor specified delivery of other nondesignated country end products in the Trade Agreements Certificate provision of the solicitation; and

(2)(i) Offers of U.S.-made, qualifying country, or designated country end products from responsive, responsible offerors are either not received or are insufficient to fill the Government’s requirements; or

(ii) A national interest waiver has been granted.

(d) The contract price does not include duty for end products or components for which the Contractor will claim duty-free entry.

(e) The HTSUS is available on the Internet at http://www.usitc.gov/tata/hts/bychapter/index.htm. The following sections of the HTSUS provide information regarding duty-free status of articles specified in the definition of “Caribbean Basic country end product” within paragraph (a) of this clause:

(1) General Note 3(c), Products Eligible for Special Tariff Treatment.


(3) Section XXII, Chapter 98, Subchapter II, Articles Exported and Returned, Advanced or Improved Abroad, U.S. Note 7(b).


(End of clause)

* * * * *

Alternate II. (DEVIATION 2020-O0019) As prescribed in 225.1101(6) and (6)(ii),
use the following clause, which adds “South Caucasus/Central and South Asian (SC/CASA) state” and “South Caucasus/Central and South Asian (SC/CASA) state end product” to paragraph (a); (ii) uses a different paragraph (c) than the basic clause; (iii) adds a new paragraph (d); and (iv) includes paragraphs (e) and (f) which are the same paragraphs (d) and (e) of the basic clause:

TRADE AGREEMENTS—ALTERNATE II (DEVIATION 2020-O0019) (JUL 2020)

(a) Definitions. As used in this clause—

“Caribbean Basin country end product”—

(i) Means an article that—

(A) Is wholly the growth, product, or manufacture of a Caribbean Basin country; or

(B) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in a Caribbean Basin country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to its supply, provided that the value of those incidental services does not exceed the value of the product itself; and

(ii) Excludes products, other than petroleum and any product derived from petroleum, that are not granted duty-free treatment under the Caribbean Basin Economic Recovery Act (19 U.S.C. 2703(b)). These exclusions presently consist of—

(A) Textiles, apparel articles, footwear, handbags, luggage, flat goods, work gloves, leather wearing apparel, and handloomed, handmade, or folklore articles that are not granted duty-free status in the Harmonized Tariff Schedule of the United States (HTSUS);

(B) Tuna, prepared or preserved in any manner in airtight containers; and

(C) Watches and watch parts (including cases, bracelets, and straps) of whatever type, including, but not limited to, mechanical, quartz digital, or quartz analog, if such watches or watch parts contain any material that is the product of any country to which the HTSUS column 2 rates of duty (HTSUS General Note 3(b)) apply.

“Commercially available off-the-shelf (COTS) item”—

(i) Means any item of supply (including construction material) that is—

(A) A commercial item (as defined in paragraph (1) of the definition of “commercial item” in section 2.101 of the Federal Acquisition Regulation);
(B) Sold in substantial quantities in the commercial marketplace; and

(C) Offered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace; and

(ii) Does not include bulk cargo, as defined in 46 U.S.C. 40102(4), such as agricultural products and petroleum products.

“Component” means an article, material, or supply incorporated directly into an end product.

“Designated country” means—

(i) A World Trade Organization Government Procurement Agreement (WTO GPA) country (Armenia, Aruba, Australia, Austria, Belgium, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea (Republic of), Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Montenegro, Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Taiwan (known in the World Trade Organization as “the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu” (Chinese Taipei)), Ukraine, or the United Kingdom);

(ii) A Free Trade Agreement country (Australia, Bahrain, Chile, Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Korea (Republic of), Mexico, Morocco, Nicaragua, Peru, or Singapore);

(iii) A least developed country (Afghanistan, Angola, Bangladesh, Benin, Bhutan, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Djibouti, East Timor, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Haiti, Kiribati, Laos, Lesotho, Liberia, Madagascar, Malawi, Maldives, Mali, Mauritania, Mozambique, Nepal, Niger, Rwanda, Samoa, Sao Tome and Principe, Senegal, Sierra Leone, Solomon Islands, Somalia, Tanzania, Togo, Tuvalu, Uganda, Vanuatu, Yemen, or Zambia); or

(iv) A Caribbean Basin country (Antigua and Barbuda, Aruba, Bahamas, Barbados, Belize, Bonaire, British Virgin Islands, Curacao, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Saba, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Sint Eustatius, Sint Maarten, or Trinidad and Tobago).

“Designated country end product” means a WTO GPA country end product, a Free Trade Agreement country end product, a least developed country end product, or a Caribbean Basin country end product.

“End product” means those articles, materials, and supplies to be acquired under this contract for public use.

“Free Trade Agreement country end product” means an article that—
(i) Is wholly the growth, product, or manufacture of a Free Trade Agreement country; or

(ii) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in a Free Trade Agreement country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to its supply, provided that the value of those incidental services does not exceed the value of the product itself.

“Least developed country end product” means an article that—

(i) Is wholly the growth, product, or manufacture of a least developed country; or

(ii) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in a least developed country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to its supply, provided that the value of those incidental services does not exceed the value of the product itself.

“Nondesignated country end product” means any end product that is not a U.S.-made end product or a designated country end product.

“Qualifying country” means a country with a reciprocal defense procurement memorandum of understanding or international agreement with the United States in which both countries agree to remove barriers to purchases of supplies produced in the other country or services performed by sources of the other country, and the memorandum or agreement complies, where applicable, with the requirements of section 36 of the Arms Export Control Act (22 U.S.C. 2776) and with 10 U.S.C. 2457. Accordingly, the following are qualifying countries:

Australia
Austria
Belgium
Canada
Czech Republic
Denmark
Egypt
Estonia
Finland
France
Germany
Greece
Israel
“Qualifying country end product” means—

(i) An unmanufactured end product mined or produced in a qualifying country; or

(ii) An end product manufactured in a qualifying country if—

(A) The cost of the following types of components exceeds 50 percent of the cost of all its components:

(1) Components mined, produced, or manufactured in a qualifying country.

(2) Components mined, produced, or manufactured in the United States.

(3) Components of foreign origin of a class or kind for which the Government has determined that sufficient and reasonably available commercial quantities of a satisfactory quality are not mined, produced, or manufactured in the United States; or

(B) The end product is a COTS item.

“South Caucasus/Central and South Asian (SC/CASA) state” means Armenia, Azerbaijan, Georgia, Kazakhstan, Kyrgyzstan, Pakistan, Tajikistan, Turkmenistan, or Uzbekistan.

“South Caucasus/Central and South Asian (SC/CASA) state end product” means an article that—

(i) Is wholly the growth, product, or manufacture of an SC/CASA state; or

(ii) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in an SC/CASA state into a new and different article of commerce with a name, character, or use distinct from
that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to its supply, provided that the value of those incidental services does not exceed the value of the product itself.

“United States” means the 50 States, the District of Columbia, and outlying areas.

“U.S.-made end product” means an article that—

(i) Is mined, produced, or manufactured in the United States; or

(ii) Is substantially transformed in the United States into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed.

“WTO GPA country end product” means an article that—

(i) Is wholly the growth, product, or manufacture of a WTO GPA country; or

(ii) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in a WTO GPA country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to its supply, provided that the value of those incidental services does not exceed the value of the product itself.

(b) Unless otherwise specified, this clause applies to all items in the Schedule.

(c) The Contractor shall deliver under this contract only U.S.-made, qualifying country, SC/CASA state, or designated country end products unless—

(1) In its offer, the Contractor specified delivery of other nondesignated country end products in the Trade Agreements Certificate provision of the solicitation; and

(2)(i) Offers of U.S.-made, qualifying country, SC/CASA state, or designated country end products from responsive, responsible offerors are either not received or are insufficient to fill the Government’s requirements; or

(ii) A national interest waiver has been granted.

(d) If the Contractor is from an SC/CASA state, the Contractor shall inform its government of its participation in this acquisition and that it generally will not have such opportunity in the future unless its government provides reciprocal procurement opportunities to U.S. products and services and suppliers of such products and services.
(e) The contract price does not include duty for end products or components for which the Contractor will claim duty-free entry.

(f) The HTSUS is available on the Internet at http://www.usitc.gov/tata/hts/bychapter/index.htm. The following sections of the HTSUS provide information regarding duty-free status of articles specified in the definition of “Caribbean Basin country end product” within paragraph (a) of this clause:

   (1) General Note 3(c), Products Eligible for Special Tariff Treatment.


   (3) Section XXII, Chapter 98, Subchapter II, Articles Exported and Returned, Advanced or Improved Abroad, U.S. Note 7(b).


   (End of clause)
252.225-7035 Buy American—Free Trade Agreements—Balance of Payments Program Certificate. (DEVIATION 2020-O0019)

Basic. (DEVIATION 2020-O0019) As prescribed in 225.1101(9) and (9)(i), use the following provision:

BUY AMERICAN—FREE TRADE AGREEMENTS—BALANCE OF PAYMENTS PROGRAM CERTIFICATE—BASIC (DEVIATION 2020-O0019) (JUL 2020)

(a) Definitions. “Bahrainian end product,” “commercially available off-the-shelf (COTS) item,” “component,” “domestic end product,” “Free Trade Agreement country,” “Free Trade Agreement country end product,” “foreign end product,” “Moroccan end product,” “Panamanian end product,” “Peruvian end product,” “qualifying country end product,” and “United States,” as used in this provision, have the meanings given in the Buy American—Free Trade Agreements—Balance of Payments Program—Basic clause of this solicitation.

(b) Evaluation. The Government—

(1) Will evaluate offers in accordance with the policies and procedures of Part 225 of the Defense Federal Acquisition Regulation Supplement; and

(2) For line items subject to the Buy American—Free Trade Agreements—Balance of Payments Program—Basic clause of this solicitation, will evaluate offers of qualifying country end products or Free Trade Agreement country end products other than Bahrainian end products, Moroccan end products, Panamanian end products, or Peruvian end products without regard to the restrictions of the Buy American or the Balance of Payments Program.

(c) Certifications and identification of country of origin.

(1) For all line items subject to the Buy American—Free Trade Agreements—Balance of Payments Program—Basic clause of this solicitation, the offeror certifies that—

(i) Each end product, except the end products listed in paragraph (c)(2) of this provision, is a domestic end product; and

(ii) Components of unknown origin are considered to have been mined, produced, or manufactured outside the United States or a qualifying country.

(2) The offeror shall identify all end products that are not domestic end products.

(i) The offeror certifies that the following supplies are qualifying country (except Australian) end products:

(Line Item Number)  (Country of Origin)

(ii) The offeror certifies that the following supplies are Free Trade Agreement country end products other than Bahrainian end products, Moroccan end products, Panamanian end products, or Peruvian end products.
products, Panamanian end products, or Peruvian end products:

<table>
<thead>
<tr>
<th>(Line Item Number)</th>
<th>(Country of Origin)</th>
</tr>
</thead>
<tbody>
<tr>
<td>(iii) The following supplies are other foreign end products, including end products manufactured in the United States that do not qualify as domestic end products, i.e., an end product that is not a COTS item and does not meet the component test in paragraph (ii) of the definition of “domestic end product”:</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>(Line Item Number)</th>
<th>(Country of Origin (If known))</th>
</tr>
</thead>
</table>

(End of provision)

Alternate I. (DEVIATION 2020-O0019) Reserved.

Alternate II. (DEVIATION 2020-O0019) As prescribed in 225.1101(9) and (9)(iii), use the following provision, which adds “South Caucasus/Central and South Asian (SC/CASA) state” and “South Caucasus/Central and South Asian (SC/CASA) state end product” to paragraph (a), and uses different paragraphs (b)(2) and (c)(2)(i) than the basic provision:

BUY AMERICAN—FREE TRADE AGREEMENTS—BALANCE OF PAYMENTS PROGRAM CERTIFICATE—ALTERNATE II (DEVIATION 2020-O0019) (JUL 2020)

(a) Definitions. “Bahrainian end product,” “commercially available off-the-shelf (COTS) item,” “component,” “domestic end product,” “Free Trade Agreement country,” “Free Trade Agreement country end product,” “foreign end product,” “Moroccan end product,” “Panamanian end product,” “Peruvian end product,” “qualifying country end product,” “South Caucasus/Central and South Asian (SC/CASA) state,” “South Caucasus/Central and South Asian (SC/CASA) state end product,” and “United States,” as used in this provision, have the meanings given in the Buy American—Free Trade Agreements—Balance of Payments Program—Alternate II clause of this solicitation.

(b) Evaluation. The Government—

(1) Will evaluate offers in accordance with the policies and procedures of part 225 of the Defense Federal Acquisition Regulation Supplement; and

(2) For line items subject to the Buy American—Free Trade Agreements—Balance of Payments Program—Alternate II clause of this solicitation, will evaluate offers of qualifying country end products, SC/CASA state end products, or Free Trade Agreement country end products other than Bahrainian end products, Moroccan end products, Panamanian end products, or Peruvian end products without regard to the restrictions of the Buy American or the Balance of Payments Program.

(c) Certifications and identification of country of origin.

(1) For all line items subject to the Buy American—Free Trade Agreements—Balance of Payments Program—Alternate II clause of this solicitation, the offeror certifies that—
(i) Each end product, except the end products listed in paragraph (c)(2) of this provision, is a domestic end product; and

(ii) Components of unknown origin are considered to have been mined, produced, or manufactured outside the United States or a qualifying country.

(2) The offeror shall identify all end products that are not domestic end products.

(i) The offeror certifies that the following supplies are qualifying country (except Australian) or SC/CASA state end products:

| Line Item Number | Country of Origin |

(ii) The offeror certifies that the following supplies are Free Trade Agreement country end products other than Bahrainian end products, Moroccan end products, or Peruvian end products:

| Line Item Number | Country of Origin |

(iii) The following supplies are other foreign end products, including end products manufactured in the United States that do not qualify as domestic end products, i.e., an end product that is not a COTS item and does not meet the component test in paragraph (ii) of the definition of “domestic end product”:

| Line Item Number | Country of Origin (If known) |

(End of provision)

Alternate III. (DEVIATION 2020-O0019) Reserved.

Alternate IV. (DEVIATION 2020-O0019) As prescribed in 225.1101(9) and (9)(v), use the following provision, which adds “Korean end product” to paragraph (a) and uses “Free Trade Agreement country end products other than Bahrainian end products, Korean end products, Moroccan end products, Panamanian end products, or Peruvian end products” in paragraphs (b)(2) and (c)(2)(ii), rather than “Free Trade Agreement country end products other than Bahrainian end products, Moroccan end products, Panamanian end products, or Peruvian end products” in paragraphs (b)(2) and (c)(2)(ii) of the basic provision:

BUY AMERICAN—FREE TRADE AGREEMENTS—BALANCE OF PAYMENTS PROGRAM CERTIFICATE—ALTERNATE IV (DEVIATION 2020-O0019) (JUL 2020)

(a) Definitions. “Bahrainian end product,” “commercially available off-the-shelf (COTS) item,” “component,” “domestic end product,” “Free Trade Agreement country,” “Free Trade Agreement country end product,” “foreign end product,” “Korean end product,” “Moroccan end product,” “Panamanian end product,” “Peruvian end product,” “qualifying country end product,” and “United States,” as used in this provision, have the meanings given in the Buy American—Free Trade Agreements—Balance of Payments Program—Alternate IV clause of this solicitation.
(b) *Evaluation.* The Government—

(1) Will evaluate offers in accordance with the policies and procedures of part 225 of the Defense Federal Acquisition Regulation Supplement; and

(2) For line items subject to the Buy American—Free Trade Agreements—Balance of Payments Program—Alternate IV clause of this solicitation, will evaluate offers of qualifying country end products or Free Trade Agreement country end products other than Bahrainian end products, Korean end products, Moroccan end products, Panamanian end products, or Peruvian end products without regard to the restrictions of the Buy American or the Balance of Payments Program.

(c) *Certifications and identification of country of origin.*

(1) For all line items subject to the Buy American—Free Trade Agreements—Balance of Payments Program—Alternate IV clause of this solicitation, the offeror certifies that—

   (i) Each end product, except the end products listed in paragraph (c)(2) of this provision, is a domestic end product; and

   (ii) Components of unknown origin are considered to have been mined, produced, or manufactured outside the United States or a qualifying country.

(2) The offeror shall identify all end products that are not domestic end products.

   (i) The offeror certifies that the following supplies are qualifying country (except Australian) end products:

   | (Line Item Number) | (Country of Origin) |

   (ii) The offeror certifies that the following supplies are Free Trade Agreement country end products other than Bahrainian end products, Korean end products, Moroccan end products, Panamanian end products, or Peruvian end products:

   | (Line Item Number) | (Country of Origin) |

   (iii) The following supplies are other foreign end products, including end products manufactured in the United States that do not qualify as domestic end products, i.e., an end product that is not a COTS item and does not meet the component test in paragraph (ii) of the definition of “domestic end product”:

   | (Line Item Number) | (Country of Origin (If known)) |

(End of provision)
use the following provision, which uses different paragraphs (a), (b)(2), (c)(2)(i), and (c)(2)(ii) than the basic provision:

BUY AMERICAN—FREE TRADE AGREEMENTS—BALANCE OF PAYMENTS PROGRAM CERTIFICATE—ALTERNATE V (DEVIATION 2020-O0019) (JUL 2020)

(a) Definitions. “Bahrainian end product,” “commercially available off-the-shelf (COTS) item,” “component,” “domestic end product,” “Free Trade Agreement country,” “Free Trade Agreement country end product,” “foreign end product,” “Korean end product,” “Moroccan end product,” “Panamanian end product,” “Peruvian end product,” “qualifying country end product,” “South Caucasus/Central and South Asian (SC/CASA) state end product,” and “United States,” as used in this provision, have the meanings given in the Buy American—Free Trade Agreements—Balance of Payments Program—Alternate V clause of this solicitation.

(b) Evaluation. The Government—

(1) Will evaluate offers in accordance with the policies and procedures of part 225 of the Defense Federal Acquisition Regulation Supplement; and

(2) For line items subject to the Buy American—Free Trade Agreements—Balance of Payments Program—Alternate V clause of this solicitation, will evaluate offers of qualifying country end products, SC/CASA state end products, or Free Trade Agreement end products other than Bahrainian end products, Korean end products, Moroccan end products, Panamanian end products, or Peruvian end products without regard to the restrictions of the Buy American statute or the Balance of Payments Program.

(c) Certifications and identification of country of origin.

(1) For all line items subject to the Buy American—Free Trade Agreements—Balance of Payments Program—Alternate V clause of this solicitation, the offeror certifies that—

   (i) Each end product, except the end products listed in paragraph (c)(2) of this provision, is a domestic end product; and

   (ii) Components of unknown origin are considered to have been mined, produced, or manufactured outside the United States or a qualifying country.

(2) The offeror shall identify all end products that are not domestic end products.

   (i) The offeror certifies that the following supplies are qualifying country (except Australian) or SC/CASA state end products:

   (Line Item Number)   (Country of Origin)

   (ii) The offeror certifies that the following supplies are Free Trade Agreement country end products other than Bahrainian end products, Korean end products, Moroccan end products, Panamanian end products, or Peruvian end products:
(Line Item Number)   (Country of Origin)

(iii) The following supplies are other foreign end products, including end products manufactured in the United States that do not qualify as domestic end products, i.e., an end product that is not a COTS item and does not meet the component test in paragraph (ii) of the definition of “domestic end product”:

(Line Item Number)   (Country of Origin (If known))

(End of provision)

252.225-7036 Buy American—Free Trade Agreements—Balance of Payments Program. (DEVIATION 2020-O0019)

Basic. As prescribed in 225.1101(10)(i) and (10)(i)(A), use the following clause:

BUY AMERICAN—FREE TRADE AGREEMENTS—BALANCE OF PAYMENTS PROGRAM—BASIC (DEVIATION 2020-O0019) (JUL 2020)

(a) Definitions. As used in this clause—

“Bahrainian end product” means an article that—

(i) Is wholly the growth, product, or manufacture of Bahrain; or

(ii) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in Bahrain into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to its supply, provided that the value of those incidental services does not exceed the value of the product itself.

“Commercially available off-the-shelf (COTS) item”—

(i) Means any item of supply (including construction material) that is—

(A) A commercial item (as defined in paragraph (1) of the definition of “commercial item” in section 2.101 of the Federal Acquisition Regulation);

(B) Sold in substantial quantities in the commercial marketplace; and

(C) Offered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace; and

(ii) Does not include bulk cargo, as defined in 46 U.S.C. 40102(4), such as agricultural products and petroleum products.

“Component” means an article, material, or supply incorporated directly into an end
“Domestic end product” means—

(i) An unmanufactured end product that has been mined or produced in the United States; or

(ii) An end product manufactured in the United States if—

(A) The cost of its qualifying country components and its components that are mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. The cost of components includes transportation costs to the place of incorporation into the end product and U.S. duty (whether or not a duty-free entry certificate is issued). Scrap generated, collected, and prepared for processing in the United States is considered domestic. A component is considered to have been mined, produced, or manufactured in the United States (regardless of its source in fact) if the end product in which it is incorporated is manufactured in the United States and the component is of a class or kind for which the Government has determined that—

(1) Sufficient and reasonably available commercial quantities of a satisfactory quality are not mined, produced, or manufactured in the United States; or

(2) It is inconsistent with the public interest to apply the restrictions of the Buy American statute; or

(B) The end product is a COTS item.

“End product” means those articles, materials, and supplies to be acquired under this contract for public use.

“Foreign end product” means an end product other than a domestic end product.

“Free Trade Agreement country” means Australia, Bahrain, Chile, Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Korea (Republic of), Mexico, Morocco, Nicaragua, Panama, Peru, or Singapore;

“Free Trade Agreement country end product” means an article that—

(i) Is wholly the growth, product, or manufacture of a Free Trade Agreement country; or

(ii) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in a Free Trade Agreement country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to its supply, provided that the value of those incidental services does not exceed the value of the product itself.

“Moroccan end product” means an article that—
(i) Is wholly the growth, product, or manufacture of Morocco; or

(ii) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in Morocco into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to its supply, provided that the value of those incidental services does not exceed the value of the product itself.

“Panamanian end product” means an article that—

(i) Is wholly the growth, product, or manufacture of Panama; or

(ii) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in Panama into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to its supply, provided that the value of those incidental services does not exceed the value of the product itself.

“Peruvian end product” means an article that—

(i) Is wholly the growth, product, or manufacture of Peru; or

(ii) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in Peru into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to its supply, provided that the value of those incidental services does not exceed the value of the product itself.

“Qualifying country” means a country with a reciprocal defense procurement memorandum of understanding or international agreement with the United States in which both countries agree to remove barriers to purchases of supplies produced in the other country or services performed by sources of the other country, and the memorandum or agreement complies, where applicable, with the requirements of section 36 of the Arms Export Control Act (22 U.S.C. 2776) and with 10 U.S.C. 2457. Accordingly, the following are qualifying countries:

Australia
Austria
Belgium
Canada
Czech Republic
“Qualifying country component” means a component mined, produced, or manufactured in a qualifying country.

“Qualifying country end product” means—

(i) An unmanufactured end product mined or produced in a qualifying country; or

(ii) An end product manufactured in a qualifying country if—

(A) The cost of the following types of components exceeds 50 percent of the cost of all its components:

(1) Components mined, produced, or manufactured in a qualifying country.

(2) Components mined, produced, or manufactured in the United States.

(3) Components of foreign origin of a class or kind for which the Government has determined that sufficient and reasonably available commercial quantities of a satisfactory quality are not mined, produced, or manufactured in the United States; or

(B) The end product is a COTS item.
“United States” means the 50 States, the District of Columbia, and outlying areas.

(b) Unless otherwise specified, this clause applies to all items in the Schedule.

(c) The Contractor shall deliver under this contract only domestic end products unless, in its offer, it specified delivery of qualifying country end products, Free Trade Agreement country end products other than Bahrainian end products, Moroccan end products, Panamanian end products, or Peruvian end products, or other foreign end products in the Buy American—Free Trade Agreements—Balance of Payments Program Certificate—Basic provision of the solicitation. If the Contractor certified in its offer that it will deliver a qualifying country end product or a Free Trade Agreement country end product other than a Bahrainian end product, a Moroccan end product, a Panamanian end product, or a Peruvian end product, the Contractor shall deliver a qualifying country end product, a Free Trade Agreement country end product other than a Bahrainian end product, a Moroccan end product, a Panamanian end product, or a Peruvian end product, or, at the Contractor’s option, a domestic end product.

(d) The contract price does not include duty for end products or components for which the Contractor will claim duty-free entry.

(End of clause)

Alternate I. (DEVIAITON 2020-O0019) Reserved.

Alternate II. (DEVIAITON 2020-O0019) As prescribed in 225.1101(10)(i) and (10)(i)(C), use the following clause, which adds “South Caucasus/Central and South Asian (SC/CASA) state” and “South Caucasus/Central and South Asian (SC/CASA) state end product” to paragraph (a), and uses a different paragraph (c) than the basic clause:

BUY AMERICAN—FREE TRADE AGREEMENTS—BALANCE OF PAYMENTS PROGRAM—ALTERNATE II (DEVIAITON 2020-O0019) (JUL 2020)

(a) Definitions. As used in this clause—

“Bahrainian end product” means an article that—

(i) Is wholly the growth, product, or manufacture of Bahrain; or

(ii) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in Bahrain into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to its supply, provided that the value of those incidental services does not exceed the value of the product itself.

“Commercially available off-the-shelf (COTS) item”—
(i) Means any item of supply (including construction material) that is—

(A) A commercial item (as defined in paragraph (1) of the definition of “commercial item” in section 2.101 of the Federal Acquisition Regulation);

(B) Sold in substantial quantities in the commercial marketplace; and

(C) Offered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace; and

(ii) Does not include bulk cargo, as defined in 46 U.S.C. 40102(4), such as agricultural products and petroleum products.

“Component” means an article, material, or supply incorporated directly into an end product.

“Domestic end product” means—

(i) An unmanufactured end product that has been mined or produced in the United States; or

(ii) An end product manufactured in the United States if—

(A) The cost of its qualifying country components and its components that are mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. The cost of components includes transportation costs to the place of incorporation into the end product and U.S. duty (whether or not a duty-free entry certificate is issued). Scrap generated, collected, and prepared for processing in the United States is considered domestic. A component is considered to have been mined, produced, or manufactured in the United States (regardless of its source in fact) if the end product in which it is incorporated is manufactured in the United States and the component is of a class or kind for which the Government has determined that—

(1) Sufficient and reasonably available commercial quantities of a satisfactory quality are not mined, produced, or manufactured in the United States; or

(2) It is inconsistent with the public interest to apply the restrictions of the Buy American statute; or

(B) The end product is a COTS item.

“End product” means those articles, materials, and supplies to be acquired under this contract for public use.

“Foreign end product” means an end product other than a domestic end product.

“Free Trade Agreement country” means Australia, Bahrain, Chile, Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Korea (Republic of), Mexico, Morocco, Nicaragua, Panama, Peru, or Singapore;
“Free Trade Agreement country end product” means an article that—

(i) Is wholly the growth, product, or manufacture of a Free Trade Agreement country; or

(ii) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in a Free Trade Agreement country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to its supply, provided that the value of those incidental services does not exceed the value of the product itself.

“Moroccan end product” means an article that—

(i) Is wholly the growth, product, or manufacture of Morocco; or

(ii) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in Morocco into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to its supply, provided that the value of those incidental services does not exceed the value of the product itself.

“Panamanian end product” means an article that—

(i) Is wholly the growth, product, or manufacture of Panama; or

(ii) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in Panama into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to its supply, provided that the value of those incidental services does not exceed the value of the product itself.

“Peruvian end product” means an article that—

(i) Is wholly the growth, product, or manufacture of Peru; or

(ii) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in Peru into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to its supply, provided that the value of those incidental services does not exceed the value of the product itself.
“Qualifying country” means a country with a reciprocal defense procurement memorandum of understanding or international agreement with the United States in which both countries agree to remove barriers to purchases of supplies produced in the other country or services performed by sources of the other country, and the memorandum or agreement complies, where applicable, with the requirements of section 36 of the Arms Export Control Act (22 U.S.C. 2776) and with 10 U.S.C. 2457. Accordingly, the following are qualifying countries:

Australia
Austria
Belgium
Canada
Czech Republic
Denmark
Egypt
Estonia
Finland
France
Germany
Greece
Israel
Italy
Japan
Latvia
Luxembourg
Netherlands
Norway
Poland
Portugal
Slovenia
Spain
Sweden
Switzerland
Turkey
United Kingdom of Great Britain and Northern Ireland.

“Qualifying country component” means a component mined, produced, or manufactured in a qualifying country.

“Qualifying country end product” means—

(i) An unmanufactured end product mined or produced in a qualifying country; or

(ii) An end product manufactured in a qualifying country if—

(A) The cost of the following types of components exceeds 50 percent of the cost of all its components:
(1) Components mined, produced, or manufactured in a qualifying country.

(2) Components mined, produced, or manufactured in the United States.

(3) Components of foreign origin of a class or kind for which the Government has determined that sufficient and reasonably available commercial quantities of a satisfactory quality are not mined, produced, or manufactured in the United States; or

(B) The end product is a COTS item.

“South Caucasus/Central and South Asian (SC/CASA) state” means Armenia, Azerbaijan, Georgia, Kazakhstan, Kyrgyzstan, Pakistan, Tajikistan, Turkmenistan, or Uzbekistan.

“South Caucasus/Central and South Asian (SC/CASA) state end product” means an article that—

(i) Is wholly the growth, product, or manufacture of an SC/CASA state; or

(ii) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in an SC/CASA state into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to its supply, provided that the value of those incidental services does not exceed the value of the product itself.

“United States” means the 50 States, the District of Columbia, and outlying areas.

(b) Unless otherwise specified, this clause applies to all items in the Schedule.

(c) The Contractor shall deliver under this contract only domestic end products unless, in its offer, it specified delivery of qualifying country end products, SC/CASA state end products, Free Trade Agreement country end products other than Bahrainian end products, Moroccan end products, Panamanian end products, or Peruvian end products, or other foreign end products in the Buy American—Free Trade Agreements—Balance of Payments Program Certificate—Alternate II provision of the solicitation. If the Contractor certified in its offer that it will deliver a qualifying country end product, SC/CASA state end products, or a Free Trade Agreement country end product other than a Bahrainian end product, a Moroccan end product, a Panamanian end product, or a Peruvian end product, the Contractor shall deliver a qualifying country end product, an SC/CASA state end product, a Free Trade Agreement country end product other than a Bahrainian end product, a Moroccan end
product, a Panamanian end product, or a Peruvian end product or, at the Contractor’s option, a domestic end product.

(d) The contract price does not include duty for end products or components for which the Contractor will claim duty-free entry.

(End of clause)

Alternate III. (DEVIATION 2020-O0019) Reserved.

Alternate IV. (DEVIATION 2020-O0019) As prescribed in 225.1101(10)(i) and (10)(i)(E), use the following clause, which adds “Korean end product” to paragraph (a), and uses a different paragraph (c) than the basic clause:

BUY AMERICAN—FREE TRADE AGREEMENTS—BALANCE OF PAYMENTS PROGRAM—ALTERNATE IV (DEVIATION 2020-O0019) (JUL 2020)

(a) Definitions. As used in this clause—

“Bahrainian end product” means an article that—

(i) Is wholly the growth, product, or manufacture of Bahrain; or

(ii) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in Bahrain into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to its supply, provided that the value of those incidental services does not exceed the value of the product itself.

“Commercially available off-the-shelf (COTS) item”—

(i) Means any item of supply (including construction material) that is—

(A) A commercial item (as defined in paragraph (1) of the definition of “commercial item” in section 2.101 of the Federal Acquisition Regulation);

(B) Sold in substantial quantities in the commercial marketplace; and

(C) Offered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace; and

(ii) Does not include bulk cargo, as defined in 46 U.S.C. 40102(4), such as agricultural products and petroleum products.

“Component” means an article, material, or supply incorporated directly into an end product.
“Domestic end product” means—

(i) An unmanufactured end product that has been mined or produced in the United States; or

(ii) An end product manufactured in the United States if—

(A) The cost of its qualifying country components and its components that are mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. The cost of components includes transportation costs to the place of incorporation into the end product and U.S. duty (whether or not a duty-free entry certificate is issued). Scrap generated, collected, and prepared for processing in the United States is considered domestic. A component is considered to have been mined, produced, or manufactured in the United States (regardless of its source in fact) if the end product in which it is incorporated is manufactured in the United States and the component is of a class or kind for which the Government has determined that—

(1) Sufficient and reasonably available commercial quantities of a satisfactory quality are not mined, produced, or manufactured in the United States; or

(2) It is inconsistent with the public interest to apply the restrictions of the Buy American statute; or

(B) The end product is a COTS item.

“End product” means those articles, materials, and supplies to be acquired under this contract for public use.

“Foreign end product” means an end product other than a domestic end product.

“Free Trade Agreement country” means Australia, Bahrain, Chile, Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Korea (Republic of), Mexico, Morocco, Nicaragua, Panama, Peru, or Singapore;

“Free Trade Agreement country end product” means an article that—

(i) Is wholly the growth, product, or manufacture of a Free Trade Agreement country; or

(ii) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in a Free Trade Agreement country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to its supply, provided that the value of those incidental services does not exceed the value of the product itself.

“Korean end product” means an article that—

(i) Is wholly the growth, product, or manufacture of Korea; or
(ii) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in Korea (Republic of) into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product, includes services (except transportation services) incidental to its supply, provided that the value of those incidental services does not exceed the value of the product itself.

“Moroccan end product” means an article that—

(i) Is wholly the growth, product, or manufacture of Morocco; or

(ii) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in Morocco into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product, includes services (except transportation services) incidental to its supply, provided that the value of those incidental services does not exceed the value of the product itself.

“Panamanian end product” means an article that—

(i) Is wholly the growth, product, or manufacture of Panama; or

(ii) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in Panama into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product, includes services (except transportation services) incidental to its supply, provided that the value of those incidental services does not exceed the value of the product itself.

“Peruvian end product” means an article that—

(i) Is wholly the growth, product, or manufacture of Peru; or

(ii) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in Peru into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product, includes services (except transportation services) incidental to its supply, provided that the value of those incidental services does not exceed the value of the product itself.

“Qualifying country” means a country with a reciprocal defense procurement memorandum of understanding or international agreement with the United States in
which both countries agree to remove barriers to purchases of supplies produced in the
other country or services performed by sources of the other country, and the
memorandum or agreement complies, where applicable, with the requirements of
section 36 of the Arms Export Control Act (22 U.S.C. 2776) and with 10 U.S.C. 2457.
Accordingly, the following are qualifying countries:

Australia
Austria
Belgium
Canada
Czech Republic
Denmark
Egypt
Estonia
Finland
France
Germany
Greece
Israel
Italy
Japan
Latvia
Luxembourg
Netherlands
Norway
Poland
Portugal
Slovenia
Spain
Sweden
Switzerland
Turkey
United Kingdom of Great Britain and Northern Ireland.

“Qualifying country component” means a component mined, produced, or
manufactured in a qualifying country.

“Qualifying country end product” means—

(i) An unmanufactured end product mined or produced in a qualifying country;
or

(ii) An end product manufactured in a qualifying country if—

(A) The cost of the following types of components exceeds 50 percent of the
cost of all its components:

(1) Components mined, produced, or manufactured in a qualifying
country.
(2) Components mined, produced, or manufactured in the United States.

(3) Components of foreign origin of a class or kind for which the Government has determined that sufficient and reasonably available commercial quantities of a satisfactory quality are not mined, produced, or manufactured in the United States; or

(B) The end product is a COTS item.

“United States” means the 50 States, the District of Columbia, and outlying areas.

(b) Unless otherwise specified, this clause applies to all items in the Schedule.

(c) The Contractor shall deliver under this contract only domestic end products unless, in its offer, it specified delivery of qualifying country end products, Free Trade Agreement country end products other than Bahrainian end products, Korean end products, Moroccan end products, Panamanian end products, or Peruvian end products, or other foreign end products in the Buy American—Free Trade Agreements—Balance of Payments Program Certificate—Alternate IV provision of the solicitation. If the Contractor certified in its offer that it will deliver a qualifying country end product or a Free Trade Agreement country end product other than a Bahrainian end product, a Korean end product, a Moroccan end product, a Panamanian end product, or a Peruvian end product, the Contractor shall deliver a qualifying country end product, a Free Trade Agreement country end product other than a Bahrainian end product, a Korean end product, a Moroccan end product, a Panamanian end product, or a Peruvian end product, or, at the Contractor’s option, a domestic end product.

(d) The contract price does not include duty for end products or components for which the Contractor will claim duty-free entry.

(End of clause)
from another country, has been substantially transformed in Bahrain into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to its supply, provided that the value of those incidental services does not exceed the value of the product itself.

“Commercially available off-the-shelf (COTS) item”—

(i) Means any item of supply (including construction material) that is—

(A) A commercial item (as defined in paragraph (1) of the definition of “commercial item” in section 2.101 of the Federal Acquisition Regulation);

(B) Sold in substantial quantities in the commercial marketplace; and

(C) Offered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace; and

(ii) Does not include bulk cargo, as defined in 46 U.S.C. 40102(4), such as agricultural products and petroleum products.

“Component” means an article, material, or supply incorporated directly into an end product.

“Domestic end product” means—

(i) An unmanufactured end product that has been mined or produced in the United States; or

(ii) An end product manufactured in the United States if—

(A) The cost of its qualifying country components and its components that are mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. The cost of components includes transportation costs to the place of incorporation into the end product and U.S. duty (whether or not a duty-free entry certificate is issued). Scrap generated, collected, and prepared for processing in the United States is considered domestic. A component is considered to have been mined, produced, or manufactured in the United States (regardless of its source in fact) if the end product in which it is incorporated is manufactured in the United States and the component is of a class or kind for which the Government has determined that—

(1) Sufficient and reasonably available commercial quantities of a satisfactory quality are not mined, produced, or manufactured in the United States; or

(2) It is inconsistent with the public interest to apply the restrictions of the Buy American statute; or

(B) The end product is a COTS item.
“End product” means those articles, materials, and supplies to be acquired under this contract for public use.

“Foreign end product” means an end product other than a domestic end product.

“Free Trade Agreement country” means Australia, Bahrain, Chile, Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Korea (Republic of), Mexico, Morocco, Nicaragua, Panama, Peru, or Singapore;

“Free Trade Agreement country end product” means an article that—

(i) Is wholly the growth, product, or manufacture of a Free Trade Agreement country; or

(ii) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in a Free Trade Agreement country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to its supply, provided that the value of those incidental services does not exceed the value of the product itself.

“Korean end product” means an article that—

(i) Is wholly the growth, product, or manufacture of Korea; or

(ii) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in Korea (Republic of) into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to its supply, provided that the value of those incidental services does not exceed the value of the product itself.

“Moroccan end product” means an article that—

(i) Is wholly the growth, product, or manufacture of Morocco; or

(ii) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in Morocco into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to its supply, provided that the value of those incidental services does not exceed the value of the product itself.

“Panamanian end product” means an article that—
(i) Is wholly the growth, product, or manufacture of Panama; or

(ii) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in Panama into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to its supply, provided that the value of those incidental services does not exceed the value of the product itself.

“Peruvian end product” means an article that—

(i) Is wholly the growth, product, or manufacture of Peru; or

(ii) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in Peru into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to its supply, provided that the value of those incidental services does not exceed the value of the product itself.

“Qualifying country” means a country with a reciprocal defense procurement memorandum of understanding or international agreement with the United States in which both countries agree to remove barriers to purchases of supplies produced in the other country or services performed by sources of the other country, and the memorandum or agreement complies, where applicable, with the requirements of section 36 of the Arms Export Control Act (22 U.S.C. 2776) and with 10 U.S.C. 2457. Accordingly, the following are qualifying countries:

Australia
Austria
Belgium
Canada
Czech Republic
Denmark
Egypt
Estonia
Finland
France
Germany
Greece
Israel
Italy
Japan
Latvia
Luxembourg
Netherlands
“Qualifying country component” means a component mined, produced, or manufactured in a qualifying country.

“Qualifying country end product” means—

(i) An unmanufactured end product mined or produced in a qualifying country; or

(ii) An end product manufactured in a qualifying country if—

(A) The cost of the following types of components exceeds 50 percent of the cost of all its components:

(1) Components mined, produced, or manufactured in a qualifying country.

(2) Components mined, produced, or manufactured in the United States.

(3) Components of foreign origin of a class or kind for which the Government has determined that sufficient and reasonably available commercial quantities of a satisfactory quality are not mined, produced, or manufactured in the United States; or

(B) The end product is a COTS item.

“South Caucasus/Central and South Asian (SC/CASA) state” means Armenia, Azerbaijan, Georgia, Kazakhstan, Kyrgyzstan, Pakistan, Tajikistan, Turkmenistan, or Uzbekistan.

“South Caucasus/Central and South Asian (SC/CASA) state end product” means an article that—

(i) Is wholly the growth, product, or manufacture of an SC/CASA state; or

(ii) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in an SC/CASA state into a new and different article of commerce with a name, character, or use distinct from that of
the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product, includes services (except transportation services) incidental to its supply, provided that the value of those incidental services does not exceed the value of the product itself.

“United States” means the 50 States, the District of Columbia, and outlying areas.

(b) Unless otherwise specified, this clause applies to all items in the Schedule.

(c) The Contractor shall deliver under this contract only domestic end products unless, in its offer, it specified delivery of qualifying country end products, SC/CASA state end products, Free Trade Agreement country end products other than Bahrainian end products, Korean end products, Moroccan end products, Panamanian end products, or Peruvian end products, or other foreign end products in the Buy American—Free Trade Agreements—Balance of Payments Program Certificate—Alternate V provision of the solicitation. If the Contractor certified in its offer that it will deliver a qualifying country end product, an SC/CASA state end product, or a Free Trade Agreement country end product other than a Bahrainian end product, a Korean end product, a Moroccan end product, a Panamanian end product, or a Peruvian end product, the Contractor shall deliver a qualifying country end product, an SC/CASA state end product, a Free Trade Agreement country end product other than a Bahrainian end product, a Korean end product, a Moroccan end product, a Panamanian end product, or a Peruvian end product or, at the Contractor’s option, a domestic end product.

(d) The contract price does not include duty for end products or components for which the Contractor will claim duty-free entry.

(End of clause)
252.225-7045 Balance of Payments Program—Construction Material Under Trade Agreements. (DEVIATION 2020-O0019)

Basic. (DEVIATION 2020-O0019) As prescribed in 225.7503(b) and (b)(1), use the following clause:

BALANCE OF PAYMENTS PROGRAM—CONSTRUCTION MATERIAL UNDER TRADE AGREEMENTS—BASIC (DEVIATION 2020-O0019) (JUL 2020)

(a) Definitions. As used in this clause—

“Caribbean Basin country construction material” means a construction material that—

(i) Is wholly the growth, product, or manufacture of a Caribbean Basin country; or

(ii) In the case of a construction material that consists in whole or in part of materials from another country, has been substantially transformed in a Caribbean Basin country into a new and different construction material distinct from the materials from which it was transformed.

“Commercially available off-the-shelf (COTS) item”—

(i) Means any item of supply (including construction material) that is—

(A) A commercial item (as defined in paragraph (1) of the definition of “commercial item” in section 2.101 of the Federal Acquisition Regulation);

(B) Sold in substantial quantities in the commercial marketplace; and

(C) Offered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace; and

(ii) Does not include bulk cargo, as defined in section 3 of the Shipping Act of 1984 (46 U.S.C. 40102), such as agricultural products and petroleum products.

“Component” means any article, material, or supply incorporated directly into construction material.

“Construction material” means an article, material, or supply brought to the construction site by the Contractor or a subcontractor for incorporation into the building or work. The term also includes an item brought to the site preassembled from articles, materials, or supplies. However, emergency life safety systems, such as emergency lighting, fire alarm, and audio evacuation systems, that are discrete systems incorporated into a public building or work and that are produced as complete systems, are evaluated as a single and distinct construction material regardless of when or how the individual parts or components of those systems are delivered to the construction site. Materials purchased directly by the Government are supplies, not construction material.
“Cost of components” means—

(i) For components purchased by the Contractor, the acquisition cost, including transportation costs to the place of incorporation into the end product (whether or not such costs are paid to a domestic firm), and any applicable duty (whether or not a duty-free entry certificate is issued); or

(ii) For components manufactured by the Contractor, all costs associated with the manufacture of the component, including transportation costs as described in paragraph (1) of this definition, plus allocable overhead costs, but excluding profit. Cost of components does not include any costs associated with the manufacture of the construction material.

“Designated country” means—

(i) A World Trade Organization Government Procurement Agreement (WTO GPA) country (Armenia, Aruba, Australia, Austria, Belgium, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea (Republic of), Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Montenegro, Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Taiwan (known in the World Trade Organization as “the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu” (Chinese Taipei)), Ukraine, or the United Kingdom);

(ii) A Free Trade Agreement country (Australia, Bahrain, Chile, Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Korea (Republic of), Mexico, Morocco, Nicaragua, Panama, Peru, or Singapore);

(iii) A least developed country (Afghanistan, Angola, Bangladesh, Benin, Bhutan, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Haiti, Kiribati, Laos, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mozambique, Nepal, Niger, Rwanda, Samoa, Sao Tome and Principe, Senegal, Sierra Leone, Solomon Islands, Somalia, South Sudan, Tanzania, Timor-Leste, Togo, Tuvalu, Uganda, Vanuatu, Yemen, or Zambia); or

(iv) A Caribbean Basin country (Antigua and Barbuda, Aruba, Bahamas, Barbados, Belize, Bonaire, British Virgin Islands, Curacao, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Saba, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Sint Eustatius, Sint Maarten, or Trinidad and Tobago).

“Designated country construction material” means a construction material that is a WTO GPA country construction material, a Free Trade Agreement country construction material, a least developed country construction material, or a Caribbean Basin country construction material.

“Domestic construction material” means—

(i) An unmanufactured construction material mined or produced in the United States; or
(ii) A construction material manufactured in the United States, if—

   (A) The cost of its components mined, produced, or manufactured in the
       United States exceeds 50 percent of the cost of all its components. Components
       of foreign origin of the same class or kind for which nonavailability determinations
       have been made are treated as domestic; or

   (B) The construction material is a COTS item.

“Free Trade Agreement country construction material” means a construction
material that—

   (i) Is wholly the growth, product, or manufacture of a Free Trade
       Agreement country; or

   (ii) In the case of a construction material that consists in whole or in part
       of materials from another country, has been substantially transformed in a Free
       Trade Agreement country into a new and different construction material distinct
       from the material from which it was transformed.

“Least developed country construction material” means a construction material
that—

   (i) Is wholly the growth, product, or manufacture of a least developed country; or

   (ii) In the case of a construction material that consists in whole or in part
       of materials from another country, has been substantially transformed in a least
       developed country into a new and different construction material distinct from the
       materials from which it was transformed.

“United States” means the 50 States, the District of Columbia, and outlying areas.

“WTO GPA country construction material” means a construction material that—

   (i) Is wholly the growth, product, or manufacture of a WTO GPA country; or

   (ii) In the case of a construction material that consists in whole or in part
       of materials from another country, has been substantially transformed in a WTO
       GPA country into a new and different construction material distinct from the
       materials from which it was transformed.

(b) This clause implements the Balance of Payments Program by providing a
preference for domestic construction material. In addition, the Contracting Officer has
determined that the WTO GPA and Free Trade Agreements apply to this acquisition.
Therefore, the Balance of Payments Program restrictions are waived for designated
country construction materials.

(c) The Contractor shall use only domestic or designated country construction
material in performing this contract, except for—
(1) Construction material valued at or below the simplified acquisition threshold in part 2 of the Federal Acquisition Regulation;

(2) Information technology that is a commercial item; or

(3) The construction material or components listed by the Government as follows:

[Contracting Officer to list applicable excepted materials or indicate “none”]

(End of clause)

Alternate I. (DEVIATION 2020-O0019) As prescribed in 225.7503(b) and (b)(2), use the following clause, which adds “Bahrainian or Mexican construction material” to paragraph (a), and uses a different paragraph (b) and (c) than the basic clause:

BALANCE OF PAYMENTS PROGRAM—CONSTRUCTION MATERIAL UNDER TRADE AGREEMENTS—ALTERNATE I (DEVIATION 2020-O0019) (JUL 2020)

(a) Definitions. As used in this clause—

“Bahrainian or Mexican construction material” means a construction material that—

(i) Is wholly the growth, product, or manufacture of Bahrain or Mexico; or

(ii) In the case of a construction material that consists in whole or in part of materials from another country, has been substantially transformed in Bahrain or Mexico into a new and different construction material distinct from the materials from which it was transformed.

“Caribbean Basin country construction material” means a construction material that—

(i) Is wholly the growth, product, or manufacture of a Caribbean Basin country; or

(ii) In the case of a construction material that consists in whole or in part of materials from another country, has been substantially transformed in a Caribbean Basin country into a new and different construction material distinct from the materials from which it was transformed.

“Commercially available off-the-shelf (COTS) item”—

(i) Means any item of supply (including construction material) that is—

(A) A commercial item (as defined in paragraph (1) of the definition of “commercial item” in section 2.101 of the Federal Acquisition Regulation);

(B) Sold in substantial quantities in the commercial marketplace; and
(C) Offered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace; and

(ii) Does not include bulk cargo, as defined in section 3 of the Shipping Act of 1984 (46 U.S.C. 40102), such as agricultural products and petroleum products.

“Component” means any article, material, or supply incorporated directly into construction material.

“Construction material” means an article, material, or supply brought to the construction site by the Contractor or a subcontractor for incorporation into the building or work. The term also includes an item brought to the site preassembled from articles, materials, or supplies. However, emergency life safety systems, such as emergency lighting, fire alarm, and audio evacuation systems, that are discrete systems incorporated into a public building or work and that are produced as complete systems, are evaluated as a single and distinct construction material regardless of when or how the individual parts or components of those systems are delivered to the construction site. Materials purchased directly by the Government are supplies, not construction material.

“Cost of components” means—

(i) For components purchased by the Contractor, the acquisition cost, including transportation costs to the place of incorporation into the end product (whether or not such costs are paid to a domestic firm), and any applicable duty (whether or not a duty-free entry certificate is issued); or

(ii) For components manufactured by the Contractor, all costs associated with the manufacture of the component, including transportation costs as described in paragraph (1) of this definition, plus allocable overhead costs, but excluding profit. Cost of components does not include any costs associated with the manufacture of the construction material.

“Designated country” means—

(i) A World Trade Organization Government Procurement Agreement (WTO GPA) country (Armenia, Aruba, Australia, Austria, Belgium, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea (Republic of), Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Montenegro, Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Taiwan (known in the World Trade Organization as “the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu” (Chinese Taipei)), Ukraine, or the United Kingdom);

(ii) A Free Trade Agreement country (Australia, Bahrain, Chile, Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Korea (Republic of), Mexico, Morocco, Nicaragua, Panama, Peru, or Singapore);
(iii) A least developed country (Afghanistan, Angola, Bangladesh, Benin, Bhutan, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Haiti, Kiribati, Laos, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mozambique, Nepal, Niger, Rwanda, Samoa, Sao Tome and Principe, Senegal, Sierra Leone, Solomon Islands, Somalia, South Sudan, Tanzania, Timor-Leste, Togo, Tuvalu, Uganda, Vanuatu, Yemen, or Zambia); or

(iv) A Caribbean Basin country (Antigua and Barbuda, Aruba, Bahamas, Barbados, Belize, Bonaire, British Virgin Islands, Curacao, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Saba, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Sint Eustatius, Sint Maarten, or Trinidad and Tobago).

“Designated country construction material” means a construction material that is a WTO GPA country construction material, a Free Trade Agreement country construction material, a least developed country construction material, or a Caribbean Basin country construction material.

“Domestic construction material” means—

(i) An unmanufactured construction material mined or produced in the United States; or

(ii) A construction material manufactured in the United States, if—

(A) The cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. Components of foreign origin of the same class or kind for which nonavailability determinations have been made are treated as domestic; or

(B) The construction material is a COTS item.

“Free Trade Agreement country construction material” means a construction material that—

(i) Is wholly the growth, product, or manufacture of a Free Trade Agreement country; or

(ii) In the case of a construction material that consists in whole or in part of materials from another country, has been substantially transformed in a Free Trade Agreement country into a new and different construction material distinct from the material from which it was transformed.

“Least developed country construction material” means a construction material that—

(i) Is wholly the growth, product, or manufacture of a least developed country; or

(ii) In the case of a construction material that consists in whole or in part of materials from another country, has been substantially transformed in a least
developed country into a new and different construction material distinct from the materials from which it was transformed.

“United States” means the 50 States, the District of Columbia, and outlying areas.

“WTO GPA country construction material” means a construction material that—

(i) Is wholly the growth, product, or manufacture of a WTO GPA country; or

(ii) In the case of a construction material that consists in whole or in part of materials from another country, has been substantially transformed in a WTO GPA country into a new and different construction material distinct from the materials from which it was transformed.

(b) This clause implements the Balance of Payments Program by providing a preference for domestic construction material. In addition, the Contracting Officer has determined that the WTO GPA and all Free Trade Agreements except the United States-Mexico-Canada Agreement and the Bahrain Free Trade Agreement apply to this acquisition. Therefore, the Balance of Payments Program restrictions are waived for designated country construction material other than Bahrainian or Mexican construction material.

(c) The Contractor shall use only domestic or designated country construction material other than Bahrainian or Mexican construction material in performing this contract, except for—

(1) Construction material valued at or below the simplified acquisition threshold in part 2 of the Federal Acquisition Regulation; or

(2) Information technology that is a commercial item; or

(3) The construction material or components listed by the Government as follows:

[Contracting Officer to list applicable excepted materials or indicate “none”].

(End of clause)

Alternate II. (DEVIATION 2020-O0019) As prescribed in 225.7503(b) and (b)(3), use the following clause, which adds “South Caucasus/Central and South Asian (SC/CASA) state” and “SC/CASA state construction material” to paragraph (a), uses a different paragraph (b) and introductory text for paragraph (c) than the basic clause, and adds paragraph (d):

BALANCE OF PAYMENTS PROGRAM—CONSTRUCTION MATERIAL UNDER TRADE AGREEMENTS—ALTERNATE II (DEVIATION 2020-O0019) (JUL 2020)

(a) Definitions. As used in this clause—
“Caribbean Basin country construction material” means a construction material that—

(i) Is wholly the growth, product, or manufacture of a Caribbean Basin country; or

(ii) In the case of a construction material that consists in whole or in part of materials from another country, has been substantially transformed in a Caribbean Basin country into a new and different construction material distinct from the materials from which it was transformed.

“Commercially available off-the-shelf (COTS) item”—

(i) Means any item of supply (including construction material) that is—

(A) A commercial item (as defined in paragraph (1) of the definition of “commercial item” in section 2.101 of the Federal Acquisition Regulation);

(B) Sold in substantial quantities in the commercial marketplace; and

(C) Offered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace; and

(ii) Does not include bulk cargo, as defined in section 3 of the Shipping Act of 1984 (46 U.S.C. 40102), such as agricultural products and petroleum products.

“Component” means any article, material, or supply incorporated directly into construction material.

“Construction material” means an article, material, or supply brought to the construction site by the Contractor or a subcontractor for incorporation into the building or work. The term also includes an item brought to the site preassembled from articles, materials, or supplies. However, emergency life safety systems, such as emergency lighting, fire alarm, and audio evacuation systems, that are discrete systems incorporated into a public building or work and that are produced as complete systems, are evaluated as a single and distinct construction material regardless of when or how the individual parts or components of those systems are delivered to the construction site. Materials purchased directly by the Government are supplies, not construction material.

“Cost of components” means—

(i) For components purchased by the Contractor, the acquisition cost, including transportation costs to the place of incorporation into the end product (whether or not such costs are paid to a domestic firm), and any applicable duty (whether or not a duty-free entry certificate is issued); or

(ii) For components manufactured by the Contractor, all costs associated with the manufacture of the component, including transportation costs as described in paragraph (1) of this definition, plus allocable overhead costs, but excluding profit. Cost
of components does not include any costs associated with the manufacture of the construction material.

“Designated country” means—

(i) A World Trade Organization Government Procurement Agreement (WTO GPA) country (Armenia, Aruba, Australia, Austria, Belgium, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea (Republic of), Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Montenegro, Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Taiwan (known in the World Trade Organization as “the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu” (Chinese Taipei)), Ukraine, or the United Kingdom);

(ii) A Free Trade Agreement country (Australia, Bahrain, Chile, Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Korea (Republic of), Mexico, Morocco, Nicaragua, Panama, Peru, or Singapore);

(iii) A least developed country (Afghanistan, Angola, Bangladesh, Benin, Bhutan, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Haiti, Kiribati, Laos, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mozambique, Nepal, Niger, Rwanda, Samoa, Sao Tome and Principe, Senegal, Sierra Leone, Solomon Islands, Somalia, South Sudan, Tanzania, Timor-Leste, Togo, Tuvalu, Uganda, Vanuatu, Yemen, or Zambia); or

(iv) A Caribbean Basin country (Antigua and Barbuda, Aruba, Bahamas, Barbados, Belize, Bonaire, British Virgin Islands, Curacao, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Saba, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Sint Eustatius, Sint Maarten, or Trinidad and Tobago).

“Designated country construction material” means a construction material that is a WTO GPA country construction material, a Free Trade Agreement country construction material, a least developed country construction material, or a Caribbean Basin country construction material.

“Domestic construction material” means—

(i) An unmanufactured construction material mined or produced in the United States; or

(ii) A construction material manufactured in the United States, if—

(A) The cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. Components of foreign origin of the same class or kind for which nonavailability determinations have been made are treated as domestic; or

(B) The construction material is a COTS item.
“Free Trade Agreement country construction material” means a construction material that—

(i) Is wholly the growth, product, or manufacture of a Free Trade Agreement country; or

(ii) In the case of a construction material that consists in whole or in part of materials from another country, has been substantially transformed in a Free Trade Agreement country into a new and different construction material distinct from the material from which it was transformed.

“Least developed country construction material” means a construction material that—

(i) Is wholly the growth, product, or manufacture of a least developed country; or

(ii) In the case of a construction material that consists in whole or in part of materials from another country, has been substantially transformed in a least developed country into a new and different construction material distinct from the materials from which it was transformed.

“South Caucasus/Central and South Asian (SC/CASA) state” means Armenia, Azerbaijan, Georgia, Kazakhstan, Kyrgyzstan, Pakistan, Tajikistan, Turkmenistan, or Uzbekistan.

“SC/CASA state construction material” means construction material that—

(i) Is wholly the growth, product, or manufacture of an SC/CASA state; or

(ii) In the case of a construction material that consists in whole or in part of materials from another country, has been substantially transformed in an SC/CASA state into a new and different construction material distinct from the material from which it was transformed.

“United States” means the 50 States, the District of Columbia, and outlying areas.

“WTO GPA country construction material” means a construction material that—

(i) Is wholly the growth, product, or manufacture of a WTO GPA country; or

(ii) In the case of a construction material that consists in whole or in part of materials from another country, has been substantially transformed in a WTO GPA country into a new and different construction material distinct from the materials from which it was transformed.

(b) This clause implements the Balance of Payments Program by providing a preference for domestic construction material. In addition, the Contracting Officer has determined that the WTO GPA, Free Trade Agreements, and other waivers relating to acquisitions in support of operations in Afghanistan apply to this
acquisition. Therefore, the Balance of Payments Program restrictions are waived for SC/CASA state and designated country construction materials.

(c) The Contractor shall use only domestic, SC/CASA state, or designated country construction material in performing this contract, except for—

(1) Construction material valued at or below the simplified acquisition threshold in part 2 of the Federal Acquisition Regulation;

(2) Information technology that is a commercial item; or

(3) The construction material or components listed by the Government as follows:

[Contracting Officer to list applicable excepted materials or indicate “none”].

(d) If the Contractor is from an SC/CASA state, the Contractor shall inform its government of its participation in this acquisition and that it generally will not have such opportunity in the future unless its government provides reciprocal procurement opportunities to U.S. products and services and suppliers of such products and services.

(End of clause)

Alternate III. (DEVIATION 2020-O0019) As prescribed in 225.7503(b) and (b)(4), use the following clause, which adds “South Caucasus/Central and South Asian (SC/CASA state” and “SC/CASA state construction material” to paragraph(a), uses a different paragraph (b) and introductory text for paragraph (c) than the basic clause, and adds paragraph (d):

BALANCE OF PAYMENTS PROGRAM—CONSTRUCTION MATERIAL UNDER TRADE AGREEMENTS—ALTERNATE III (DEVIATION 2020-O0019) (JUL 2020)

(a) Definitions. As used in this clause—

“Caribbean Basin country construction material” means a construction material that—

(i) Is wholly the growth, product, or manufacture of a Caribbean Basin country; or

(ii) In the case of a construction material that consists in whole or in part of materials from another country, has been substantially transformed in a Caribbean Basin country into a new and different construction material distinct from the materials from which it was transformed.

“Commercially available off-the-shelf (COTS) item”—

(i) Means any item of supply (including construction material) that is—
(A) A commercial item (as defined in paragraph (1) of the definition of "commercial item" in section 2.101 of the Federal Acquisition Regulation);

(B) Sold in substantial quantities in the commercial marketplace; and

(C) Offered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace; and

(ii) Does not include bulk cargo, as defined in section 3 of the Shipping Act of 1984 (46 U.S.C. 40102), such as agricultural products and petroleum products.

“Component” means any article, material, or supply incorporated directly into construction material.

“Construction material” means an article, material, or supply brought to the construction site by the Contractor or a subcontractor for incorporation into the building or work. The term also includes an item brought to the site preassembled from articles, materials, or supplies. However, emergency life safety systems, such as emergency lighting, fire alarm, and audio evacuation systems, that are discrete systems incorporated into a public building or work and that are produced as complete systems, are evaluated as a single and distinct construction material regardless of when or how the individual parts or components of those systems are delivered to the construction site. Materials purchased directly by the Government are supplies, not construction material.

“Cost of components” means—

(i) For components purchased by the Contractor, the acquisition cost, including transportation costs to the place of incorporation into the end product (whether or not such costs are paid to a domestic firm), and any applicable duty (whether or not a duty-free entry certificate is issued); or

(ii) For components manufactured by the Contractor, all costs associated with the manufacture of the component, including transportation costs as described in paragraph (1) of this definition, plus allocable overhead costs, but excluding profit. Cost of components does not include any costs associated with the manufacture of the construction material.

“Designated country” means—

(i) A World Trade Organization Government Procurement Agreement (WTO GPA) country (Armenia, Aruba, Australia, Austria, Belgium, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea (Republic of), Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Montenegro, Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Taiwan (known in the World Trade Organization as "the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu" (Chinese Taipei)), Ukraine, or the United Kingdom);
(ii) A Free Trade Agreement country (Australia, Bahrain, Chile, Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Korea (Republic of), Mexico, Morocco, Nicaragua, Panama, Peru, or Singapore);

(iii) A least developed country (Afghanistan, Angola, Bangladesh, Benin, Bhutan, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Haiti, Kiribati, Laos, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mozambique, Nepal, Niger, Rwanda, Samoa, Sao Tome and Principe, Senegal, Sierra Leone, Solomon Islands, Somalia, South Sudan, Tanzania, Timor-Leste, Togo, Tuvalu, Uganda, Vanuatu, Yemen, or Zambia); or

(iv) A Caribbean Basin country (Antigua and Barbuda, Aruba, Bahamas, Barbados, Belize, Bonaire, British Virgin Islands, Curacao, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Saba, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Sint Eustatius, Sint Maarten, or Trinidad and Tobago).

“Designated country construction material” means a construction material that is a WTO GPA country construction material, a Free Trade Agreement country construction material, a least developed country construction material, or a Caribbean Basin country construction material.

“Domestic construction material” means—

(i) An unmanufactured construction material mined or produced in the United States; or

(ii) A construction material manufactured in the United States, if—

(A) The cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. Components of foreign origin of the same class or kind for which nonavailability determinations have been made are treated as domestic; or

(B) The construction material is a COTS item.

“Free Trade Agreement country construction material” means a construction material that—

(i) Is wholly the growth, product, or manufacture of a Free Trade Agreement country; or

(ii) In the case of a construction material that consists in whole or in part of materials from another country, has been substantially transformed in a Free Trade Agreement country into a new and different construction material distinct from the material from which it was transformed.

“Least developed country construction material” means a construction material that—
Changes to the text are indicated by a change bar in the right-hand margin.

(i) Is wholly the growth, product, or manufacture of a least developed country; or

(ii) In the case of a construction material that consists in whole or in part of materials from another country, has been substantially transformed in a least developed country into a new and different construction material distinct from the materials from which it was transformed.

“South Caucasus/Central and South Asian (SC/CASA) state” means Armenia, Azerbaijan, Georgia, Kazakhstan, Kyrgyzstan, Pakistan, Tajikistan, Turkmenistan, or Uzbekistan.

“SC/CASA state construction material” means construction material that—

(i) Is wholly the growth, product, or manufacture of an SC/CASA state; or

(ii) In the case of a construction material that consists in whole or in part of materials from another country, has been substantially transformed in an SC/CASA state into a new and different construction material distinct from the material from which it was transformed.

“United States” means the 50 States, the District of Columbia, and outlying areas.

“WTO GPA country construction material” means a construction material that—

(i) Is wholly the growth, product, or manufacture of a WTO GPA country; or

(ii) In the case of a construction material that consists in whole or in part of materials from another country, has been substantially transformed in a WTO GPA country into a new and different construction material distinct from the materials from which it was transformed.

(b) This clause implements the Balance of Payments Program by providing a preference for domestic construction material. In addition, the Contracting Officer has determined that the WTO GPA, all Free Trade Agreements except the United States-Mexico-Canada Agreement and the Bahrain Free Trade Agreement, and other waivers relating to acquisitions in support of operations in Afghanistan apply to this acquisition. Therefore, the Balance of Payments Program restrictions are waived for SC/CASA state and designated country construction material other than Bahrainian or Mexican construction material.

(c) The Contractor shall use only domestic, SC/CASA state, or designated country construction material other than Bahrainian or Mexican construction material in performing this contract, except for—

(1) Construction material valued at or below the simplified acquisition threshold in part 2 of the Federal Acquisition Regulation;

(2) Information technology that is a commercial item; or
(3) The construction material or components listed by the Government as follows:

[Contracting Officer to list applicable excepted materials or indicate “none”].

(d) If the Contractor is from an SC/CASA state, the Contractor shall inform its government of its participation in this acquisition and that it generally will not have such opportunity in the future unless its government provides reciprocal procurement opportunities to U.S. products and services and suppliers of such products and services.

(End of clause)
MEMORANDUM FOR COMMANDER, UNITED STATES CYBER
COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES SPECIAL OPERATIONS
COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES TRANSPORTATION
COMMAND (ATTN: ACQUISITION EXECUTIVE)
DEPUTY ASSISTANT SECRETARY OF THE ARMY
(PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE NAVY
(PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE
(CONTRACTING)
DIRECTORS, DEFENSE AGENCIES
DIRECTORS, DEFENSE FIELD ACTIVITIES

SUBJECT: Class Deviation—Prohibition on Use of Certain Energy Sourced from Inside the Russian Federation

Effective immediately, unless a waiver is granted, contracting officers shall not award a contract for the acquisition of furnished energy for a covered military installation, if the contract uses any energy sourced from inside the Russian Federation as a means of generating the furnished energy for the covered military installation. For the purposes of this deviation—

- “Covered military installation” means a military installation in Europe identified by the Department of Defense as a main operating base; and
- “Furnished energy” means energy furnished to a covered military installation in any form and for any purpose, including heating, cooling, and electricity.

Contracting officers shall use the solicitation provision provided in Attachment 1 and the contract clause provided in Attachment 2, as prescribed in the attachments.

This class deviation implements section 2821 of the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116-92). The head of the agency may waive application of this prohibition to a specific contract for furnished energy, if the head of the agency certifies to the congressional defense committees that—

- Waiver of the prohibition requirements is necessary to ensure an adequate supply of furnished energy for the covered military installation; and
• The official has balanced these national security requirements against the potential risk associated with reliance upon the Russian Federation for furnished energy.

If a waiver has been granted for a contract for furnished energy, not later than 14 days prior to entering into the contract, the official granting the waiver shall submit notice of the waiver to the congressional defense committees with a copy to the Principal Director of Defense Pricing and Contracting via email at osd.pentagon.ousd-a-s.mbx.dpc-cp@mail.mil. The waiver notice shall include—

• The rationale for the waiver, including the basis for the above certifications;

• An assessment of how the waiver may impact the European energy resiliency strategy; and

• An explanation of the measures the Department of Defense is taking to mitigate the risk of using Russian Federation furnished energy.

The contracting officer shall obtain a copy of the waiver and notice from the requiring activity or program manager prior to awarding the contract and include a copy of the waiver and notice in the contract file.

This class deviation remains in effect until it is incorporated in the Defense Federal Acquisition Regulation Supplement, or is otherwise rescinded. My point of contact is Mr. Jeff Grover, who is available at 703-697-9352 or jeffrey.c.grover.civ@mail.mil.

Kim Herrington
Acting Principal Director,
Defense Pricing and Contracting

Attachment:
As stated
252.225-7971 Prohibition on Use of Certain Energy Sourced from Inside the Russian Federation—Representation. (DEVIATION 2020-O0018)

Use the following provision in solicitations for the acquisition of furnished energy for a covered military installation, including solicitations using FAR part 12 procedures for the acquisition of commercial items, unless a waiver has been granted by the head of agency in accordance with section 2821 of the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116-92):

PROHIBITION ON USE OF CERTAIN ENERGY SOURCED FROM INSIDE THE RUSSIAN FEDERATION—REPRESENTATION (DEVIATION 2020-O0018) (MAY 2020)

(a) Definitions. As used in this clause—

“Covered military installation” means a military installation in Europe identified by the Department of Defense as a main operating base; and

“Furnished energy” means energy furnished to a covered military installation in any form and for any purpose, including heating, cooling, and electricity.

(b) Prohibition. Section 2821 of the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116-92) prohibits contracting officers from entering into a contract for the acquisition of furnished energy for a covered military installation that uses any energy sourced from inside the Russian Federation as a means of generating the furnished energy for the covered military installation.

(c) Representation. By submission of its offer, the Offeror represents that the Offeror will not use any energy sourced from inside the Russian Federation as a means of generating the furnished energy for the covered military installation in the performance of any contract, subcontract, or other contractual instrument resulting from this solicitation.

(End of provision)
252.225-7970  Prohibition on Use of Certain Energy Sourced from Inside the Russian Federation. (DEVIATION 2020-O0018)

Use the following clause in solicitations and contracts for the acquisition of furnished energy for a covered military installation, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, unless a waiver has been granted by the head of agency in accordance with section 2821 of the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116-92):

PROHIBITION ON USE OF CERTAIN ENERGY SOURCED FROM INSIDE THE RUSSIAN FEDERATION (DEVIATION 2020-O0018) (MAY 2020)

(a) Definitions. As used in this clause—

“Covered military installation” means a military installation in Europe identified by the Department of Defense as a main operating base; and

“Furnished energy” means energy furnished to a covered military installation in any form and for any purpose, including heating, cooling, and electricity.

(b) Prohibition. In accordance with section 2821 of the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116-92), the Contractor shall not use in the performance of this contract any energy sourced from inside the Russian Federation as a means of generating the furnished energy for the covered military installation.

(c) Subcontracts. The Contractor shall insert the substance of this clause, including this paragraph (c), in subcontracts and other contractual instruments that are for furnished energy at a covered military installation, including subcontracts and other contractual instruments for commercial items.

(End of clause)
MEMORANDUM FOR COMMANDER, UNITED STATES CYBER
COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES SPECIAL OPERATIONS
COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES TRANSPORTATION
COMMAND (ATTN: ACQUISITION EXECUTIVE)
DEPUTY ASSISTANT SECRETARY OF THE ARMY
(PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE NAVY
(PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE
(CONTRACTING)
DIRECTORS, DEFENSE AGENCIES
DIRECTORS, DEFENSE FIELD ACTIVITIES

SUBJECT: Class Deviation—Acquisition of Dinnerware or Stainless Steel Flatware

For contracts to be awarded after December 20, 2020, contracting officers shall incorporate the attached clause in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, that are for the acquisition of dinnerware or stainless steel flatware and have an estimated value that exceeds the simplified acquisition threshold, unless the dinnerware or stainless steel flatware meet an exception.

This class deviation implements section 854 of the National Defense Authorization Act for Fiscal Year 2020. Section 854 adds dinnerware and stainless steel flatware to the list of covered items at 10 U.S.C. 2533a (commonly known as the “Berry Amendment”), paragraph (b). With some exceptions, covered items under the Berry Amendment may not be procured with funds appropriated or otherwise available if the items are not grown, reprocessed, reused, or produced in the United States.

This class deviation remains in effect until it is otherwise rescinded or until the statutory sunset date of September 30, 2023. My point of contact is Mr. Jeff Grover, who is available at 703-697-9352 or jeffrey.c.grover.civ@mail.mil.
252.225-7969 Acquisition of Dinnerware and Stainless Steel Flatware. (DEVIATION 2020-O0017)

Use the following clause in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for acquisition of commercial items, that are for acquisition of dinnerware or stainless steel flatware with an estimated value that exceeds the simplified acquisition threshold, if the contract is to be awarded after December 20, 2020, and before September 23, 2023, unless the dinnerware or stainless steel flatware is for—

(a) Acquisitions outside the United States in support of combat operations;

(b) Acquisitions by vessels in foreign waters;

(c) Emergency acquisitions by activities located outside the United States for the personnel of such activities; or

(d) Commissary resale.

ACQUISITION OF DINNERWARE AND STAINLESS STEEL FLATWARE (DEVIATION 2020-O0017) (JUN 2020)

(a) Definitions. As used in this clause, “United States” means the 50 States, the District of Columbia, and outlying areas.

(b) Requirement. Any dinnerware or stainless steel flatware delivered under this contract shall be produced in the United States, consistent with the requirements at 10 U.S.C. 2533a (commonly known as the “Berry Amendment”).

(c) Subcontracts. The Contractor shall include the substance of this clause, including this paragraph (c), in subcontracts, including subcontracts for commercial items, that are for the acquisition of dinnerware or stainless steel flatware.

(End of clause)
MEMORANDUM FOR COMMANDER, UNITED STATES CYBER COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES SPECIAL OPERATIONS COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES TRANSPORTATION COMMAND (ATTN: ACQUISITION EXECUTIVE)
DEPUTY ASSISTANT SECRETARY OF THE ARMY (PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE NAVY (PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE (CONTRACTING)
DIRECTORS, DEFENSE AGENCIES
DIRECTORS, DEFENSE FIELD ACTIVITIES

SUBJECT: Class Deviation—Original Documents, Signatures, Seals, and Notarization

Effective immediately, to respond to the Coronavirus Disease 2019 (COVID-19) national emergency, contracting officers shall utilize the deviations from the Federal Acquisition Regulation (FAR) and the Defense Federal Acquisition Regulation Supplement (DFARS) authorized in attachments 1 and 2, respectively, to provide flexibility with regard to original documents, manual signatures, seals, and notarization in order to facilitate certain essential contracting procedures.

Specifically, when obtaining financial protection against losses under contracts per FAR part 28—

- Electronic signatures and electronic, mechanically-applied, or printed dates may be used and shall be considered original signatures and dates, without regard to the order in which they are affixed for all of part 28, not just 28.101-3;
- A corporate seal is not required on any form listed at FAR 28.106-1;
- The signed statement by the contractor that payment is due and owed referenced at FAR 28.106-8 is not required to be notarized;
- The Standard Form 28 executed by the individual surety pursuant to FAR 28.203(b) is not required to be sworn and notarized as indicated on the form;
- A written authorization of the release signed by the surety is acceptable, in lieu of the notarized authorization of release by the surety required by FAR 28.203-5(a); and
- Use the following deviation clauses, in lieu of the corresponding FAR clauses:
  - 52.228-11, Pledges of Assets (DEVIATION 2020-O0016), which removes the requirement for the Standard Form 28 to be sworn and notarized.
Class Deviation 2020-O0016

Original Documents, Signatures, Seals, and Notarization

- 52.228-15, Performance and Payment Bonds—Construction (DEVIATION 2020-O0016), which removes the requirements for seals on Standard Forms.
- 52.228-16, Performance and Payment Bonds—Other than Construction (DEVIATION 2020-O0016), which removes requirements for seals on Standard Forms.

When processing assignment of claims per FAR subpart 32.8—
- A copy of the assignment instrument is acceptable, in lieu of a true copy of the assignment instrument as required by FAR 32.802(e); and
- Electronic signatures by responsible parties and electronic filing of assignment instruments and notices of assignments as outlined in attachments 1 and 2 are acceptable, in lieu of the requirements at FAR 32.805 and DFARS 232.805.

When executing novation agreements and change-of-name agreements per FAR part 42—
- Copies of the documents listed at FAR 42.1204(f) are acceptable in lieu of authenticated or certified copies; and
- Novation Agreements as described at FAR 42.1204(i) and Change-of-Name Agreements as described at FAR 42.1205(b) do not require corporate seals.

This class deviation remains in effect until rescinded. My point of contact is Larry McLaury, who is available by telephone at 703-697-6710 or by email at Larry.j.mclaury2.civ@mail.mil.

Kim Herrington
Acting Principal Director,
Defense Pricing and Contracting

Attachments:
As stated
FEDERAL ACQUISITION REGULATION

PART 28—BONDS AND INSURANCE

* * * *

28.002 Policy. (DEVIATION 2020-O0016)
For purposes of this part, electronic signatures and electronic, mechanically-applied, or printed dates may be used and shall be considered original signatures and dates, without regard to the order in which they were affixed.

SUBPART 28.1—BONDS AND OTHER FINANCIAL PROTECTIONS

* * * *

28.106 Administration.

28.106-1 Bonds and bond-related forms. (DEVIATION 2020-O0016)
The following Standard Forms (SF’s) and Optional Forms (OF’s), shall be used, except in foreign countries, when a bid bond, performance or payment bond, or an individual surety is required. The bond forms shall be used as indicated in the instruction portion of each form, except that a seal is not required. For SF 28 also see 28.203(b).

* * * *

28.106-8 Payment to subcontractors or suppliers. (DEVIATION 2020-O0016)
The contracting officer will only authorize payment to subcontractors or suppliers from an ILC (or any other cash equivalent security) upon a judicial determination of the rights of the parties, a signed statement by the contractor that the payment is due and owed, or a signed agreement between the parties as to amount due and owed.

* * * *

SUBPART 28.2—SURETIES AND OTHER SECURITY FOR BONDS

* * * *
28.203 Acceptability of individual sureties. (DEVIATION 2020-O0016)

* * * * *

(b) An individual surety must execute the bond, and the unencumbered value of the assets (exclusive of all outstanding pledges for other bond obligations) pledged by the individual surety, must equal or exceed the penal amount of each bond. The individual surety shall provide a security interest in accordance with 28.203-1 and execute the Standard Form 28, except that the words “being duly sworn, depose and say” on the Standard Form 28 are replaced with the word “affirm” and such Standard Form 28 is not required to be sworn and notarized. One individual surety is adequate support for a bond, provided the unencumbered value of the assets pledged by that individual surety equal or exceed the amount of the bond. An offeror may submit up to three individual sureties for each bond, in which case the pledged assets, when combined, must equal or exceed the penal amount of the bond. Each individual must accept both joint and several liability to the extent of the penal amount of the bond.

* * * * *

28.203-5 Release of lien. (DEVIATION 2020-O0016)

(a) After consultation with legal counsel, the contracting officer shall release the security interest on the individual surety’s assets using the Optional Form 90, Release of Lien on Real Property, or Optional Form 91, Release of Personal Property from Escrow, or a similar release as soon as possible consistent with the conditions in subparagraphs (a)(1) and (2) of this subsection. A surety’s assets pledged in support of a payment bond may be released to a subcontractor or supplier upon Government receipt of a Federal district court judgment, or a sworn statement by the subcontractor or supplier that the claim is correct along with a written authorization of the release signed by the surety saying that it approves of such release.

* * * * *

PART 32 – CONTRACT FINANCING
SUBPART 32.8 – ASSIGNMENT OF CLAIMS

32.802 Conditions. (DEVIATION 2020-00016)

(e) The assignee sends a written notice of assignment together with a copy of the assignment instrument to the—

(1) Contracting officer or the agency head;

(2) Surety on any bond applicable to the contract; and

(3) Disbursing officer designated in the contract to make payment.

32.805 Procedure. (DEVIATION 2020-00016)

(a) Assignments.

(1) Assignments by corporations shall be—

(i) Signed by an authorized representative;

(ii) Signed by the secretary or the assistant secretary of the corporation; and

(iii) Accompanied by a copy of the resolution of the corporation’s board of directors authorizing the signing representative to sign the assignment.

(3) Assignments by an individual shall be signed by that individual.
(b) **Filing.** The assignee shall forward by email or other electronic means the notice of assignment and a copy of the instrument of assignment to each party specified in 32.802(e). See DFARS 232.805 (DEVIATION 2020-00016).

(c) **Format for notice of assignment.** The following is a suggested format for use by an assignee in providing the notice of assignment required by 32.802(e).

**Notice of Assignment**

To: _______ [Name, address and email address for one of the parties specified in 32.802(e)].

This has reference to Contract No. _______ dated _______, entered into between _______ [Contractor’s name and address] and _______ [Government agency, name of office, and address], for _______ [Describe nature of the contract].

Monies due or to become due under the contract described above have been assigned to the undersigned under the provisions of the Assignment of Claims Act of 1940, as amended, (31 U.S.C. 3727, 41 U.S.C. 6305).

A copy of the instrument of assignment executed by the Contractor on _______ [Date], is attached to this notice.

Payments due or to become due under this contract should be made to the undersigned assignee.

Please acknowledge receipt on behalf of the addressee by return email or other electronic means to the undersigned.

Very truly yours,

[Name of Assignee]

By ______________________ [Signature of Signing Officer]

________________________________ [Title of Signing Officer]

________________________________ [Address of Assignee]

________________________________ [Email Address of Assignee]
(e) **Release of assignment.**

(2) The assignee, under a further assignment or reassignment, in order to establish a right to receive payment from the Government, must send to the addressees listed in 32.802(e) a-

   (i) Written notice of release of the contractor by the assigning financing institution;

   (ii) Copy of the release instrument;

   (iii) Written notice of the further assignment or reassignment; and

   (iv) Copy of the further assignment or reassignment instrument.

(3) If the assignee releases the contractor from an assignment of claims under a contract, the contractor, in order to establish a right to receive payment of the balance due under the contract, must send a written notice of release together with a copy of the release of assignment instrument to the addressees noted in 32.802(e).
(f) Except as provided in paragraph (g) of this section, the contractor shall submit to the responsible contracting officer one copy of each of the following documents, as applicable, as the documents become available:

(1) A copy of the instrument effecting the transfer of assets; e.g., bill of sale, certificate of merger, contract, deed, agreement, or court decree.

(2) A copy of each resolution of the corporate parties’ boards of directors authorizing the transfer of assets.

(3) A copy of the minutes of each corporate party’s stockholder meeting necessary to approve the transfer of assets.

(4) A copy of the transferee’s certificate and articles of incorporation, if a corporation was formed for the purpose of receiving the assets involved in performing the Government contracts.

* * * * *

(i) The responsible contracting officer shall use the following format for agreements when the transferor and transferee are corporations and all the transferor’s assets are transferred. This format may be adapted to fit specific cases and may be used as a guide in preparing similar agreements for other situations.

NOVATION AGREEMENT

* * * * *

(b) * * *

(9) The contracts shall remain in full force and effect, except as modified by this Agreement. Each party has executed this Agreement as of the day and year first above written.

UNITED STATES OF AMERICA,

By
Title

Page 6 of 13
ABC Corporation,
By ____________________________________________
Title __________________________________________

XYZ Corporation,
By ____________________________________________
Title __________________________________________

CERTIFICATE

I, ____________, certify that I am the Secretary of ABC Corporation, that ________________, who signed this Agreement for this corporation, was then _____________ of this corporation; and that this Agreement was duly signed for and on behalf of this corporation by authority of its governing body and within the scope of its corporate powers.

Witness my hand this day of __________________ 20 ___.
By ____________________________________________

CERTIFICATE

I, ____________, certify that I am the Secretary of XYZ Corporation, that ________________, who signed this Agreement for this corporation, was then _____________ of this corporation; and that this Agreement was duly signed for and on behalf of this corporation by authority of its governing body and within the scope of its corporate powers.

Witness my hand this day of ____________________20 ___.
By ____________________________________________

* * * * *

42.1205 Agreement to recognize contractor’s change of name.
(DEVIATION 2020-00016)

* * * * *

(b) * * *

CHANGE-OF-NAME AGREEMENT

* * * * *

(b) In consideration of these facts, the parties agree that-
(1) The contracts covered by this Agreement are amended by substituting the name “ABC Corporation” for the name “XYZ Corporation” wherever it appears in the contracts; and

(2) Each party has executed this Agreement as of the day and year first above written.

UNITED STATES OF AMERICA,

By ____________________________________________
Title  __________________________________________

ABC CORPORATION,

By ____________________________________________
Title  __________________________________________

CERTIFICATE

I, __________, certify that I am the Secretary of ABC Corporation; that __________, who signed this Agreement for this corporation, was then _________ of this corporation; and that this Agreement was duly signed for and on behalf of this corporation by authority of its governing body and within the scope of its corporate powers.

Witness my hand this _______ day of ____________ 20___.

By ____________________________________________

* * * * *

PART 52 – SOLICITATION PROVISIONS AND CONTRACT CLAUSES

* * * * *

52.228-11 Pledges of Assets. (DEVIATION 2020-O0016)
As prescribed in 28.203-6, insert the following clause:

PLEDGES OF ASSETS (APR 2020)(DEVIATION 2020-O0016)

(a) Offerors shall obtain from each person acting as an individual surety on a bid guarantee, a performance bond, or a payment bond—
(1) Pledge of assets; and

(2) Standard Form 28, Affidavit of Individual Surety, except that the words “being duly sworn, depose and say” on the Standard Form 28 are replaced with the word “affirm” and the Standard Form 28 is not required to be sworn and notarized in block 12.

(b) Pledges of assets from each person acting as an individual surety shall be in the form of—

(1) Evidence of an escrow account containing cash, certificates of deposit, commercial or Government securities, or other assets described in FAR 28.203-2 (except see 28.203-2(b)(2) with respect to Government securities held in book entry form); and/or

(2) A recorded lien on real estate. The offeror will be required to provide—

   (i) A mortgagee title insurance policy, in an insurance amount equal to the amount of the lien, or other evidence of title that is consistent with the requirements of Section 2 of the United States Department of Justice Title Standards at https://www.justice.gov/enrd/page/file/922431/download. This title evidence must show fee simple title vested in the surety along with any concurrent owners; whether any real estate taxes are due and payable; and any recorded encumbrances against the property, including the lien filed in favor of the Government as required by FAR 28.203-3(d);

   (ii) Evidence of the amount due under any encumbrance shown in the evidence of title;

   (iii) A copy of the current real estate tax assessment of the property or a current appraisal dated no earlier than 6 months prior to the date of the bond, prepared by a professional appraiser who certifies that the appraisal has been conducted in accordance with the generally accepted appraisal standards as reflected in the Uniform Standards of Professional Appraisal Practice, as promulgated by the Appraisal Foundation.

(End of clause)
52.228-15 Performance and Payment Bonds—Construction.
As prescribed in 28.102-3(a), insert a clause substantially as follows:

PERFORMANCE AND PAYMENT BONDS—CONSTRUCTION (APR 2020) (DEVIATION 2020-O0016)

(a) Definitions. As used in this clause—

Original contract price means the award price of the contract; or, for requirements contracts, the price payable for the estimated total quantity; or, for indefinite-quantity contracts, the price payable for the specified minimum quantity. Original contract price does not include the price of any options, except those options exercised at the time of contract award.

(b) Amount of required bonds. Unless the resulting contract price is $150,000 or less, the successful offeror shall furnish performance and payment bonds to the Contracting Officer as follows:

(1) Performance bonds (Standard Form 25, except that no seal is required). The penal amount of performance bonds at the time of contract award shall be 100 percent of the original contract price.

(2) Payment bonds (Standard Form 25A, except that no seal is required). The penal amount of payment bonds at the time of contract award shall be 100 percent of the original contract price.

(3) Additional bond protection.

(i) The Government may require additional performance and payment bond protection if the contract price is increased. The increase in protection generally will equal 100 percent of the increase in contract price.

(ii) The Government may secure the additional protection by directing the Contractor to increase the penal amount of the existing bond or to obtain an additional bond.
(c) **Furnishing executed bonds.** The Contractor shall furnish all executed bonds, including any necessary reinsurance agreements, to the Contracting Officer, within the time period specified in the Bid Guarantee provision of the solicitation, or otherwise specified by the Contracting Officer, but in any event, before starting work.

(d) **Surety or other security for bonds.** The bonds shall be in the form of firm commitment, supported by corporate sureties whose names appear on the list contained in Treasury Department Circular 570, individual sureties, or by other acceptable security such as postal money order, certified check, cashier's check, irrevocable letter of credit, or, in accordance with Treasury Department regulations, certain bonds or notes of the United States. Treasury Circular 570 is published in the Federal Register or may be obtained from the U.S. Department of the Treasury, Financial Management Service, Surety Bond Branch, 3700 East West Highway, Room 6F01, Hyattsville, MD 20782. Or via the internet at [http://www.fms.treas.gov/c570/](http://www.fms.treas.gov/c570/).

(e) **Notice of subcontractor waiver of protection (40 U.S.C. 3133(c)).** Any waiver of the right to sue on the payment bond is void unless it is in writing, signed by the person whose right is waived, and executed after such person has first furnished labor or material for use in the performance of the contract.

(End of clause)

* * * * *

**52.228-16 Performance and Payment Bonds—Other Than Construction.**

As prescribed in 28.103-4, insert a clause substantially as follows:

PERFORMANCE AND PAYMENT BONDS—OTHER THAN CONSTRUCTION (APR 2020)

(DEVIATION 2020-00016)

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

Original contract price means the award price of the contract or, for requirements contracts, the price payable for the estimated quantity; or, for indefinite-quantity contracts, the price payable for the specified minimum quantity. Original contract price does not include the price of any options, except those options exercised at the time of contract award.
(b) The Contractor shall furnish a performance bond (Standard Form 1418), except that a seal is not required) for the protection of the Government in an amount equal to ______ percent of the original contract price and a payment bond (Standard Form 1416, except that a seal is not required) in an amount equal to ______ percent of the original contract price.

(c) The Contractor shall furnish all executed bonds, including any necessary reinsurance agreements, to the Contracting Officer, within __ days, but in any event, before starting work.

(d) The Government may require additional performance and payment bond protection if the contract price is increased. The Government may secure the additional protection by directing the Contractor to increase the penal amount of the existing bonds or to obtain additional bonds.

(e) The bonds shall be in the form of firm commitment, supported by corporate sureties whose names appear on the list contained in Treasury Department Circular 570, individual sureties, or by other acceptable security such as postal money order, certified check, cashier's check, irrevocable letter of credit, or, in accordance with Treasury Department regulations, certain bonds or notes of the United States. Treasury Circular 570 is published in the Federal Register, or may be obtained from the U.S. Department of the Treasury, Financial Management Service, Surety Bond Branch, 3700 East West Highway, Room 6F01, Hyattsville, MD 20782. Or via the internet at http://www.fms.treas.gov/c570/.

(End of clause)

Alternate I (APR 2020) (2020-00016). As prescribed in 28.103-4, substitute the following paragraphs (b) and (d) for paragraphs (b) and (d) of the basic clause:

(b) The Contractor shall furnish a performance bond (Standard Form 1418, except that a seal is not required) for the protection of the Government in an amount equal to ______ percent of the original contract price.
(d) The Government may require additional performance bond protection if the contract price is increased. The Government may secure the additional protection by directing the Contractor to increase the penal amount of the existing bond or to obtain an additional bond.
DEFENSE FEDERAL ACQUISITION REGULATION SUPPLEMENT

PART 232—ASSIGNMENT OF CLAIMS

* * * * *

SUBPART 232.8—ASSIGNMENT OF CLAIMS

* * * * *

232.805 Procedure. (DEVIATION 2020-O0016)

(b) The assignee shall forward by email or other electronic means, the notice of assignment and a copy of the instrument of assignment—

(i) To the administrative contracting officer (ACO). The ACO shall acknowledge receipt by signing and dating the notice of assignment and shall—

(A) File the copy of the instrument of assignment and signed and dated notice in the contract file;

(B) Forward a copy of the signed and dated notice to the disbursing officer of the payment office cited in the contract;

(C) Return a copy of the signed and dated notice to the assignee; and

(D) Advise the contracting officer of the assignment;

(ii) To the surety or sureties, if any. The surety shall acknowledge receipt by signing and dating the notice of assignment and shall return a copy of the signed and dated notice to the assignee, who shall forward a copy to the disbursing officer designated in the contract.

(iii) To the disbursing officer of the payment office cited in the contract. The disbursing officer shall acknowledge receipt by signing and dating the notice of assignment and return to the assignee the copy of the signed and dated notice and shall file the copy of the instrument and original notice.

* * * * *
MEMORANDUM FOR COMMANDER, UNITED STATES CYBER COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES SPECIAL OPERATIONS COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES TRANSPORTATION COMMAND (ATTN: ACQUISITION EXECUTIVE)
DEPUTY ASSISTANT SECRETARY OF THE ARMY (PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE NAVY (PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE (CONTRACTING)
DIRECTORS, DEFENSE AGENCIES
DIRECTORS, DEFENSE FIELD ACTIVITIES

SUBJECT: Class Deviation—Prohibition on Procurement of Foreign-Made Unmanned Aircraft Systems

Effective immediately, unless an exception applies or a waiver is granted, contracting officers shall not enter into or renew a contract for the procurement of—

- An unmanned aircraft system (UAS), or any related services or equipment, that—
  - Is manufactured in the People’s Republic of China or by an entity domiciled in the People’s Republic of China;
  - Uses flight controllers, radios, data transmission devices, cameras, or gimbals manufactured in the People’s Republic of China or by an entity domiciled in the People’s Republic of China;
  - Uses a ground control system or operating software developed in the People’s Republic of China or by an entity domiciled in the People’s Republic of China; or
  - Uses network connectivity or data storage located in, or administered by an entity domiciled in, the People’s Republic of China; or

- A system for the detection or identification of a UAS, or any related services or equipment, that is manufactured—
  - In the People’s Republic of China; or
  - By an entity domiciled in the People’s Republic of China.
This prohibition does not apply to procurements for the purposes of: counter-UAS surrogate testing and training; or intelligence, electronic warfare, and information warfare operations, testing, analysis, and training.

Contracting officers shall use the solicitation provision provided in Attachment 1 and the contract clause provided in Attachment 2, as prescribed in the attachments.

This class deviation implements the procurement prohibition under section 848 of the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116-92). Pursuant to section 848, the Secretary of Defense may waive the prohibition on a case-by-case basis by certifying in writing to the congressional defense committees that the procurement is required in the national interest of the United States. If a waiver has been granted for a specific acquisition in accordance with section 848, the contracting officer shall obtain a copy of the waiver from the requiring activity or program manager prior to making the award. A copy of the approved waiver shall be included in the contract file.

This class deviation remains in effect until it is incorporated in the Defense Federal Acquisition Regulation Supplement or otherwise rescinded. My point of contact is Mr. Jeff Grover, who is available at (703) 697-9352 or jeffrey.c.grover.civ@mail.mil.

Kim Herrington
Acting Principal Director,
Defense Pricing and Contracting

Use the following provision in solicitations, including solicitations using FAR part 12 procedures for the acquisition of commercial items, unless—

(a) The acquisition is for—

(1) Counter-unmanned aircraft system surrogate testing and training; or

(2) Intelligence, electronic warfare, and information warfare operations, texting, analysis, and training; or

(b) A waiver has been granted by the Secretary of Defense in accordance with section 848 of the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116-92).

PROHIBITION ON THE PROCUREMENT OF FOREIGN-MADE UNMANNED AIRCRAFT SYSTEMS—REPRESENTATION (MAY 2020) (DEVIATION 2020-O0015)

(a) Prohibition. Section 848 of the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116-92) prohibits DoD from using or procuring—

(1) An unmanned aircraft system (UAS), or any related services or equipment, that—

   (i) Is manufactured in the People’s Republic of China or by an entity domiciled in the People’s Republic of China;

   (ii) Uses flight controllers, radios, data transmission devices, cameras, or gimbals manufactured in the People’s Republic of China or by an entity domiciled in the People’s Republic of China;

   (iii) Uses a ground control system or operating software developed in the People’s Republic of China or by an entity domiciled in the People’s Republic of China; or

   (iv) Uses network connectivity or data storage located in, or administered by an entity domiciled in, the People’s Republic of China; or

(2) A system for the detection or identification of a UAS, or any related services or equipment, that is manufactured—
(i) In the People’s Republic of China; or

(ii) By an entity domiciled in the People’s Republic of China.

(b) Representations. By submission of its offer, the Offeror represents that it will not provide or use—

(1) A UAS, as described in paragraph (a)(1) of this provision, in the performance of any contract, subcontract, or other contractual instrument resulting from this solicitation; and

(2) A system for the detection or identification of a UAS, as described in paragraph (a)(2) of this provision, in the performance of any contract, subcontract, or other contractual instrument resulting from this solicitation.

(End of provision)

Use the following clause in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, unless—

(a) The acquisition is for—

(1) Counter-unmanned aircraft system surrogate testing and training; or

(2) Intelligence, electronic warfare, and information warfare operations, texting, analysis, and training; or

(b) A waiver has been granted by the Secretary of Defense in accordance with section 848 of the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116-92).

PROHIBITION ON THE PROCUREMENT OF FOREIGN-MADE UNMANNED AIRCRAFT SYSTEMS (MAY 2020) (DEVIATION 2020-O0015)

(a) Prohibition. In accordance with section 848 of the National Defense Authorization Act for Fiscal Year 2020, the Contractor shall not provide or use in the performance of this contract—

(1) An unmanned aircraft system (UAS), or any related services or equipment, that—

   (i) Is manufactured in the People’s Republic of China or by an entity domiciled in the People’s Republic of China;

   (ii) Uses flight controllers, radios, data transmission devices, cameras, or gimbals manufactured in the People’s Republic of China or by an entity domiciled in the People’s Republic of China;

   (iii) Uses a ground control system or operating software developed in the People’s Republic of China or by an entity domiciled in the People’s Republic of China; or

   (iv) Uses network connectivity or data storage located in, or administered by an entity domiciled in, the People’s Republic of China; or

(2) A system for the detection or identification of a UAS, or any related services or equipment, that is manufactured—
(i) In the People’s Republic of China; or

(ii) By an entity domiciled in the People’s Republic of China.

(b) Subcontracts. The Contractor shall insert the substance of this clause, including this paragraph (b), in all subcontracts or other contractual instruments, including subcontracts for the acquisition of commercial items.

(End of clause)
MEMORANDUM FOR COMMANDER, UNITED STATES CYBER COMMAND (ATTN: ACQUISITION EXECUTIVE)  
COMMANDER, UNITED STATES SPECIAL OPERATIONS COMMAND (ATTN: ACQUISITION EXECUTIVE)  
COMMANDER, UNITED STATES TRANSPORTATION COMMAND (ATTN: ACQUISITION EXECUTIVE)  
DEPUTY ASSISTANT SECRETARY OF THE ARMY (PROCUREMENT)  
DEPUTY ASSISTANT SECRETARY OF THE NAVY (PROCUREMENT)  
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE (CONTRACTING)  
DIRECTORS, DEFENSE AGENCIES  
DIRECTORS, DEFENSE FIELD ACTIVITIES

SUBJECT: Class Deviation 2020-O0014—Flexibilities for Electronic Delivery of Information Related to Suspensions and Debarments

Effective immediately, in response to the Novel Coronavirus Disease 2019 (COVID-19) outbreak, debarring and suspending officials may deviate from the requirements at Federal Acquisition Regulation (FAR) 9.406-3(c) and (e) and 9.407-3(c) and (d)(4) to provide notices of proposed debarment or suspension and debarring and suspension official decisions to contractors via certified mail, return receipt requested. In addition to these forms of notification, debarring and suspending officials are also authorized to provide such notices and decisions to contractors electronically via e-mail and/or secure file exchange service.

Initial notices of suspension or proposed debarment sent via email shall make available copies of the record which formed the basis for the decision, as required by Defense Federal Acquisition Regulation Supplement (DFARS) Appendix H-101. In addition, as a deviation to the above provisions of the FAR, suspending and debarring officials shall include instructions for a contractor to present matters in opposition or evidence relevant to the facts, as authorized by DFARS Appendix H-103 and H-104, either in writing via mail or email or in person or through a representative and, as deemed appropriate by the suspending and debarring official, via telephone or video-teleconference.

This class deviation remains in effect until rescinded. My point of contact is Mr. Jeff Grover, who is available at 703-697-9352 or jeffrey.c.grover.civ@mail.mil.

Kim Herrington  
Acting Principal Director,  
Defense Pricing and Contracting
MEMORANDUM FOR COMMANDER, UNITED STATES CYBER COMMAND (ATTN: ACQUISITION EXECUTIVE) COMMANDER, UNITED STATES SPECIAL OPERATIONS COMMAND (ATTN: ACQUISITION EXECUTIVE) COMMANDER, UNITED STATES TRANSPORTATION COMMAND (ATTN: ACQUISITION EXECUTIVE) DEPUTY ASSISTANT SECRETARY OF THE ARMY (PROCUREMENT) DEPUTY ASSISTANT SECRETARY OF THE NAVY (PROCUREMENT) DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE (CONTRACTING) DIRECTORS, DEFENSE AGENCIES DIRECTORS, DEFENSE FIELD ACTIVITIES

SUBJECT: Class Deviation—CARES Act Section 3610 Implementation

Effective immediately, this class deviation revises and supersedes Class Deviation 2020-O0013 issued on April 8, 2020. The purpose of this revision is to reiterate the statement that reimbursements under section 3610 are subject to the availability of funds and change the start date of the time period for which paid leave must be taken to be eligible for reimbursement under section 3610. In the attachment to this deviation, a new paragraph (b)(7) is added at DFARS 231.205-79 to clarify that the allowable amount under this deviation is limited to the amount of funds obligated on a separate line item specifically for the purpose of reimbursement under section 3610. Where appropriate, the time period for which paid leave must be taken is changed from January 31, 2020, through September 30, 2020, to March 27, 2020, through September 30, 2020.

Pursuant to FAR 31.101, Objectives, this class deviation to FAR 31 and DFARS 231 is effective immediately and authorizes contracting officers to use the attached DFARS 231.205-79, CARES Act Section 3610 Implementation, as a framework for implementation of section 3610, Federal Contractor Authority, of the Coronavirus Aid, Relief, and Economic Security (CARES) Act (Pub. L. 116-136).

The CARES Act was enacted on March 27, 2020, in response to the Coronavirus Disease 2019 (COVID-19) national emergency. Section 3610 of the CARES Act allows agencies to reimburse, at the minimum applicable contract billing rates (not to exceed an average of 40 hours per week), any paid leave, including sick leave, a contractor provides to keep its employees or subcontractors in a ready state from March 27, 2020, through September 30, 2020, including to protect the life and safety of Government and contractor personnel, during the public health emergency declared for COVID-19 on January 31, 2020.
As expressed in the OUSD(A&S) Defense Pricing and Contracting Memorandum, Managing Defense Contracts Impacts of the Novel Coronavirus, dated March 30, 2020, it is important that our military, civilian, and contractor communities work together to withstand the effects of COVID-19 and maintain mission readiness. Currently, many Department of Defense (DoD) contractors are struggling to maintain a mission-ready workforce due to work site closures, personnel quarantines, and state and local restrictions on movement related to the COVID-19 pandemic that cannot be resolved through remote work. It is imperative that we support affected contractors, using the acquisition tools available to us, to ensure that, together, we remain a healthy, resilient, and responsive total force.

It is also important that our contracting officers are good stewards of taxpayer funds while supporting contractor resiliency. Therefore, contracting officers shall use the attached DFARS 231.205-79, CARES Act Section 3610—Implementation, when implementing section 3610, to appropriately balance flexibilities and limitations.

Some contractors may receive compensation from other provisions of the CARES Act, or other COVID-19 relief scenarios, including tax credits, and contracting officers must avoid duplication of payments. For example, the Paycheck Protection Program (PPP) established pursuant to sections 1102 and 1106 of the CARES Act may provide, in some cases, a direct means for a small business to obtain relief. A small business contractor that is sheltering-in-place and unable to telework could use the PPP to pay its employees and then have the PPP loan forgiven, pursuant to the criteria established in the interim rule published by the Small Business Administration. In such a case, the small business should not seek reimbursement for the payment from DoD using the provisions of section 3610.

Contractors are responsible for supporting any claimed costs, including claimed leave costs for their employees, with appropriate documentation and for identifying credits that may reduce reimbursement under section 3610. Contracting officers are encouraged to work with contractors to understand how they are using or plan to use the COVID-19 relief provisions and encourage contractors to use existing contract terms or the relief provisions available to them in response to COVID-19. In addition, it is important that contracting officers secure representations from contractors regarding any other relief claimed or received stemming from COVID-19, including an affirmation that the contractor has not or will not pursue reimbursement for the same costs accounted for under their request, to support their requests for reimbursement under section 3610.

When implementing section 3610, contracting officers shall consider the immediacy of the specific circumstances of the contractor involved and respond accordingly. The survival of many of the businesses the CARES Act is designed to assist may depend on this efficiency. For example, the impact of COVID-19 on a contractor providing labor services will differ from the impact on a contractor that develops information systems. Some contractors may be unable to conduct any business during the COVID-19 pandemic. As a result, such contractors would generate no new revenue, and may have difficulties making payroll, retaining employees, and meeting other financial obligations. In contrast, other contractors may still have incoming revenue, and be able to conduct work remotely. While impacts will certainly be experienced by many contractors, some will have a more immediate need for relief than others.
Section 3610 seeks to provide many flexibilities for contracting officers, including the authority to:

- Enable the contractor to stay in a ready state (i.e., able to mobilize in a timely manner) by treating as allowable paid leave costs a contractor incurs to keep its employees and subcontractor employees in such a state.

- Use any “funds made available to the agency” by Congress to reimburse contractors for workers’ lost time, not otherwise reimbursable, between March 27, 2020, and September 30, 2020, if the contractor provides leave to its employees or subcontractor employees “to maintain a ready state, including to protect the life and safety of Government and contractor personnel,” which include, but are not limited to, quarantining, social distancing, or other COVID-19 related interruptions, as discussed in Office of Management and Budget Memorandum M-20-18, Managing Federal Contract Performance Issues Associated with the Novel Coronavirus, dated March 20, 2020;

- Modify contracts to provide for reimbursement of allowable paid leave costs, not otherwise reimbursable, without securing additional consideration; and

- Provide such reimbursement on any contract type.

Section 3610 also provides limitations on reimbursements:

- A contractor may only receive reimbursement if its employees or subcontractor employees:
  - Cannot perform work on a government-owned, government-leased, contractor-owned, or contractor-leased facility or site approved by the Federal Government for contract performance due to closures or other restrictions; and
  - Are unable to telework because their job duties cannot be performed remotely during the public health emergency declared on January 31, 2020, for COVID–19.

- Reimbursement is authorized only:
  - At the appropriate rates under the contract for up to an average of 40 hours per week; and
  - For contractor or subcontractor payments made for costs incurred, not otherwise reimbursable, not earlier than March 27, 2020, and not later than September 30, 2020;

- The Government must reduce the maximum reimbursement authorized by the amount of credit the contractor is allowed pursuant to division G of the Families First Coronavirus Response Act (Pub. L. 116–127) and any applicable credits the contractor is allowed under the CARES Act or other credit allowed by law that is specifically identifiable with the public health emergency declared on January 31, 2020 for COVID–19; and
Reimbursement is contingent upon the availability of funds.

We anticipate the need for additional guidance and will continue to provide answers to frequently asked questions and provide additional implementation information and guidance as appropriate.

This class deviation remains in effect until rescinded. My point of contact is Mr. Greg Snyder, who is available by telephone at 571-217-4920 or by email at gregory.d.snyder.civ@mail.mil.

Kim Herrington
Acting Principal Director,
Defense Pricing and Contracting

Attachment
As stated
DFARS 231.205-79 CARES Act Section 3610 - Implementation

(a) Applicability.

(1) This cost principle applies only to a contractor:

   (i) that the cognizant contracting officer has established in writing to be an affected contractor;

   (ii) whose employees or subcontractor employees:

      (A) Cannot perform work on a government-owned, government-leased, contractor-owned, or contractor-leased facility or site approved by the federal government for contract performance due to closures or other restrictions, and

      (B) Are unable to telework because their job duties cannot be performed remotely during the public health emergency declared on January 31, 2020, for Coronavirus (COVID–19).

(2) The maximum reimbursement authorized by section 3610 shall be reduced by the amount of credit a contractor is allowed pursuant to division G of the Families First Coronavirus Response Act (Pub. L. 116-127) and any applicable credits a contractor is allowed under the CARES Act (Pub. L. 116-136) or other credit allowed by law that is specifically identifiable with the public health emergency declared on January 31, 2020 for COVID–19.

(b) Allowability.

(1) Notwithstanding any contrary provisions of FAR subparts 31.2, 31.3, 31.6, 31.7 and DFARS 231.2, 231.3, 231.6, and 231.7, costs of paid leave (including sick leave), are allowable at the appropriate rates under the contract for up to an average of 40 hours per week, and may be charged as direct charges, if appropriate, if incurred for the purpose of:

   (i) Keeping contractor employees and subcontractor employees in a ready state, including to protect the life and safety of Government and contractor personnel, notwithstanding the risks of the public health emergency declared on January 31, 2020, for COVID–19, or

   (ii) Protecting the life and safety of Government and contractor personnel against risks arising from the COVID-19 public health emergency.

(2) Costs covered by this section are limited to those that are incurred as a consequence of granting paid leave as a result of the COVID-19 national emergency and that would not be incurred in the normal course of the contractor’s business. Costs of paid leave that would be incurred without regard to the existence of the COVID-19 national emergency
remain subject to all other applicable provisions of FAR subparts 31.2, 31.3, 31.6, 31.7 and DFARS 231.2, 231.3, 231.6, and 231.7. In order to be allowable under this section, costs must be segregated and identifiable in the contractor’s records so that compliance with all terms of this section can be reasonably ascertained. Segregation and identification of costs can be performed by any reasonable method as long as the results provide a sufficient audit trail.

(3) Covered paid leave is limited to leave taken by employees who otherwise would be performing work on a site that has been approved for work by the Federal Government, including on a government-owned, government-leased, contractor-owned, or contractor-leased facility approved by the federal government for contract performance; but

(i) The work cannot be performed because such facilities have been closed or made practically inaccessible or inoperable, or other restrictions prevent performance of work at the facility or site as a result of the COVID-19 national emergency; and

(ii) Paid leave is granted because the employee is unable to telework because their job duties cannot be performed remotely during public health emergency declared on January 31, 2020, for COVID-19.

(4) The facility at which work would otherwise be performed is deemed inaccessible for purposes of paragraph (b)(3) of this subpart to the extent that travel to the facility is prohibited or made impracticable by applicable Federal, State, or local law, including temporary orders having the effect of law.

(5) The paid leave made allowable by this section must be taken no earlier than March 27, 2020, and no later than September 30, 2020.

(6) Costs made allowable by this section are reduced by the amount the contractor is eligible to receive under any other Federal payment, allowance, or tax or other credit allowed by law that is specifically identifiable with the public health emergency declared on January 31, 2020, for COVID–19, such as the tax credit allowed by division G of Public Law 116–127.

(7) The allowable amount is limited to the amount of funds specifically obligated on a separate line item that cites the purpose of the funds is for reimbursement under section 3610 of the CARES Act.
MEMORANDUM FOR COMMANDER, UNITED STATES CYBER
COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES SPECIAL OPERATIONS COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES TRANSPORTATION COMMAND (ATTN: ACQUISITION EXECUTIVE)
DEPUTY ASSISTANT SECRETARY OF THE ARMY (PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE NAVY (PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE (CONTRACTING)
DIRECTORS, DEFENSE AGENCIES
DIRECTORS, DEFENSE FIELD ACTIVITIES

SUBJECT: Class Deviation—Undefinitized Contract Actions During the National Emergency for the Coronavirus Disease 2019

Effective immediately, for undefinitized contract actions (UCAs):

- The requirement at DFARS 217.7404-4(a) to limit obligations, after receipt of a qualifying proposal, to 75 percent of the not-to-exceed price before definitization does not apply to UCAs related to the national emergency for the Coronavirus Disease 2019 (COVID-19), as determined by the head of the contracting activity.

- The head of the contracting activity may waive the limitations in DFARS 217.7404(a)(1)(i), 217.7404-3(a), and 217.7404-4(a) for a UCA, if the head of the contracting activity determines that the waiver is necessary due to the national emergency for COVID-19. The words “without power of redelegation” at DFARS 217.7404-3(a)(1) are deleted.

This class deviation implements sections 13004 and 13005 of the Coronavirus Aid, Relief, and Economic Security (CARES) Act (Pub. L. 116-136) and remains in effect until rescinded. My point of contact is Lt Col Bryan Lamb, who is available by telephone at 703-693-0497 or by email at Bryan.D.Lamb.mil@mail.mil.

Kim Herrington
Acting Principal Director,
Defense Pricing and Contracting
MEMORANDUM FOR COMMANDER, UNITED STATES CYBER COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES SPECIAL OPERATIONS COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES TRANSPORTATION COMMAND (ATTN: ACQUISITION EXECUTIVE)
DEPUTY ASSISTANT SECRETARY OF THE ARMY (PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE NAVY (PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE (CONTRACTING)
DIRECTORS, DEFENSE AGENCIES
DIRECTORS, DEFENSE FIELD ACTIVITIES

SUBJECT: Class Deviation—Submission of Interim Vouchers Under Classified Contracts

Effective immediately, this class deviation revises and supersedes the class deviation issued on March 27, 2020. The revision is necessary to change the reference to the office, to which interim vouchers are submitted, from “disbursing office” to “payment office.”

Therefore, effective immediately, in response to the Coronavirus Disease 2019 (COVID-19) national emergency, contracting officers shall direct contractors to submit interim vouchers under classified contracts, using an appropriate method, directly to the payment office listed in the contract. Interim vouchers under classified contracts are considered provisionally approved by the Defense Contract Audit Agency (DCAA). Contracting officers shall require contractors to follow all program security protocols and to continue to safeguard program information when submitting interim vouchers that are considered provisionally approved.

Contractors have been required to submit interim vouchers to the Defense Contract Audit Agency (DCAA) in accordance with Federal Acquisition Regulation (FAR) 42.803(b)(1) and Defense Federal Acquisition Regulation Supplement (DFARS) 242.803(b)(i)(A) and (B). For some classified contracts, contractors submit interim vouchers outside the Procurement Integrated Enterprise Environment (PIEE) or other authorized unclassified system because of security restrictions. This deviation relieves the requirement for the interim voucher to be submitted to DCAA prior to payment.

This class deviation remains in effect until rescinded. My point of contact is John Burns, who is available by telephone at (571) 372-6181 or by email at john.h.burns.civ@mail.mil.

Kim Herrington M.1507719313
Acting Principal Director,
Defense Pricing and Contracting
MEMORANDUM FOR COMMANDER, UNITED STATES CYBER COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES SPECIAL OPERATIONS COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES TRANSPORTATION COMMAND (ATTN: ACQUISITION EXECUTIVE)
DEPUTY ASSISTANT SECRETARY OF THE ARMY (PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE NAVY (PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE (CONTRACTING)
DIRECTORS, DEFENSE AGENCIES
DIRECTORS, DEFENSE FIELD ACTIVITIES

SUBJECT: Class Deviation—Progress Payment Rates

Effective immediately, in response to the Coronavirus Disease 2019 (COVID-19) national emergency, the progress payment rates at Defense Federal Acquisition Regulation Supplement (DFARS) 232.501-1 are increased to 90 percent for large business concerns and 95 percent for small business concerns. Contracting officers shall use the attached deviation clauses as follows:

- Use 252.232-7004, DoD Progress Payment Rates (DEVIATION 2020-O0010), in lieu of the clause at DFARS 252.232-7004.

- Use 52.232-16, Progress Payments (DEVIATION 2020-O0010), in lieu of the clause at Federal Acquisition Regulation (FAR) 52.232-16.

- Use Alternate II (DEVIATION 2020-O0010), in lieu of Alternate II of FAR clause 52.232-16.

Contracting officers shall use Alternate III of FAR clause 52.232-16 as prescribed at FAR 32.502-4(d) with the deviation for FAR clause 52.232-16 provided in the attachment.
This class deviation remains in effect until rescinded. My point of contact is Sara Higgins, who is available by telephone at (703) 614-1255 or by email at sara.a.higgins2.civ@mail.mil.

Kim Herrington
Acting Principal Director,
Defense Pricing and Contracting

Attachments:
As stated
252.232-7004 DoD Progress Payment Rates. (DEVIATION 2020-O0010)
Use the following deviation clause in lieu of the clause at DFARS 252.232-7004 as prescribed in DFARS 232.502-4-70(b), if the contractor is a small business or small disadvantaged business concern:

DOD PROGRESS PAYMENT RATES (MAR 2020) (DEVIATION 2020-O0010)

If the Contractor is a small business concern, the Progress Payments clause of this contract is modified to change each mention of the progress payment rate and liquidation rate (excepting paragraph (k), Limitations on Undefinitized Contract Actions) to 95 percent.

(End of clause)

* * * * *

52.232-16 Progress Payments. (DEVIATION 2020-O0010)
Use the following deviation clause in lieu of the clause at FAR 52.232-16 as prescribed in 32.502-4(a):

PROGRESS PAYMENTS (MAR 2020) (DEVIATION 2020-O0010)

The Government will make progress payments to the Contractor when requested as work progresses, but not more frequently than monthly, in amounts of $2,500 or more approved by the Contracting Officer, under the following conditions:

(a) Computation of amounts.

(1) Unless the Contractor requests a smaller amount, the Government will compute each progress payment as 90 percent of the Contractor's total costs incurred under this contract whether or not actually paid, plus financing payments to subcontractors (see paragraph (j) of this clause), less the sum of all previous progress payments made by the Government under this contract. The Contracting Officer will consider cost of money that would be allowable under FAR 31.205-10 as an incurred cost for progress payment purposes.

(2) The amount of financing and other payments for supplies and services purchased directly for the contract are limited to the amounts that have been paid by cash, check, or other forms of payment, or that are determined due and will be paid to subcontractors—

(i) In accordance with the terms and conditions of a subcontract or invoice; and

(ii) Ordinarily within 30 days of the submission of the Contractor's payment request to the Government.
(3) The Government will exclude accrued costs of Contractor contributions under employee pension plans until actually paid unless-

(i) The Contractor's practice is to make contributions to the retirement fund quarterly or more frequently; and

(ii) The contribution does not remain unpaid 30 days after the end of the applicable quarter or shorter payment period (any contribution remaining unpaid shall be excluded from the Contractor's total costs for progress payments until paid).

(4) The Contractor shall not include the following in total costs for progress payment purposes in paragraph (a)(1) of this clause:

(i) Costs that are not reasonable, allocable to this contract, and consistent with sound and generally accepted accounting principles and practices.

(ii) Costs incurred by subcontractors or suppliers.

(iii) Costs ordinarily capitalized and subject to depreciation or amortization except for the properly depreciated or amortized portion of such costs.

(iv) Payments made or amounts payable to subcontractors or suppliers, except for-

(A) Completed work, including partial deliveries, to which the Contractor has acquired title; and

(B) Work under cost-reimbursement or time-and-material subcontracts to which the Contractor has acquired title.

(5) The amount of unliquidated progress payments may exceed neither (i) the progress payments made against incomplete work (including allowable unliquidated progress payments to subcontractors) nor (ii) the value, for progress payment purposes, of the incomplete work. Incomplete work shall be considered to be the supplies and services required by this contract, for which delivery and invoicing by the Contractor and acceptance by the Government are incomplete.

(6) The total amount of progress payments shall not exceed 90 percent of the total contract price.

(7) If a progress payment or the unliquidated progress payments exceed the amounts permitted by subparagraphs (a)(4) or (a)(5) above, the Contractor shall repay the amount of such excess to the Government on demand.
(8) Notwithstanding any other terms of the contract, the Contractor agrees not to request progress payments in dollar amounts of less than $2,500. The Contracting Officer may make exceptions.

(9) The costs applicable to items delivered, invoiced, and accepted shall not include costs in excess of the contract price of the items.

(b) Liquidation. Except as provided in the Termination for Convenience of the Government clause, all progress payments shall be liquidated by deducting from any payment under this contract, other than advance or progress payments, the unliquidated progress payments, or 90 percent of the amount invoiced, whichever is less. The Contractor shall repay to the Government any amounts required by a retroactive price reduction, after computing liquidations and payments on past invoices at the reduced prices and adjusting the unliquidated progress payments accordingly. The Government reserves the right to unilaterally change from the ordinary liquidation rate to an alternate rate when deemed appropriate for proper contract financing.

(c) Reduction or suspension. The Contracting Officer may reduce or suspend progress payments, increase the rate of liquidation, or take a combination of these actions, after finding on substantial evidence any of the following conditions:

(1) The Contractor failed to comply with any material requirement of this contract (which includes paragraphs (f) and (g) below).

(2) Performance of this contract is endangered by the Contractor's (i) failure to make progress or (ii) unsatisfactory financial condition.

(3) Inventory allocated to this contract substantially exceeds reasonable requirements.

(4) The Contractor is delinquent in payment of the costs of performing this contract in the ordinary course of business.

(5) The fair value of the undelivered work is less than the amount of unliquidated progress payments for that work.

(6) The Contractor is realizing less profit than that reflected in the establishment of any alternate liquidation rate in paragraph (b) above, and that rate is less than the progress payment rate stated in subparagraph (a)(1) above.

(d) Title.

(1) Title to the property described in this paragraph (d) shall vest in the Government. Vestiture shall be immediately upon the date of this contract, for property acquired or produced
Changes to the clause text are indicated by a change bar in the right-hand margin.

before that date. Otherwise, vestiture shall occur when the property is or should have been allocable or properly chargeable to this contract.

(2) Property, as used in this clause, includes all of the below-described items acquired or produced by the Contractor that are or should be allocable or properly chargeable to this contract under sound and generally accepted accounting principles and practices.

(i) Parts, materials, inventories, and work in process;

(ii) Special tooling and special test equipment to which the Government is to acquire title;

(iii) Nondurable (i.e., noncapital) tools, jigs, dies, fixtures, molds, patterns, taps, gauges, test equipment, and other similar manufacturing aids, title to which would not be obtained as special tooling under subparagraph (ii) above; and

(iv) Drawings and technical data, to the extent the Contractor or subcontractors are required to deliver them to the Government by other clauses of this contract.

(3) Although title to property is in the Government under this clause, other applicable clauses of this contract, e.g., the termination clauses, shall determine the handling and disposition of the property.

(4) The Contractor may sell any scrap resulting from production under this contract without requesting the Contracting Officer's approval, but the proceeds shall be credited against the costs of performance.

(5) To acquire for its own use or dispose of property to which title is vested in the Government under this clause, the Contractor must obtain the Contracting Officer's advance approval of the action and the terms. The Contractor shall (i) exclude the allocable costs of the property from the costs of contract performance, and (ii) repay to the Government any amount of unliquidated progress payments allocable to the property. Repayment may be by cash or credit memorandum.

(6) When the Contractor completes all of the obligations under this contract, including liquidation of all progress payments, title shall vest in the Contractor for all property (or the proceeds thereof) not—

(i) Delivered to, and accepted by, the Government under this contract; or

(ii) Incorporated in supplies delivered to, and accepted by, the Government under this contract and to which title is vested in the Government under this clause.
(7) The terms of this contract concerning liability for Government-furnished property shall not apply to property to which the Government acquired title solely under this clause.

(e) **Risk of loss.** Before delivery to and acceptance by the Government, the Contractor shall bear the risk of loss for property, the title to which vests in the Government under this clause, except to the extent the Government expressly assumes the risk. The Contractor shall repay the Government an amount equal to the unliquidated progress payments that are based on costs allocable to property that is lost (see 45.101).

(f) **Control of costs and property.** The Contractor shall maintain an accounting system and controls adequate for the proper administration of this clause.

(g) **Reports, forms, and access to records.**

1. The Contractor shall promptly furnish reports, certificates, financial statements, and other pertinent information (including estimates to complete) reasonably requested by the Contracting Officer for the administration of this clause. Also, the Contractor shall give the Government reasonable opportunity to examine and verify the Contractor's books, records, and accounts.

2. The Contractor shall furnish estimates to complete that have been developed or updated within six months of the date of the progress payment request. The estimates to complete shall represent the Contractor's best estimate of total costs to complete all remaining contract work required under the contract. The estimates shall include sufficient detail to permit Government verification.

3. Each Contractor request for progress payment shall:

   (i) Be submitted on Standard Form 1443, Contractor's Request for Progress Payment, or the electronic equivalent as required by agency regulations, in accordance with the form instructions and the contract terms; and

   (ii) Include any additional supporting documentation requested by the Contracting Officer.

(h) **Special terms regarding default.** If this contract is terminated under the Default clause, (i) the Contractor shall, on demand, repay to the Government the amount of unliquidated progress payments, and (ii) title shall vest in the Contractor, on full liquidation of progress payments, for all property for which the Government elects not to require delivery under the Default clause. The Government shall be liable for no payment except as provided by the Default clause.

   (i) **Reservations of rights.**
(1) No payment or vesting of title under this clause shall (i) excuse the Contractor from performance of obligations under this contract or (ii) constitute a waiver of any of the rights or remedies of the parties under the contract.

(2) The Government's rights and remedies under this clause (i) shall not be exclusive but rather shall be in addition to any other rights and remedies provided by law or this contract and (ii) shall not be affected by delayed, partial, or omitted exercise of any right, remedy, power, or privilege, nor shall such exercise or any single exercise preclude or impair any further exercise under this clause or the exercise of any other right, power, or privilege of the Government.

(j) Financing payments to subcontractors. The financing payments to subcontractors mentioned in paragraphs (a)(1) and (a)(2) of this clause shall be all financing payments to subcontractors or divisions, if the following conditions are met:

(1) The amounts included are limited to—

   (i) The unliquidated remainder of financing payments made; plus

   (ii) Any unpaid subcontractor requests for financing payments.

(2) The subcontract or interdivisional order is expected to involve a minimum of approximately 6 months between the beginning of work and the first delivery; or, if the subcontractor is a small business concern, 4 months.

(3) If the financing payments are in the form of progress payments, the terms of the subcontract or interdivisional order concerning progress payments—

   (i) Are substantially similar to the terms of this clause for any subcontractor that is a large business concern, or this clause with its Alternate I for any subcontractor that is a small business concern;

   (ii) Are at least as favorable to the Government as the terms of this clause;

   (iii) Are not more favorable to the subcontractor or division than the terms of this clause are to the Contractor;

   (iv) Are in conformance with the requirements of FAR 32.504(e); and

   (v) Subordinate all subcontractor rights concerning property to which the Government has title under the subcontract to the Government's right to require delivery of the property to the Government if—

       (A) The Contractor defaults; or
(B) The subcontractor becomes bankrupt or insolvent.

(4) If the financing payments are in the form of performance-based payments, the terms of the subcontract or interdivisional order concerning payments—

   (i) Are substantially similar to the Performance-Based Payments clause at FAR 52.232-32 and meet the criteria for, and definition of, performance-based payments in FAR Part 32;

   (ii) Are in conformance with the requirements of FAR 32.504(f); and

   (iii) Subordinate all subcontractor rights concerning property to which the Government has title under the subcontract to the Government's right to require delivery of the property to the Government if—

         (A) The Contractor defaults; or

         (B) The subcontractor becomes bankrupt or insolvent.

(5) If the financing payments are in the form of commercial item financing payments, the terms of the subcontract or interdivisional order concerning payments—

   (i) Are constructed in accordance with FAR 32.206(c) and included in a subcontract for a commercial item purchase that meets the definition and standards for acquisition of commercial items in FAR Parts 2 and 12;

   (ii) Are in conformance with the requirements of FAR 32.504(g); and

   (iii) Subordinate all subcontractor rights concerning property to which the Government has title under the subcontract to the Government's right to require delivery of the property to the Government if—

         (A) The Contractor defaults; or

         (B) The subcontractor becomes bankrupt or insolvent.

(6) If financing is in the form of progress payments, the progress payment rate in the subcontract is the customary rate used by the contracting agency, depending on whether the subcontractor is or is not a small business concern.

(7) Concerning any proceeds received by the Government for property to which title has vested in the Government under the subcontract terms, the parties agree that the proceeds shall
be applied to reducing any unliquidated financing payments by the Government to the Contractor under this contract.

(8) If no unliquidated financing payments to the Contractor remain, but there are unliquidated financing payments that the Contractor has made to any subcontractor, the Contractor shall be subrogated to all the rights the Government obtained through the terms required by this clause to be in any subcontract, as if all such rights had been assigned and transferred to the Contractor.

(9) To facilitate small business participation in subcontracting under this contract, the Contractor shall provide financing payments to small business concerns, in conformity with the standards for customary contract financing payments stated in FAR 32.113. The Contractor shall not consider the need for such financing payments as a handicap or adverse factor in the award of subcontracts.

(k) Limitations on undefinitized contract actions. Notwithstanding any other progress payment provisions in this contract, progress payments may not exceed 80 percent of costs incurred on work accomplished under undefinitized contract actions. A contract action is any action resulting in a contract, as defined in subpart 2.1, including contract modifications for additional supplies or services, but not including contract modifications that are within the scope and under the terms of the contract, such as contract modifications issued pursuant to the Changes clause, or funding and other administrative changes. This limitation shall apply to the costs incurred, as computed in accordance with paragraph (a) of this clause, and shall remain in effect until the contract action is definitized. Costs incurred which are subject to this limitation shall be segregated on Contractor progress payment requests and invoices from those costs eligible for higher progress payment rates. For purposes of progress payment liquidation, as described in paragraph (b) of this clause, progress payments for undefinitized contract actions shall be liquidated at 80 percent of the amount invoiced for work performed under the undefinitized contract action as long as the contract action remains undefinitized. The amount of unliquidated progress payments for undefinitized contract actions shall not exceed 80 percent of the maximum liability of the Government under the undefinitized contract action or such lower limit specified elsewhere in the contract. Separate limits may be specified for separate actions.

(l) Due date. The designated payment office will make progress payments on the ____ [Contracting Officer insert date as prescribed by agency head; if not prescribed, insert "30th"] day after the designated billing office receives a proper progress payment request. In the event that the Government requires an audit or other review of a specific progress payment request to ensure compliance with the terms and conditions of the contract, the designated payment office is not compelled to make payment by the specified due date. Progress payments are considered contract financing and are not subject to the interest penalty provisions of the Prompt Payment Act.
(m) **Progress payments under indefinite-delivery contracts**. The Contractor shall account for and submit progress payment requests under individual orders as if the order constituted a separate contract, unless otherwise specified in this contract.

(End of clause)

**Alternate II (MAR 2020). (DEVIAITON 2020-O0010)**

Use the following deviation to Alternate II of FAR clause 52.232-16 as prescribed in 32.502-4(c):

If the contract is a letter contract, add paragraphs (n) and (o). The amount specified in paragraph (o) shall not exceed 90 percent of the maximum liability of the Government under the letter contract. The contracting officer may specify separate limits for separate parts of the work.

(n) The Contracting Officer will liquidate progress payments made under this letter contract, unless previously liquidated under paragraph (b) of this clause, using the following procedures:

1. If this letter contract is superseded by a definitive contract, unliquidated progress payments made under this letter contract shall be liquidated by deducting the amount from the first progress or other payments made under the definitive contract.

2. If this letter contract is not superseded by a definitive contract calling for the furnishing of all or part of the articles or services covered under the letter contract, unliquidated progress payments made under the letter contract shall be liquidated by deduction from the amount payable under the Termination clause.

3. If this letter contract is partly terminated and partly superseded by a contract, the Government will allocate the unliquidated progress payments to the terminated and unterminated portions as the Government deems equitable, and will liquidate each portion under the relevant procedure in paragraphs (n)(1) and (n)(2) of this clause.

4. If the method of liquidating progress payments provided in this clause does not result in full liquidation, the Contractor shall immediately pay the unliquidated balance to the Government on demand.

(o) The amount of unliquidated progress payments shall not exceed ____ [Contracting Officer specify dollar amount].
MEMORANDUM FOR COMMANDER, UNITED STATES CYBER  
COMMAND (ATTN: ACQUISITION EXECUTIVE)  
COMMANDER, UNITED STATES SPECIAL OPERATIONS  
COMMAND (ATTN: ACQUISITION EXECUTIVE)  
COMMANDER, UNITED STATES TRANSPORTATION  
COMMAND (ATTN: ACQUISITION EXECUTIVE)  
DEPUTY ASSISTANT SECRETARY OF THE ARMY  
(PROCUREMENT)  
DEPUTY ASSISTANT SECRETARY OF THE NAVY  
(PROCUREMENT)  
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE  
(CONTRACTING)  
DIRECTORS, DEFENSE AGENCIES  
DIRECTORS, DEFENSE FIELD ACTIVITIES  

SUBJECT: Class Deviation—Limitations on Subcontracting for Small Business  

Effective immediately, this class deviation revises and supersedes the class deviation issued on March 17, 2020. The revision is necessary to clarify the effective date of the class deviation.  

Therefore, effective March 30, 2020, contracting officers shall follow the procedures provided in this class deviation when issuing solicitations and awarding contracts or task or delivery orders under FAR part 19 to—  

(A) Small business concerns;  
(B) 8(a) program participants;  
(C) Historically Underutilized Business Zone (HUBZone) small business concerns;  
(D) Service-disabled veteran-owned small business (SDVOSB) concerns;  
(E) Economically disadvantaged women-owned small business (EDWOSB) concerns; and  
(F) Women-owned small business (WOSB) concerns eligible under the WOSB Program.  

The following procedures and the attached deviation clauses implement revisions made by the Small Business Administration to its regulation. These revisions changed and standardized the limitations on subcontracting and the nonmanufacturer rule with which small businesses must comply under Government contracts awarded pursuant to the set-aside, sole-source, or HUBZone price evaluation preference authorities of the Small Business Act. This class deviation updates the limitations on subcontracting and the nonmanufacturer rule for all small businesses in the clauses relating to awards under FAR part 19.
(A) Small Business Concerns

In solicitations, contracts, and task or delivery orders that are set aside for small business under FAR part 19, contracting officers shall use the clauses in Attachment 1 as follows:

- Use 52.219-6, Notice of Total Small Business Set-Aside (DEVIATION 2020-O0008), in lieu of FAR 52.219-6 and 52.219-33, Nonmanufacturer Rule.
- Use 52.219-7, Notice of Partial Small Business Set-Aside (DEVIATION 2020-O0008), in lieu of FAR 52.219-7 and 52.219-33.
- Use 52.219-14, Limitations on Subcontracting (DEVIATION 2020-O0008), in lieu of FAR 52.219-14.

Contracting officers shall use the alternates to FAR clauses 52.219-6 and 52.219-7 prescribed at FAR 19.507 with the deviation clauses provided in the attachment. The limitations on subcontracting and nonmanufacturer rule apply to small business set-asides for contracts that exceed the simplified acquisition threshold. The limitations on subcontracting and nonmanufacturer rule do not apply to small business set-asides for contracts at or below the simplified acquisition threshold.

(B) 8(a) Program Participants

In solicitations, contracts, and task or delivery orders under the 8(a) program (FAR subpart 19.8), contracting officers shall use the clauses in Attachment 2 as follows:

- Use 52.219-14, Limitations on Subcontracting (DEVIATION 2020-O0008), in lieu of FAR 52.219-14 for competitive 8(a) procurements and 8(a) sole-source awards.
- Use 52.219-33, Nonmanufacturer Rule (DEVIATION 2020-O0008), in lieu of FAR 52.219-33 for 8(a) sole-source awards only.

The limitations on subcontracting apply to contracts and task or delivery orders awarded pursuant to competitive 8(a) procurements and 8(a) sole-source awards under FAR part 19 regardless of the dollar value of the award.

(C) HUBZone Small Business Concerns

In solicitations, contracts, and task or delivery orders that are set aside for, or awarded on a sole-source basis to, HUBZone small business concerns under FAR part 19, as well as procurements using the HUBZone price evaluation preference, contracting officers shall use the clauses in Attachment 3 as follows:

- Use 52.219-3, Notice of HUBZone Set-Aside or Sole Source Award (DEVIATION 2020-O0008), in lieu of FAR 52.219-3 and 52.219-33.
- Use 52.219-4, Notice of Price Evaluation Preference for HUBZone Small Business Concerns (DEVIATION 2020-O0008), in lieu of FAR 52.219-4 and 52.219-33.
Contracting officers shall not use Alternate I of FAR 52.219-3 or Alternate I of FAR 52.219-4. These alternates conflict with the attached deviation clauses.

The limitations on subcontracting and the nonmanufacturer rule apply to contracts and task or delivery orders that are set aside for, or awarded on a sole-source basis to, HUBZone small business concerns under FAR part 19, or awarded using the HUBZone price evaluation preference, regardless of the dollar value of the award.

(D) SDVOSB Concerns

In solicitations, contracts, and task or delivery orders that are set aside for, or awarded on a sole-source basis to, SDVOSB concerns under FAR part 19, contracting officers shall use the clause in Attachment 4 as follows:

- Use 52.219-27, Notice of Service-Disabled Veteran-Owned Small Business Set-Aside (DEVIATION 2020-O0008), in lieu of FAR 52.219-27 and 52.219-33.

The limitations on subcontracting and the nonmanufacturer rule apply to contracts and task or delivery orders that are set aside for, or awarded on a sole-source basis to, SDVOSB concerns under FAR part 19 regardless of the dollar value of the award.

(E) EDWOSB Concerns

In solicitations, contracts, and task or delivery orders that are set aside for, or awarded on a sole-source basis to, EDWOSB concerns under FAR part 19, contracting officers shall use the clause in Attachment 5 as follows:

- Use 52.219-29, Notice of Set-Aside for, or Sole Source Award to, Economically Disadvantaged Women-Owned Small Business Concerns (DEVIATION 2020-O0008), in lieu of FAR 52.219-29 and 52.219-33.

The limitations on subcontracting and the nonmanufacturer rule apply to contracts and task or delivery orders that are set aside for, or awarded on a sole-source basis to, EDWOSB concerns under FAR part 19 regardless of the dollar value of the award.

(F) WOSB Concerns Eligible under the WOSB Program

In solicitations, contracts, and task or delivery orders that are set aside for, or awarded on a sole-source basis to, WOSB concerns eligible under the WOSB Program under FAR part 19, contracting officers shall use the clause in Attachment 6 as follows:

- Use 52.219-30, Notice of Set-Aside for, or Sole Source Award to, Women-Owned Small Business Concerns Eligible Under the Women-Owned Small Business Program (DEVIATION 2020-O0008), in lieu of FAR 52.219-30 and 52.219-33.
The limitations on subcontracting and the nonmanufacturer rule apply to contracts and task or delivery orders that are set aside for, or awarded on a sole-source basis to, WOSB concerns eligible under the WOSB Program under FAR part 19 regardless of the dollar value of the award.

This class deviation remains in effect until it is incorporated in the FAR or otherwise rescinded. My point of contact is Ms. Jennifer D. Johnson, who may be reached at 571-372-6100 or jennifer.d.johnson1.civ@mail.mil.

Kim Herrington  
Acting Principal Director,  
Defense Pricing and Contracting

Attachments:  
As stated
52.219-6 Notice of Total Small Business Set-Aside (DEVIATION 2020-O0008).

Insert the following clause in solicitations and contracts involving total small business set-asides. This includes multiple-award contracts when orders may be set aside for any of the small business concerns identified in 19.000(a)(3), as described in 8.405-5 and 16.505(b)(2)(i)(F):

NOTICE OF TOTAL SMALL BUSINESS SET-ASIDE (MAR 2020) (DEVIATION 2020-O0008)

(a) **Definition.** “Small business concern,” as used in this clause, means a concern, including its affiliates, that is independently owned and operated, not dominant in the field of operation in which it is bidding on Government contracts, and qualified as a small business under the size standards in this solicitation.

(b) **Applicability.** This clause applies only to—

   (1) Contracts that have been totally set aside for small business concerns; and
   
   (2) Orders set aside for small business concerns under multiple-award contracts as described in 8.405-5 and 16.505(b)(2)(i)(F).

(c) **General.**

   (1) Offers are solicited only from small business concerns. Offers received from concerns that are not small business concerns shall be considered nonresponsive and will be rejected.

   (2) Any award resulting from this solicitation will be made to a small business concern.

(d) **Agreement.**

   (1) For a contract or an order at or below the simplified acquisition threshold, a small business concern may provide the end item of any firm. For a contract or an order exceeding the simplified acquisition threshold, a small business concern that provides an end item it did not manufacture, process, or produce, shall—

      (i) Provide an end item that a small business has manufactured, processed, or produced in the United States or its outlying areas;

      (ii) Be primarily engaged in the retail or wholesale trade and normally sell the type of item being supplied; and

      (iii) Take ownership or possession of the item(s) with its personnel, equipment, or facilities in a manner consistent with industry practice; for example, providing storage, transportation, or delivery.

   (2) For contracts or orders for multiple end items, at least 50 percent of the total value of the contract or order shall be manufactured, processed, or produced in the United States or its outlying areas by small business concerns.

   (3) Paragraphs (d)(1) through (2) of this clause do not apply to construction or service contracts.
52.219-7 Notice of Partial Small Business Set-Aside (DEVIATION 2020-O0008).

Insert the following clause in solicitations and contracts involving partial small business set-asides. This includes part or parts of multiple-award contracts, including those described in 38.101:

NOTICE OF PARTIAL SMALL BUSINESS SET-ASIDE (MAR 2020) (DEVIATION 2020-O0008)

(a) **Definition.** “Small business concern,” as used in this clause, means a concern, including its affiliates, that is independently owned and operated, not dominant in the field of operation in which it is bidding on Government contracts, and qualified as a small business under the size standards in this solicitation.

(b) **Applicability.** This clause applies only to contracts that have been partially set aside for small business concerns.

(c) **General.**

(1) A portion of this requirement, identified elsewhere in this solicitation, has been set aside for award to one or more small business concerns identified in 19.000(a)(3). Offers received from concerns that do not qualify as small business concerns shall be considered nonresponsive and shall be rejected on the set-aside portion of the requirement.

(2) Small business concerns may submit offers and compete for the non-set-aside portion and the set-aside portion.

(d) The Offeror shall—

[Contracting Officer check as appropriate.]

__ Submit a separate offer for each portion of the solicitation for which it wants to compete (i.e., set-aside portion, non-set-aside portion, or both); or

__ Submit one offer to include all portions for which it wants to compete.

(e) **Partial set-asides of multiple-award contracts.**

(1) Small business concerns will not compete against other than small business concerns for any order issued under the part or parts of the multiple-award contract that are set aside.

(2) Small business concerns may compete for orders issued under the part or parts of the multiple-award contract that are not set aside, if the small business concern received a contract award for the non-set-aside portion.

(f) **Agreement.**

(End of clause)
(1) For a contract or an order at or below the simplified acquisition threshold, a small business concern may provide the end item of any firm. For a contract or an order exceeding the simplified acquisition threshold, a small business concern that provides an end item it did not manufacture, process, or produce, shall—
   (i) Provide an end item that a small business has manufactured, processed, or produced in the United States or its outlying areas;
   (ii) Be primarily engaged in the retail or wholesale trade and normally sell the type of item being supplied; and
   (iii) Take ownership or possession of the item(s) with its personnel, equipment, or facilities in a manner consistent with industry practice; for example, providing storage, transportation, or delivery.

(2) For contracts or orders for multiple end items, at least 50 percent of the total value of the contract or order shall be manufactured, processed, or produced in the United States or its outlying areas by small business concerns.

(3) Paragraphs (f)(1) through (2) of this clause do not apply to construction or service contracts.

(End of clause)

* * * * *

52.219-14 Limitations on Subcontracting (DEVIATION 2020-O0008).

Insert the following clause in solicitations and contracts for supplies, services, and construction, if any portion of the requirement is to be set aside for small business and the contract amount is expected to exceed the simplified acquisition threshold. This includes multiple-award contracts when orders may be set aside for small business concerns, as described in 8.405-5 and 16.505(b)(2)(i)(F), and when orders may be issued directly to a small business concern as described in 19.504(c)(1)(ii). For contracts that are set aside, the contracting officer shall indicate in paragraph (g) of the clause whether compliance with the limitations on subcontracting is required at the contract or order level:

LIMITATIONS ON SUBCONTRACTING (MAR 2020) (DEVIATION 2020-O0008)

(a) This clause does not apply to the unrestricted portion of a partial set-aside.

(b) Definition. “Similarly situated entity,” as used in this clause, means a first-tier subcontractor, including an independent contractor, that—
(1) Has the same small business program status as that which qualified the prime contractor for the award (e.g., for a small business set-aside contract, any small business concern, without regard to its socioeconomic status); and

(2) Is considered small for the size standard under the North American Industry Classification System (NAICS) code the prime contractor assigned to the subcontract.

(c) **Applicability.** This clause applies only to—

(1) Contracts that have been set aside for small business concerns or 8(a) participants;

(2) Part or parts of a multiple-award contract that have been set aside for small business concerns or 8(a) participants;

(3) Contracts that have been awarded on a sole-source basis in accordance with subpart 19.8;

(4) Orders set aside for small business concerns under multiple-award contracts, as described in 8.405-5 and 16.505(b)(2)(i)(F), if the order amount is expected to exceed the simplified acquisition threshold;

(5) Orders competed among 8(a) participants in accordance with subpart 19.8 under multiple-award contracts, as described in 8.405-5 and 16.505(b)(2)(i)(F), regardless of dollar value;

(6) Contracts using the HUBZone price evaluation preference to award to a HUBZone small business concern unless the concern waived the evaluation preference; and

(7) Orders issued directly to small business concerns or 8(a) participants under multiple-award contracts as described in 19.504(c)(1)(ii).

(d) **Independent contractors.** An independent contractor shall be considered a subcontractor.

(e) **Limitations on subcontracting.** By submission of an offer and execution of a contract, the Contractor agrees that in performance of a contract assigned a NAICS code for—

(1) Services (except construction), it will not pay more than 50 percent of the amount paid by the Government for contract performance to subcontractors that are not similarly situated entities. Any work that a similarly situated entity further subcontracts will count toward the prime contractor’s 50 percent subcontract amount that cannot be exceeded. When a contract includes both services and supplies, the 50 percent limitation shall apply only to the service portion of the contract. Other direct costs are excluded to the extent they are not the principal purpose of the contract and cannot be obtained from small business concerns;

(2) Supplies (other than procurement from a nonmanufacturer of such supplies), it will not pay more than 50 percent of the amount paid by the Government for contract performance, excluding the cost of materials, to subcontractors that are not similarly situated entities. Any work that a similarly situated entity further subcontracts will count toward the prime contractor’s 50 percent subcontract amount that cannot be exceeded. When a contract includes both supplies and services, the 50 percent limitation shall apply only to the supply portion of the contract;
(3) General construction, it will not pay more than 85 percent of the amount paid by the Government for contract performance, excluding the cost of materials, to subcontractors that are not similarly situated entities. Any work that a similarly situated entity further subcontracts will count toward the prime contractor’s 85 percent subcontract amount that cannot be exceeded; or

(4) Construction by special trade contractors, it will not pay more than 75 percent of the amount paid by the Government for contract performance, excluding the cost of materials, to subcontractors that are not similarly situated entities. Any work that a similarly situated entity further subcontracts will count toward the prime contractor’s 75 percent subcontract amount that cannot be exceeded.

(f) A joint venture agrees that, in the performance of the contract, the applicable percentage specified in paragraph (e) of this clause will be performed by the aggregate of the joint venture participants.

(g) The Contractor shall comply with the limitations on subcontracting as follows:

(1) For contracts, in accordance with paragraphs (c)(1) and (2) of this clause—

[Contracting Officer check as appropriate.]

__ By the end of the base term of the contract and then by the end of each subsequent option period; or

__ By the end of the performance period for each order issued under the contract.

(2) For orders, in accordance with paragraphs (c)(3) and (4) of this clause, by the end of the performance period for the order.

(End of clause)
52.219-14 Limitations on Subcontracting (DEVIATION 2020-O0008).

Insert the following clause in any solicitation and contract resulting from the procedures in subpart 19.8. This includes multiple-award contracts when orders may be set aside for 8(a) participants as described in 8.405-5 and 16.505(b)(2)(i)(F), and when orders may be issued directly to an 8(a) participant as described in 19.504(c)(1)(ii). For contracts that are set aside, the contracting officer shall indicate in paragraph (g) of the clause whether compliance with the limitations on subcontracting is required at the contract or order level:

LIMITATIONS ON SUBCONTRACTING (MAR 2020) (DEVIATION 2020-O0008)

(a) This clause does not apply to the unrestricted portion of a partial set-aside.
(b) Definition. “Similarly situated entity,” as used in this clause, means a first-tier subcontractor, including an independent contractor, that—
   (1) Has the same small business program status as that which qualified the prime contractor for the award (e.g., for a small business set-aside contract, any small business concern, without regard to its socioeconomic status); and
   (2) Is considered small for the size standard under the North American Industry Classification System (NAICS) code the prime contractor assigned to the subcontract.
(c) Applicability. This clause applies only to—
   (1) Contracts that have been set aside for small business concerns or 8(a) participants;
   (2) Part or parts of a multiple-award contract that have been set aside for small business concerns or 8(a) participants;
   (3) Contracts that have been awarded on a sole-source basis in accordance with subpart 19.8;
   (4) Orders set aside for small business concerns under multiple-award contracts as described in 8.405-5 and 16.505(b)(2)(i)(F), if the order amount is expected to exceed the simplified acquisition threshold;
   (5) Orders competed among 8(a) participants in accordance with subpart 19.8 under multiple-award contracts, as described in 8.405-5 and 16.505(b)(2)(i)(F), regardless of dollar value;
   (6) Contracts using the HUBZone price evaluation preference to award to a HUBZone small business concern unless the concern waived the evaluation preference; and
   (7) Orders issued directly to small business concerns or 8(a) participants under multiple-award contracts as described in 19.504(c)(1)(ii).
(d) Independent contractors. An independent contractor shall be considered a subcontractor.
(e) Limitations on subcontracting. By submission of an offer and execution of a contract, the Contractor agrees that in performance of a contract assigned a NAICS code for—
(1) Services (except construction), it will not pay more than 50 percent of the amount paid by the Government for contract performance to subcontractors that are not similarly situated entities. Any work that a similarly situated entity further subcontracts will count toward the prime contractor’s 50 percent subcontract amount that cannot be exceeded. When a contract includes both services and supplies, the 50 percent limitation shall apply only to the service portion of the contract. Other direct costs are excluded to the extent they are not the principal purpose of the contract and cannot be obtained from small business concerns;

(2) Supplies (other than procurement from a nonmanufacturer of such supplies), it will not pay more than 50 percent of the amount paid by the Government for contract performance, excluding the cost of materials, to subcontractors that are not similarly situated entities. Any work that a similarly situated entity further subcontracts will count toward the prime contractor’s 50 percent subcontract amount that cannot be exceeded. When a contract includes both supplies and services, the 50 percent limitation shall apply only to the supply portion of the contract;

(3) General construction, it will not pay more than 85 percent of the amount paid by the Government for contract performance, excluding the cost of materials, to subcontractors that are not similarly situated entities. Any work that a similarly situated entity further subcontracts will count toward the prime contractor’s 85 percent subcontract amount that cannot be exceeded;

(4) Construction by special trade contractors, it will not pay more than 75 percent of the amount paid by the Government for contract performance, excluding the cost of materials, to subcontractors that are not similarly situated entities. Any work that a similarly situated entity further subcontracts will count toward the prime contractor’s 75 percent subcontract amount that cannot be exceeded.

(f) A joint venture agrees that, in the performance of the contract, the applicable percentage specified in paragraph (e) of this clause will be performed by the aggregate of the joint venture participants.

(g) The Contractor shall comply with the limitations on subcontracting as follows:

(1) For contracts, in accordance with paragraphs (c)(1) and (2) of this clause—

[Contracting Officer check as appropriate.]

__ By the end of the base term of the contract and then by the end of each subsequent option period; or

__ By the end of the performance period for each order issued under the contract.

(2) For orders, in accordance with paragraphs (c)(3) and (4) of this clause, by the end of the performance period for the order.

(End of clause)
52.219-33 Nonmanufacturer Rule (DEVIATION 2020-O0008).

Insert the following clause in solicitations and contracts when the item being acquired has been assigned a manufacturing or supply North American Industry Classification System (NAICS) code, and the requirement is awarded on a sole-source basis in accordance with subpart 19.8. Do not insert the clause when the Small Business Administration has determined that there are no small business manufacturers of the product or items and has waived the nonmanufacturer rule:

NONMANUFACTURER RULE (MAR 2020) (DEVIATION 2020-O0008)

(a) Definitions. As used in this clause—

“Manufacturer” means the concern that transforms raw materials, miscellaneous parts, or components into the end item. Concerns that only minimally alter the item being procured do not qualify as manufacturers of the end item. Concerns that add substances, parts, or components to an existing end item to modify its performance will not be considered the end item manufacturer, where those identical modifications can be performed by and are available from the manufacturer of the existing end item.

“Nonmanufacturer” means a concern, including a supplier, that provides an end item it did not manufacture, process, or produce.

(b) Applicability.

(1) This clause does not apply to contracts awarded pursuant to the unrestricted portion of a partial set-aside or to a contractor that is the manufacturer of the product or end item.

(2) This clause applies to—

(i) Contracts that have been awarded pursuant to a competitive 8(a) procurement;

(ii) Contracts that have been awarded on a sole-source basis in accordance with subpart 19.8; and

(iii) Orders competed among 8(a) participants under multiple-award contracts as described in 8.405-5 and 16.505(b)(2)(i)(F); and

(iv) Orders issued directly to an 8(a) participant under multiple-award contracts as described in 19.504(c)(1)(ii).

(c) Requirements.

(1) The Contractor shall—

(i) Provide an end item that a small business has manufactured, processed, or produced in the United States or its outlying areas;

(ii) Be primarily engaged in the retail or wholesale trade and normally sell the type of item being supplied; and
(iii) Take ownership or possession of the item(s) with its personnel, equipment, or facilities in a manner consistent with industry practice; for example, providing storage, transportation, or delivery.

(2) For contracts or orders for multiple end items, at least 50 percent of the total value of the contract or order shall be manufactured, processed, or produced in the United States or its outlying areas by small business concerns.
52.219-3 Notice of HUBZone Set-Aside or Sole Source Award (DEVIATION 2020-O0008).

Insert the following clause in solicitations and contracts for acquisitions that are set aside for, or awarded on a sole source basis to, HUBZone small business concerns under 19.1305 or 19.1306. This includes multiple-award contracts when orders may be set aside for HUBZone small business concerns as described in 8.405-5 and 16.505(b)(2)(i)(F) or when orders may be issued directly to one HUBZone small business concern in accordance with 19.504(c)(1)(ii):

NOTICE OF HUBZONE SET-ASIDE OR SOLE SOURCE AWARD (MAR 2020) (DEVIATION 2020-O0008)

(a) Definitions. As used in this clause—

“HUBZone small business concern” means a small business concern, certified by the Small Business Administration (SBA), that appears on the List of Qualified HUBZone Small Business Concerns maintained by the SBA (13 CFR 126.103).

“Similarly situated entity” means a first-tier subcontractor, including an independent contractor, that—

(1) Has the same small business program status as that which qualified the prime contractor for the award (e.g., for a small business set-aside contract, any small business concern, without regard to its socioeconomic status); and

(2) Is considered small for the size standard under the North American Industry Classification System (NAICS) code the prime contractor assigned to the subcontract.

(b) Applicability. This clause applies only to—

(1) Contracts that have been set aside or awarded on a sole source basis to HUBZone small business concerns;

(2) Part or parts of a multiple-award contract that have been set aside for HUBZone small business concerns;

(3) Orders set aside for HUBZone small business concerns under multiple-award contracts as described in 8.405-5 and 16.505(b)(2)(i)(F); and

(4) Orders issued directly to HUBZone small business concerns under multiple-award contracts as described in 19.504(c)(1)(ii).

(c) General.

(1) Offers are solicited only from HUBZone small business concerns. Offers received from concerns that are not HUBZone small business concerns will not be considered.

(2) Any award resulting from this solicitation will be made to a HUBZone small business concern.

(d) Independent contractors. An independent contractor shall be considered a subcontractor.
(e) **Limitations on subcontracting.** By submission of an offer and execution of a contract, a HUBZone small business concern agrees that, in the case of a contract assigned a NAICS code for—

(1) Services (except construction), it will not pay more than 50 percent of the amount paid by the Government for contract performance to subcontractors that are not similarly situated entities. Any work that a similarly situated entity further subcontracts will count toward the prime contractor’s 50 percent subcontract amount that cannot be exceeded. When a contract includes both services and supplies, the 50 percent limitation shall apply only to the service portion of the contract. Other direct costs are excluded to the extent they are not the principal purpose of the contract and cannot be obtained from small business concerns;

(2) Supplies (other than acquisition from a nonmanufacturer of the supplies), it will not pay more than 50 percent of the amount paid by the Government for contract performance, excluding the cost of materials, to subcontractors that are not similarly situated entities. Any work that a similarly situated entity further subcontracts will count toward the prime contractor’s 50 percent subcontract amount that cannot be exceeded. When a contract includes both supplies and services, the 50 percent limitation shall apply only to the supply portion of the contract;

(3) General construction, it will not pay more than 85 percent of the amount paid by the Government for contract performance, excluding the cost of materials, to subcontractors that are not similarly situated entities. Any work that a similarly situated entity further subcontracts will count toward the prime contractor’s 85 percent subcontract amount that cannot be exceeded; or

(4) Construction by special trade contractors, it will not pay more than 75 percent of the amount paid by the Government for contract performance, excluding the cost of materials, to subcontractors that are not similarly situated entities. Any work that a similarly situated entity further subcontracts will count toward the prime contractor’s 75 percent subcontract amount that cannot be exceeded.

(f) A HUBZone small business contractor shall comply with the limitations on subcontracting as follows:

(1) For contracts, in accordance with paragraphs (b)(1) or (2) of this clause—

> [Contracting Officer check as appropriate.]

___ By the end of the base term of the contract and then by the end of each subsequent option period; or

___ By the end of the performance period for each order issued under the contract.

(2) For orders, in accordance with paragraph (b)(3) or (4) of this clause, by the end of the performance period for the order.

(g) **Joint venture.** A HUBZone joint venture agrees that, in the performance of the contract, the applicable percentage specified in paragraph (e) of this clause shall be performed by the aggregate of the HUBZone small business participants.
(h) **Nonmanufacturer.**

(1) Unless SBA has waived the requirements of paragraphs (g)(1)(i) through (iii) of this clause in accordance with 13 CFR 121.1204, a HUBZone small business concern that provides an end item it did not manufacture, process, or produce, shall—

   (i) Provide an end item that a small business has manufactured, processed, or produced in the United States or its outlying areas;

   (ii) Be primarily engaged in the retail or wholesale trade and normally sell the type of item being supplied; and

   (iii) Take ownership or possession of the item(s) with its personnel, equipment, or facilities in a manner consistent with industry practice; for example, providing storage, transportation, or delivery.

(2) For contracts or orders for multiple end items, at least 50 percent of the total value of the contract or order shall be manufactured, processed, or produced in the United States or its outlying areas by small business concerns.

(3) Paragraphs (h)(1) through (2) of this clause do not apply to construction or service contracts.

(i) **Notice.** The HUBZone small business offeror acknowledges that a prospective HUBZone awardee must be a HUBZone small business concern at the time of award of this contract. The HUBZone offeror shall provide the Contracting Officer a copy of the notice required by 13 CFR 126.501 if material changes occur before contract award that could affect its HUBZone eligibility. If the apparently successful HUBZone offeror is not a HUBZone small business concern at the time of award of this contract, the Contracting Officer will proceed to award to the next otherwise successful HUBZone small business concern or other offeror.

(End of clause)

**52.219-4 Notice of Price Evaluation Preference for HUBZone Small Business Concerns (DEVIATION 2020-O0008).**

Insert the following clause in solicitations and contracts for acquisitions conducted using full and open competition:

**NOTICE OF PRICE EVALUATION PREFERENCE FOR HUBZONE SMALL BUSINESS CONCERNS (MAR 2020) (DEVIATION 2020-O0008)**

(a) **Definitions.** As used in this clause—
“HUBZone small business concern” means a small business concern, certified by the Small Business Administration (SBA), that appears on the List of Qualified HUBZone Small Business Concerns maintained by the SBA (13 CFR 126.103).

“Similarly situated entity” means a first-tier subcontractor, including an independent contractor, that—

(1) Has the same small business program status as that which qualified the prime contractor for the award (e.g., for a small business set-aside contract, any small business concern, without regard to its socioeconomic status); and

(2) Is considered small for the size standard under the North American Industry Classification System (NAICS) code the prime contractor assigned to the subcontract.

(b) Evaluation preference.

(1) Offers will be evaluated by adding a factor of 10 percent to the price of all offers, except—

(i) Offers from HUBZone small business concerns that have not waived the evaluation preference; and

(ii) Otherwise successful offers from small business concerns.

(2) The factor of 10 percent shall be applied on a line item basis or to any group of items on which award may be made. Other evaluation factors described in the solicitation shall be applied before application of the factor.

(3) When the two highest rated offerors are a HUBZone small business concern and a large business, and the evaluated offer of the HUBZone small business concern is equal to the evaluated offer of the large business after considering the price evaluation preference, award will be made to the HUBZone small business concern.

(c) Waiver of evaluation preference. A HUBZone small business concern may elect to waive the evaluation preference, in which case the factor will be added to its offer for evaluation purposes. The agreements in paragraphs (e) and (f) of this clause do not apply if the Offeror has waived the evaluation preference.

__ Offeror elects to waive the evaluation preference.

(d) Independent contractors. An independent contractor shall be considered a subcontractor.

(e) Limitations on subcontracting. By submission of an offer and execution of a contract, a HUBZone small business concern agrees that, in the case of a contract assigned a NAICS code for—

(1) Services (except construction), it will not pay more than 50 percent of the amount paid by the Government for contract performance to subcontractors that are not similarly situated entities. Any work that a similarly situated entity further subcontracts will count toward the prime contractor’s 50 percent subcontract amount that cannot be exceeded. When a contract includes both services and supplies, the 50 percent limitation shall apply only to the service
portion of the contract. Other direct costs are excluded to the extent they are not the principal purpose of the contract and cannot be obtained from small business concerns;

(2) Supplies (other than procurement from a nonmanufacturer of such supplies), it will not pay more than 50 percent of the amount paid by the Government for contract performance, excluding the cost of materials, to subcontractors that are not similarly situated entities. Any work that a similarly situated entity further subcontracts will count toward the prime contractor’s 50 percent subcontract amount that cannot be exceeded. When a contract includes both supplies and services, the 50 percent limitation shall apply only to the supply portion of the contract;

(3) General construction, it will not pay more than 85 percent of the amount paid by the Government for contract performance, excluding the cost of materials, to subcontractors that are not similarly situated entities. Any work that a similarly situated entity further subcontracts will count toward the prime contractor’s 85 percent subcontract amount that cannot be exceeded; or

(4) Construction by special trade contractors, it will not pay more than 75 percent of the amount paid by the Government for contract performance, excluding the cost of materials, to subcontractors that are not similarly situated entities. Any work that a similarly situated entity further subcontracts will count toward the prime contractor’s 75 percent subcontract amount that cannot be exceeded.

(f) A HUBZone joint venture agrees that the aggregate of the HUBZone small business concerns to the joint venture, not each concern separately, will perform the applicable requirements specified in paragraph (e) of this clause.

(g) Nonmanufacturer.

(1) Unless SBA has waived the requirements of paragraphs (g)(1)(i) through (iii) of this clause in accordance with 13 CFR 121.1204, a HUBZone small business concern that provides an end item it did not manufacture, process, or produce, shall—

(i) Provide an end item that a small business has manufactured, processed, or produced in the United States or its outlying areas;

(ii) Be primarily engaged in the retail or wholesale trade and normally sell the type of item being supplied; and

(iii) Take ownership or possession of the item(s) with its personnel, equipment, or facilities in a manner consistent with industry practice; for example, providing storage, transportation, or delivery.

(2) For contracts or orders for multiple end items, at least 50 percent of the total value of the contract or order shall be manufactured, processed, or produced in the United States or its outlying areas by small business concerns.

(3) Paragraphs (g)(1) through (2) of this clause do not apply—

(i) To construction or service contracts; or

(ii) When the Offeror waives the evaluation preference.
(h) Notice. The HUBZone small business Offeror acknowledges that a prospective HUBZone awardee must be a HUBZone small business concern at the time of award of this contract. The HUBZone offeror shall provide the Contracting Officer a copy of the notice required by 13 CFR 126.501 if material changes occur before contract award that could affect its HUBZone eligibility. If the apparently successful HUBZone Offeror is not a HUBZone small business concern at the time of award of this contract, the Contracting Officer will proceed to award to the next otherwise successful HUBZone small business concern or other offeror.

(End of clause)
52.219-27 Notice of Service-Disabled Veteran-Owned Small Business Set-Aside (DEVIATION 2020-O0008).

Insert the following clause in solicitations and contracts for acquisitions that are set aside for, or awarded on a sole source basis to, service-disabled veteran-owned small business concerns under 19.1405 and 19.1406. This includes multiple-award contracts when orders may be set aside for service-disabled veteran-owned small business concerns as described in 8.405-5 and 16.505(b)(2)(i)(F) or when orders may be issued directly to one service-disabled veteran-owned small business contractor in accordance with 19.504(c)(1)(ii):

**NOTICE OF SERVICE-DISABLED VETERAN-OWNED SMALL BUSINESS SET-ASIDE (MAR 2020) (DEVIATION 2020-O0008)**

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

“Service-disabled veteran-owned small business concern”—

(1) Means a small business concern—

(i) Not less than 51 percent of which is owned by one or more service-disabled veterans or, in the case of any publicly owned business, not less than 51 percent of the stock of which is owned by one or more service-disabled veterans; and

(ii) The management and daily business operations of which are controlled by one or more service-disabled veterans or, in the case of a service-disabled veteran with permanent and severe disability, the spouse or permanent caregiver of such veteran.

(2) “Service-disabled veteran” means a veteran, as defined in 38 U.S.C. 101(2), with a disability that is service-connected, as defined in 38 U.S.C. 101(16).

“Similarly situated entity” means a first-tier subcontractor, including an independent contractor, that—

(1) Has the same small business program status as that which qualified the prime contractor for the award (e.g., for a small business set-aside contract, any small business concern, without regard to its socioeconomic status); and

(2) Is considered small for the size standard under the North American Industry Classification System (NAICS) code the prime contractor assigned to the subcontract.

(b) **Applicability.** This clause applies only to—

(1) Contracts that have been set aside for service-disabled veteran-owned small business concerns;

(2) Part or parts of a multiple-award contract that have been set aside for service-disabled veteran-owned small business concerns;

(3) Orders set aside for service-disabled veteran-owned small business concerns under multiple-award contracts as described in 8.405-5 and 16.505(b)(2)(i)(F); and
(4) Orders issued directly to service-disabled veteran-owned small business concerns under multiple-award contracts as described in 19.504(c)(1)(ii).

(c) General.

(1) Offers are solicited only from service-disabled veteran-owned small business concerns. Offers received from concerns that are not service-disabled veteran-owned small business concerns shall not be considered.

(2) Any award resulting from this solicitation will be made to a service-disabled veteran-owned small business concern.

(d) Independent contractors. An independent contractor shall be considered a subcontractor.

(e) Limitations on subcontracting. By submission of an offer and execution of a contract, a service-disabled veteran-owned small business concern agrees that in the performance of a contract assigned a NAICS code for—

(1) Services (except construction), it will not pay more than 50 percent of the amount paid by the Government for contract performance to subcontractors that are not similarly situated entities. Any work that a similarly situated entity further subcontracts will count toward the prime contractor’s 50 percent subcontract amount that cannot be exceeded. When a contract includes both services and supplies, the 50 percent limitation shall apply only to the service portion of the contract. Other direct costs are excluded to the extent they are not the principal purpose of the contract and cannot be obtained from small business concerns;

(2) Supplies (other than acquisition from a nonmanufacturer of the supplies), it will not pay more than 50 percent of the amount paid by the Government for contract performance, excluding the cost of materials, to subcontractors that are not similarly situated entities. Any work that a similarly situated entity further subcontracts will count toward the prime contractor’s 50 percent subcontract amount that cannot be exceeded. When a contract includes both supplies and services, the 50 percent limitation shall apply only to the supply portion of the contract;

(3) General construction, it will not pay more than 85 percent of the amount paid by the Government for contract performance, excluding the cost of materials, to subcontractors that are not similarly situated entities. Any work that a similarly situated entity further subcontracts will count toward the prime contractor’s 85 percent subcontract amount that cannot be exceeded; or

(4) Construction by special trade contractors, it will not pay more than 75 percent of the amount paid by the Government for contract performance, excluding the cost of materials, to subcontractors that are not similarly situated entities. Any work that a similarly situated entity further subcontracts will count toward the prime contractor’s 75 percent subcontract amount that cannot be exceeded.

(f) A service-disabled veteran-owned small business concern shall comply with the limitations on subcontracting as follows:

(1) For contracts, in accordance with paragraphs (b)(1) and (2) of this clause—
[Contracting Officer check as appropriate.]
__ By the end of the base term of the contract and then by the end of each subsequent option
period; or
__ By the end of the performance period for each order issued under the contract.

(2) For orders, in accordance with paragraphs (b)(3) and (4) of this clause, by the end of the
performance period for the order.

(g) Joint venture. A joint venture may be considered a service-disabled veteran owned small
business concern if—

(1) At least one member of the joint venture is a service-disabled veteran-owned small
business concern, and makes the following representations: That it is a service-disabled veteran-
owned small business concern, and that it is a small business concern under the North American
Industry Classification Systems (NAICS) code assigned to the procurement;

(2) Each other concern is small under the size standard corresponding to the NAICS code
assigned to the procurement; and

(3) The joint venture meets the requirements of 13 CFR 121.103(h).

(4) The joint venture meets the requirements of 13 CFR 125.15(b).

(h) Nonmanufacturer.

(1) Unless SBA has waived the requirements of paragraphs (h)(1)(i) through (iii) of this
clause in accordance with 13 CFR 121.1204, a service-disabled veteran-owned small business
concern that provides an end item it did not manufacture, process, or produce, shall—

(i) Provide an end item that a small business has manufactured, processed, or produced
in the United States or its outlying areas;

(ii) Be primarily engaged in the retail or wholesale trade and normally sell the type of
item being supplied; and

(iii) Take ownership or possession of the item(s) with its personnel, equipment, or
facilities in a manner consistent with industry practice; for example, providing storage,
transportation, or delivery.

(2) For contracts or orders for multiple end items, at least 50 percent of the total value of
the contract or order shall be manufactured, processed, or produced in the United States or its
outlying areas by small business concerns.

(3) Paragraphs (h)(1) through (2) of this clause do not apply to construction or service
contracts.

(End of clause)
52.219-29 Notice of Set-Aside for, or Sole Source Award to, Economically Disadvantaged Women-Owned Small Business Concerns (DEVIATION 2020-O0008).

Insert the following clause in solicitations and contracts for acquisitions that are set aside for, or awarded on a sole source basis to, economically disadvantaged women-owned small business (EDWOSB) concerns under 19.1505(b) or 19.1506(a). This includes multiple-award contracts when orders may be set aside for EDWOSB concerns as described in 8.405-5 and 16.505(b)(2)(i)(F) or when orders may be issued directly to one EDWOSB contractor in accordance with 19.504(c)(1)(ii):

NOTICE OF SET-ASIDE FOR, OR SOLE SOURCE AWARD TO, ECONOMICALLY DISADVANTAGED WOMEN-OWNED SMALL BUSINESS CONCERNS (MAR 2020) (DEVIATION 2020-O0008)

(a) Definitions. As used in this clause—

“Economically disadvantaged women-owned small business (EDWOSB) concern” means a small business concern that is at least 51 percent directly and unconditionally owned by, and the management and daily business operations of which are controlled by, one or more women who are citizens of the United States and who are economically disadvantaged in accordance with 13 CFR part 127. It automatically qualifies as a women-owned small business (WOSB) concern eligible under the WOSB Program.

“Similarly situated entity” means a first-tier subcontractor, including an independent contractor, that—

(1) Has the same small business program status as that which qualified the prime contractor for the award (e.g., for a small business set-aside contract, any small business concern, without regard to its socioeconomic status); and

(2) Is considered small for the size standard under the North American Industry Classification System (NAICS) code the prime contractor assigned to the subcontract.

“WOSB Program Repository” means a secure, Web-based application that collects, stores, and disseminates documents to the contracting community and SBA, which verify the eligibility of a business concern for a contract to be awarded under the WOSB Program.

(b) Applicability. This clause applies only to—

(1) Contracts that have been set aside for, or awarded on a sole source basis to, EDWOSB concerns;

(2) Part or parts of a multiple-award contract that have been set aside for EDWOSB concerns;

(3) Orders set aside for EDWOSB concerns under multiple-award contracts as described in 8.405-5 and 16.505(b)(2)(i)(F); and
(4) Orders issued directly to EDWOSB concerns under multiple-award contracts as described in 19.504(c)(1)(ii).

(c) General.

(1) Offers are solicited only from EDWOSB concerns. Offers received from concerns that are not EDWOSB concerns will not be considered.

(2) Any award resulting from this solicitation will be made to an EDWOSB concern.

(3) The Contracting Officer will ensure that the apparent successful offeror has provided all required documents to the WOSB Program Repository. The contract will not be awarded until all required documents are received.

(d) Independent contractors. An independent contractor shall be considered a subcontractor.

(e) Limitations on subcontracting. By submission of an offer and execution of a contract, an EDWOSB concern agrees that in the performance of a contract assigned a NAICS code for—

(1) Services (except construction), it will not pay more than 50 percent of the amount paid by the Government for contract performance to subcontractors that are not similarly situated entities. Any work that a similarly situated entity further subcontracts will count toward the prime contractor’s 50 percent subcontract amount that cannot be exceeded. When a contract includes both services and supplies, the 50 percent limitation shall apply only to the service portion of the contract. Other direct costs are excluded to the extent they are not the principal purpose of the contract and cannot be obtained from small business concerns;

(2) Supplies or products (other than procurement from a nonmanufacturer in such supplies or products), it will not pay more than 50 percent of the amount paid by the Government for contract performance, excluding the cost of materials, to subcontractors that are not similarly situated entities. Any work that a similarly situated entity further subcontracts will count toward the prime contractor’s 50 percent subcontract amount that cannot be exceeded. When a contract includes both supplies and services, the 50 percent limitation shall apply only to the supply portion of the contract;

(3) General construction, it will not pay more than 85 percent of the amount paid by the Government for contract performance, excluding the cost of materials, to subcontractors that are not similarly situated entities. Any work that a similarly situated entity further subcontracts will count toward the prime contractor’s 85 percent subcontract amount that cannot be exceeded; or

(4) Construction by special trade contractors, it will not pay more than 75 percent of the amount paid by the Government for contract performance, excluding the cost of materials, to subcontractors that are not similarly situated entities. Any work that a similarly situated entity further subcontracts will count toward the prime contractor’s 75 percent subcontract amount that cannot be exceeded.

(f) An EDWOSB concern shall comply with the limitations on subcontracting as follows:

(1) For contracts, in accordance with paragraphs (b)(1) and (2) of this clause—
[Contracting Officer check as appropriate.]  

By the end of the base term of the contract and then by the end of each subsequent option period; or

By the end of the performance period for each order issued under the contract.

(2) For orders, in accordance with paragraphs (b)(3) and (4) of this clause, by the end of the performance period for the order.

(g) Joint Venture. A joint venture may be considered an EDWOSB concern if—

(1) It meets the applicable size standard corresponding to the NAICS code assigned to the contract, unless an exception to affiliation applies pursuant to 13 CFR 121.103(h)(3);

(2) The EDWOSB participant of the joint venture is designated in the System for Award Management as an EDWOSB concern;

(3) The parties to the joint venture have entered into a written joint venture agreement that contains provisions—

(i) Setting forth the purpose of the joint venture;

(ii) Designating an EDWOSB concern as the managing venturer of the joint venture, and an employee of the managing venturer as the project manager responsible for the performance of the contract;

(iii) Stating that not less than 51 percent of the net profits earned by the joint venture will be distributed to the EDWOSB;

(iv) Specifying the responsibilities of the parties with regard to contract performance, sources of labor, and negotiation of the EDWOSB contract; and

(v) Requiring the final original records be retained by the managing venturer upon completion of the EDWOSB contract performed by the joint venture.

(4) The joint venture performs the applicable percentage of work required in accordance with paragraph (d) above; and

(5) The procuring activity executes the contract in the name of the EDWOSB or joint venture.

(h) Nonmanufacturer.

(1) Unless SBA has waived the requirements of paragraphs (h)(1)(i) through (iii) of this clause in accordance with 13 CFR 121.1204, an EDWOSB concern that provides an end item it did not manufacture, process, or produce, shall—

(i) Provide an end item that a small business has manufactured, processed, or produced in the United States or its outlying areas;

(ii) Be primarily engaged in the retail or wholesale trade and normally sell the type of item being supplied; and
(iii) Take ownership or possession of the item(s) with its personnel, equipment, or facilities in a manner consistent with industry practice; for example, providing storage, transportation, or delivery.

(2) For contracts or orders for multiple end items, at least 50 percent of the total value of the contract or order shall be manufactured, processed, or produced in the United States or its outlying areas by small business concerns.

(3) Paragraphs (h)(1) through (2) of this clause do not apply to construction or service contracts.

(End of clause)
52.219-30  Notice of Set-Aside for, or Sole Source Award to, Women-Owned Small Business Concerns Eligible Under the Women-Owned Small Business Program (DEVIATION 2020-O0008).

Insert the following clause in solicitations and contracts for acquisitions that are set aside for, or awarded on a sole source basis to, women-owned small business (WOSB) concerns under 19.1505(c) or 19.1506(b). This includes multiple-award contracts when orders may be set aside for WOSB concerns eligible under the WOSB Program as described in 8.405-5 and 16.505(b)(2)(i)(F) or when orders may be issued directly to one WOSB contractor in accordance with 19.504(c)(1)(ii):

NOTICE OF SET-ASIDE FOR, OR SOLE SOURCE AWARD TO, WOMEN-OWNED SMALL BUSINESS CONCERNS ELIGIBLE UNDER THE WOMEN-OWNED SMALL BUSINESS PROGRAM (MAR 2020) (DEVIATION 2020-O0008)

(a) Definitions. As used in this clause—

“Similarly situated entity” means a first-tier subcontractor, including an independent contractor, that—

(1) Has the same small business program status as that which qualified the prime contractor for the award (e.g., for a small business set-aside contract, any small business concern, without regard to its socioeconomic status); and

(2) Is considered small for the size standard under the North American Industry Classification System (NAICS) code the prime contractor assigned to the subcontract.

“Women-owned small business (WOSB) concern eligible under the WOSB Program” (in accordance with 13 CFR part 127), means a small business concern that is at least 51 percent directly and unconditionally owned by, and the management and daily business operations of which are controlled by, one or more women who are citizens of the United States.

“WOSB Program Repository” means a secure, Web-based application that collects, stores, and disseminates documents to the contracting community and SBA, which verify the eligibility of a business concern for a contract to be awarded under the WOSB Program.

(b) Applicability. This clause applies only to—

(1) Contracts that have been set aside for, or awarded on a sole source basis to, WOSB concerns eligible under the WOSB Program;

(2) Part or parts of a multiple-award contract that have been set aside for WOSB concerns eligible under the WOSB Program;

(3) Orders set aside for WOSB concerns eligible under the WOSB Program, under multiple-award contracts as described in 8.405-5 and 16.505(b)(2)(i)(F); and
(4) Orders issued directly to WOSB concerns eligible under the WOSB Program under multiple-award contracts as described in 19.504(c)(1)(ii).

(c) General.

(1) Offers are solicited only from WOSB concerns eligible under the WOSB Program. Offers received from concerns that are not WOSB concerns eligible under the WOSB Program shall not be considered.

(2) Any award resulting from this solicitation will be made to a WOSB concern eligible under the WOSB Program.

(3) The Contracting Officer will ensure that the apparent successful offeror has provided the required documents to the WOSB Program Repository. The contract shall not be awarded until all required documents are received.

(d) Independent contractors. An independent contractor shall be considered a subcontractor.

(e) Limitations on subcontracting. By submission of an offer and execution of a contract, a WOSB concern eligible under the WOSB Program agrees that in the performance of a contract assigned a NAICS code for—

(1) Services (except construction), it will not pay more than 50 percent of the amount paid by the Government for contract performance to subcontractors that are not similarly situated entities. Any work that a similarly situated entity further subcontracts will count toward the prime contractor’s 50 percent subcontract amount that cannot be exceeded. When a contract includes both services and supplies, the 50 percent limitation shall apply only to the service portion of the contract. Other direct costs are excluded to the extent they are not the principal purpose of the contract and cannot be obtained from small business concerns;

(2) Supplies or products (other than procurement from a nonmanufacturer in such supplies or products), it will not pay more than 50 percent of the amount paid by the Government for contract performance, excluding the cost of materials, to subcontractors that are not similarly situated entities. Any work that a similarly situated entity further subcontracts will count toward the prime contractor’s 50 percent subcontract amount that cannot be exceeded. When a contract includes both supplies and services, the 50 percent limitation shall apply only to the supply portion of the contract;

(3) General construction, it will not pay more than 85 percent of the amount paid by the Government for contract performance, excluding the cost of materials, to subcontractors that are not similarly situated entities. Any work that a similarly situated entity further subcontracts will count toward the prime contractor’s 85 percent subcontract amount that cannot be exceeded; or

(4) Construction by special trade contractors, it will not pay more than 75 percent of the amount paid by the Government for contract performance, excluding the cost of materials, to subcontractors that are not similarly situated entities. Any work that a similarly situated entity
further subcontracts will count toward the prime contractor’s 75 percent subcontract amount that cannot be exceeded.

(f) A WOSB concern eligible under the WOSB Program shall comply with the limitations on subcontracting as follows:

(1) For contracts, in accordance with paragraphs (b)(1) and (2) of this clause—

[Contracting Officer check as appropriate.]

__  By the end of the base term of the contract and then by the end of each subsequent option period; or
__  By the end of the performance period for each order issued under the contract.

(2) For orders, in accordance with paragraphs (b)(3) and (4) of this clause, by the end of the performance period for the order.

(g) Joint Venture. A joint venture may be considered a WOSB concern eligible under the WOSB Program if—

(1) It meets the applicable size standard corresponding to the NAICS code assigned to the contract, unless an exception to affiliation applies pursuant to 13 CFR 121.103(h)(3);

(2) The WOSB participant of the joint venture is designated in the System for Award Management as a WOSB concern eligible under the WOSB Program;

(3) The parties to the joint venture have entered into a written joint venture agreement that contains provisions—

(i) Setting forth the purpose of the joint venture;
(ii) Designating a WOSB concern eligible under the WOSB Program as the managing venturer of the joint venture, and an employee of the managing venturer as the project manager responsible for the performance of the contract;
(iii) Stating that not less than 51 percent of the net profits earned by the joint venture will be distributed to the WOSB;
(iv) Specifying the responsibilities of the parties with regard to contract performance, sources of labor, and negotiation of the WOSB contract; and
(v) Requiring the final original records be retained by the managing venturer upon completion of the WOSB contract performed by the joint venture.

(4) The procuring activity executes the contract in the name of the WOSB concern eligible under the WOSB Program or joint venture.

(h) Nonmanufacturer.

(1) Unless SBA has waived the requirements of paragraphs (h)(1)(i) through (iii) of this clause in accordance with 13 CFR 121.1204, a WOSB concern eligible under the WOSB Program that provides an end item it did not manufacture, process, or produce, shall—

(i) Provide an end item that a small business has manufactured, processed, or produced in the United States or its outlying areas;
(ii) Be primarily engaged in the retail or wholesale trade and normally sell the type of item being supplied; and

(iii) Take ownership or possession of the item(s) with its personnel, equipment, or facilities in a manner consistent with industry practice; for example, providing storage, transportation, or delivery.

(2) For contracts or orders for multiple end items, at least 50 percent of the total value of the contract or order shall be manufactured, processed, or produced in the United States or its outlying areas by small business concerns.

(3) Paragraphs (h)(1) through (2) of this clause do not apply to construction or service contracts.

(End of clause)
MEMORANDUM FOR COMMANDER, UNITED STATES CYBER COMMAND (ATTN: ACQUISITION EXECUTIVE) 
COMMANDER, UNITED STATES SPECIAL OPERATIONS COMMAND (ATTN: ACQUISITION EXECUTIVE) 
COMMANDER, UNITED STATES TRANSPORTATION COMMAND (ATTN: ACQUISITION EXECUTIVE) 
DEPUTY ASSISTANT SECRETARY OF THE ARMY (PROCUREMENT) 
DEPUTY ASSISTANT SECRETARY OF THE NAVY (PROCUREMENT) 
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE (CONTRACTING) 
DIRECTORS, DEFENSE AGENCIES 
DIRECTORS, DEFENSE FIELD ACTIVITIES 

SUBJECT: Class Deviation—Protection of Technical Data and Computer Software Under Small Business Innovation Research Program Contracts

Effective immediately, contracting officers shall use the clause provided in Attachment 1, in lieu of the clause at DFARS 252.227-7018, Rights in Noncommercial Technical Data and Computer Software—Small Business Innovation Research (SBIR) Program, in new solicitations and contracts awarded under the SBIR Program, when technical data or computer software will be generated during contract performance. Contracting officers shall use the deviation clause provided in Attachment 1 with Alternate I to DFARS 252.227-7018, as prescribed in DFARS 227.7104(d).

This class deviation implements the Small Business Administration’s Policy Directive published in the Federal Register on April 2, 2019 (84 FR 12794). The Policy Directive extends the period of time during which the Government must protect technical data and computer software developed or generated under SBIR contracts against unauthorized use and disclosure. This protection period begins at contract award and ends 20 years after contract award. The Policy Directive also provides for the Government to use, and to authorize others to use on its behalf, the data for Government purposes.
This class deviation remains in effect until implemented in the DFARS or otherwise rescinded. My point of contact is Jennifer D. Johnson, who may be reached at 571-372-6100, or at jennifer.d.johnson1.civ@mail.mil.

Kim Herrington
Acting Principal Director,
Defense Pricing and Contracting
(DEVIATION 2020-O0007)
As prescribed in 227.7104(a), use the following clause:

RIGHTS IN NONCOMMERCIAL TECHNICAL DATA AND COMPUTER SOFTWARE--SMALL BUSINESS INNOVATION RESEARCH (SBIR) PROGRAM
(MAR 2020) (DEVIATION 2020-O0007)

(a) Definitions. As used in this clause—

(1) “Commercial computer software” means software developed or regularly used for nongovernmental purposes which—

(i) Has been sold, leased, or licensed to the public;

(ii) Has been offered for sale, lease, or license to the public;

(iii) Has not been offered, sold, leased, or licensed to the public but will be available for commercial sale, lease, or license in time to satisfy the delivery requirements of this contract; or

(iv) Satisfies a criterion expressed in paragraph (a)(1)(i), (ii), or (iii) of this clause and would require only minor modification to meet the requirements of this contract.

(2) “Computer database” means a collection of recorded data in a form capable of being processed by a computer. The term does not include computer software.

(3) “Computer program” means a set of instructions, rules, or routines, recorded in a form that is capable of causing a computer to perform a specific operation or series of operations.

(4) “Computer software” means computer programs, source code, source code listings, object code listings, design details, algorithms, processes, flow charts, formulae, and related material that would enable the software to be reproduced, recreated, or recompiled. Computer software does not include computer databases or computer software documentation.

(5) “Computer software documentation” means owner's manuals, user's manuals, installation instructions, operating instructions, and other similar items, regardless of storage medium, that explain the capabilities of the computer software or provide instructions for using the software.

(6) “Covered Government support contractor” means a contractor (other than a litigation support contractor covered by 252.204-7014) under a contract, the primary purpose of which is to furnish independent and impartial advice or technical assistance directly to the Government in support of the Government's management and oversight.
of a program or effort (rather than to directly furnish an end item or service to accomplish a program or effort), provided that the contractor—

(i) Is not affiliated with the prime contractor or a first-tier subcontractor on the program or effort, or with any direct competitor of such prime contractor or any such first-tier subcontractor in furnishing end items or services of the type developed or produced on the program or effort; and

(ii) Receives access to the technical data or computer software for performance of a Government contract that contains the clause at 252.227-7025, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends.

(7) “Data” means recorded information, regardless of the form or method of the recording. The term includes technical data and computer software. The term does not include information incidental to contract administration, such as financial, administrative, cost or pricing, or management information.

(8) “Detailed manufacturing or process data” means technical data that describe the steps, sequences, and conditions of manufacturing, processing or assembly used by the manufacturer to produce an item or component or to perform a process.

(9) “Developed” means—

(i) (Applicable to technical data other than computer software documentation.) An item, component, or process, exists and is workable. Thus, the item or component must have been constructed or the process practiced. Workability is generally established when the item, component, or process has been analyzed or tested sufficiently to demonstrate to reasonable people skilled in the applicable art that there is a high probability that it will operate as intended. Whether, how much, and what type of analysis or testing is required to establish workability depends on the nature of the item, component, or process, and the state of the art. To be considered “developed,” the item, component, or process need not be at the stage where it could be offered for sale or sold on the commercial market, nor must the item, component or process be actually reduced to practice within the meaning of Title 35 of the United States Code;

(ii) A computer program has been successfully operated in a computer and tested to the extent sufficient to demonstrate to reasonable persons skilled in the art that the program can reasonably be expected to perform its intended purpose;

(iii) Computer software, other than computer programs, has been tested or analyzed to the extent sufficient to demonstrate to reasonable persons skilled in the art that the software can reasonably be expected to perform its intended purpose; or

(iv) Computer software documentation required to be delivered under a contract has been written, in any medium, in sufficient detail to comply with requirements under that contract.

(10) “Developed exclusively at private expense” means development was
accomplished entirely with costs charged to indirect cost pools, costs not allocated to a government contract, or any combination thereof.

(i) Private expense determinations should be made at the lowest practicable level.

(ii) Under fixed-price contracts, when total costs are greater than the firm-fixed-price or ceiling price of the contract, the additional development costs necessary to complete development shall not be considered when determining whether development was at government, private, or mixed expense.

(11) “Developed exclusively with government funds” means development was not accomplished exclusively or partially at private expense.

(12) “Developed with mixed funding” means development was accomplished partially with costs charged to indirect cost pools and/or costs not allocated to a government contract, and partially with costs charged directly to a government contract.

(13) “Form, fit, and function data” means technical data that describe the required overall physical, functional, and performance characteristics (along with the qualification requirements, if applicable) of an item, component, or process to the extent necessary to permit identification of physically and functionally interchangeable items.

(14) “Generated” means technical data or computer software first created in the performance of this contract.

(15) “Government purpose” means any activity in which the United States Government is a party, including cooperative agreements with international or multinational defense organizations or sales or transfers by the United States Government to foreign governments or international organizations. Government purposes include competitive procurement, but do not include the rights to use, modify, reproduce, release, perform, display, or disclose technical data or computer software for commercial purposes or authorize others to do so.

(16) “Government purpose rights” means the rights to—

(i) Use, modify, reproduce, release, perform, display, or disclose technical data or computer software within the Government without restriction; and

(ii) Release or disclose technical data or computer software outside the Government and authorize persons to whom release or disclosure has been made to use, modify, reproduce, release, perform, display, or disclose that data for United States Government purposes.

(17) “Limited rights” means the rights to use, modify, reproduce, release, perform, display, or disclose technical data, in whole or in part, within the Government. The Government may not, without the written permission of the party asserting limited rights, release or disclose the technical data outside the Government, use the technical data for manufacture, or authorize the technical data to be used by another party,
except that the Government may reproduce, release, or disclose such data or authorize the use or reproduction of the data by persons outside the Government if—

(i) The production, release, disclosure, or use is—

(A) Necessary for emergency repair and overhaul; or

(B) A release or disclosure to—

(1) A covered Government support contractor in performance of its covered Government support contracts for use, modification, reproduction, performance, display, or release or disclosure to a person authorized to receive limited rights technical data; or

(2) A foreign government, of technical data other than detailed manufacturing or process data, when use of such data by the foreign government is in the interest of the Government and is required for evaluational or informational purposes;

(ii) The recipient of the technical data is subject to a prohibition on the further reproduction, release, disclosure, or use of the technical data; and

(iii) The Contractor or subcontractor asserting the restriction is notified of such reproduction, release, disclosure, or use.

(18) “Minor modification” means a modification that does not significantly alter the nongovernmental function or purpose of computer software or is of the type customarily provided in the commercial marketplace.

(19) “Noncommercial computer software” means software that does not qualify as commercial computer software under paragraph (a)(1) of this clause.

(20) “Restricted rights” apply only to noncommercial computer software and mean the Government's rights to—

(i) Use a computer program with one computer at one time. The program may not be accessed by more than one terminal or central processing unit or time shared unless otherwise permitted by this contract;

(ii) Transfer a computer program to another Government agency without the further permission of the Contractor if the transferor destroys all copies of the program and related computer software documentation in its possession and notifies the licensor of the transfer. Transferred programs remain subject to the provisions of this clause;

(iii) Make the minimum number of copies of the computer software required for safekeeping (archive), backup, or modification purposes;

(iv) Modify computer software provided that the Government may—
(A) Use the modified software only as provided in paragraphs (a)(20)(i) and (iii) of this clause; and

(B) Not release or disclose the modified software except as provided in paragraphs (a)(20)(ii), (v), (vi), and (vii) of this clause;

(v) Permit contractors or subcontractors performing service contracts (see 37.101 of the Federal Acquisition Regulation) in support of this or a related contract to use computer software to diagnose and correct deficiencies in a computer program, to modify computer software to enable a computer program to be combined with, adapted to, or merged with other computer programs or when necessary to respond to urgent tactical situations, provided that—

(A) The Government notifies the party which has granted restricted rights that a release or disclosure to particular contractors or subcontractors was made;

(B) Such contractors or subcontractors are subject to the non-disclosure agreement at 227.7103-7 of the Defense Federal Acquisition Regulation Supplement or are Government contractors receiving access to the software for performance of a Government contract that contains the clause at 252.227-7025, Limitations on the Use or Disclosure of Government Furnished Information Marked with Restrictive Legends;

(C) The Government shall not permit the recipient to decompile, disassemble, or reverse engineer the software, or use software decompiled, disassembled, or reverse engineered by the Government pursuant to paragraph (a)(20)(iv) of this clause, for any other purpose; and

(D) Such use is subject to the limitations in paragraphs (a)(20)(i) through (iii) of this clause;

(vi) Permit contractors or subcontractors performing emergency repairs or overhaul of items or components of items procured under this or a related contract to use the computer software when necessary to perform the repairs or overhaul, or to modify the computer software to reflect the repairs or overhaul made, provided that—

(A) The intended recipient is subject to the non-disclosure agreement at 227.7103-7 or is a Government contractor receiving access to the software for performance of a Government contract that contains the clause at 252.227-7025, Limitations on the Use or Disclosure of Government Furnished Information Marked with Restrictive Legends;

(B) The Government shall not permit the recipient to decompile, disassemble, or reverse engineer the software, or use software decompiled, disassembled, or reverse engineered by the Government pursuant to paragraph (a)(20)(iv) of this clause, for any other purpose; and

(C) Such use is subject to the limitations in paragraphs (a)(20)(i) through (iii) of this clause; and
(vii) Permit covered Government support contractors in the performance of Government contracts that contain the clause at [252.227-7025](https://www.acquisition.gov/cdm/content/252.227-7025), Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends, to use, modify, reproduce, perform, display, or release or disclose the computer software to a person authorized to receive restricted rights computer software, provided that—

(A) The Government shall not permit the covered Government support contractor to decompile, disassemble, or reverse engineer the software, or use software decompiled, disassembled, or reverse engineered by the Government pursuant to the paragraph (a)(20)(iv) of this clause, for any other purpose; and

(B) Such use is subject to the limitations in paragraphs (a)(20)(i) through (iv) of this clause.

(21) “SBIR data” means all data developed or generated in the performance of a SBIR contract.

(22) “SBIR data protection period” means the period of time during which the Government is obligated to protect SBIR data against unauthorized use and disclosure in accordance with SBIR data rights. The SBIR protection period begins on the date of award of the contract under which the SBIR data are developed or generated and ends 20 years after that date. This protection period is not extended by any subsequent SBIR contracts under which any portion of that SBIR data is used or delivered. The SBIR data protection period of any such subsequent SBIR contract applies only to the SBIR data that are developed or generated under that subsequent contract.

(23) “SBIR data rights” means the Government’s rights, during the SBIR data protection period, in SBIR data covered by paragraph (b)(5) of this clause, as follows:

(i) Limited rights in such SBIR technical data; and

(ii) Restricted rights in such SBIR computer software.

(24) “Technical data” means recorded information, regardless of the form or method of the recording, of a scientific or technical nature (including computer software documentation). The term does not include computer software or information incidental to contract administration, such as financial and/or management information.

(25) “Unlimited rights” means rights to use, modify, reproduce, release, perform, display, or disclose, technical data or computer software in whole or in part, in any manner and for any purpose whatsoever, and to have or authorize others to do so.

(b) *Rights in technical data and computer software.* The Contractor grants or shall obtain for the Government the following royalty-free, world-wide, nonexclusive, irrevocable license rights in technical data or noncommercial computer software. All rights not granted to the Government are retained by the Contractor.

(1) *Unlimited rights.* The Government shall have unlimited rights in technical
data, including computer software documentation, or computer software, including such data generated under this contract, that are—

(i) Form, fit, and function data;

(ii) Necessary for installation, operation, maintenance, or training purposes (other than detailed manufacturing or process data);

(iii) Corrections or changes to Government-furnished technical data or computer software;

(iv) Otherwise publicly available or have been released or disclosed by the Contractor or a subcontractor without restrictions on further use, release or disclosure other than a release or disclosure resulting from the sale, transfer, or other assignment of interest in the technical data or computer software to another party or the sale or transfer of some or all of a business entity or its assets to another party;

(v) Data in which the Government has acquired previously unlimited rights under another Government contract or as a result of negotiations;

(vi) Data furnished to the Government, under this or any other Government contract or subcontract thereunder, with—

(A) Government purpose license rights, limited rights, or restricted rights, and the restrictive condition(s) has/have expired; or

(B) Government purpose rights and the Contractor’s exclusive right to use such data for commercial purposes has expired; and

(vii) Computer software documentation generated or required to be delivered under this contract.

(2) Government purpose rights.

(i) The Government shall have government purpose rights for the period specified in paragraph (b)(2)(ii) of this clause in data that are—

(A) Not SBIR data, and are—

(f) Technical data pertaining to items, components, or processes developed with mixed funding, or computer software developed with mixed funding, except when the Government is entitled to unlimited rights in such data as provided in paragraph (b)(1) of this clause; or

(2) Created with mixed funding in the performance of a contract that does not require the development, manufacture, construction, or productions of items, components, or processes; or

(B) SBIR data, upon expiration of the SBIR data protection period.
(ii)(A) For the non-SBIR data described in paragraph (b)(2)(i)(A) of this clause, the Government shall have Government purpose rights for a period of five years, or such other period as may be negotiated. This period shall commence upon execution of the contract, subcontract, letter contract (or similar contractual instrument), or contract modification (including a modification to exercise an option) that required development of the items, components, or processes, or creation of the data described in paragraph (b)(2)(i)(A)(2) of this clause. Upon expiration of the five-year or other negotiated period, the Government shall have unlimited rights in the data.

(B) For the SBIR data described in paragraph (b)(2)(i)(B) of this clause, the Government shall have Government purpose rights perpetually, or for such other period as may be negotiated. This period commences upon the expiration of the SBIR data protection period. Upon expiration of any such negotiated period, the Government shall have unlimited rights in the data.

(iii) The Government shall not release or disclose data in which it has government purpose rights unless—

(A) Prior to release or disclosure, the intended recipient is subject to the nondisclosure agreement at 227.7103-7 of the Defense Federal Acquisition Regulation Supplement (DFARS); or

(B) The recipient is a Government contractor receiving access to the data for performance of a Government contract that contains the clause at DFARS 252.227-7025, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends.

(iv) The Contractor has the exclusive right, including the right to license others, to use technical data in which the Government has obtained government purpose rights under this contract for any commercial purpose during the time period specified in the government purpose rights legend prescribed in paragraph (f)(2) of this clause.

(3) Limited rights. The Government shall have limited rights in technical data, that were not generated under this contract, pertain to items, components or processes developed exclusively at private expense, and are marked, in accordance with the marking instructions in paragraph (f)(1) of this clause, with the legend prescribed in paragraph (f)(3) of this clause.

(4) Restricted rights in computer software. The Government shall have restricted rights in noncommercial computer software required to be delivered or otherwise furnished to the Government under this contract that were developed exclusively at private expense and were not generated under this contract.

(5) SBIR data rights. Except for technical data, including computer software documentation, or computer software in which the Government has unlimited rights under paragraph (b)(1) of this clause, the Government shall have SBIR data rights, during the SBIR data protection period of this contract, in all SBIR data.
(6) **Specifically negotiated license rights.** The standard license rights granted to the Government under paragraphs (b)(1) through (b)(5) of this clause may be modified by mutual agreement to provide such rights as the parties consider appropriate but shall not provide the Government lesser rights in technical data, including computer software documentation, than are enumerated in paragraph (a)(17) of this clause or lesser rights in computer software than are enumerated in paragraph (a)(20) of this clause. Any rights so negotiated shall be identified in a license agreement made part of this contract.

(7) **Prior government rights.** Technical data, including computer software documentation, or computer software that will be delivered, furnished, or otherwise provided to the Government under this contract, in which the Government has previously obtained rights shall be delivered, furnished, or provided with the pre-existing rights, unless—

(i) The parties have agreed otherwise; or

(ii) Any restrictions on the Government's rights to use, modify, release, perform, display, or disclose the technical data or computer software have expired or no longer apply.

(8) **Release from liability.** The Contractor agrees to release the Government from liability for any release or disclosure of technical data, computer software, or computer software documentation made in accordance with paragraph (a)(15), (a)(19), or (b)(5) of this clause, or in accordance with the terms of a license negotiated under paragraph (b)(6) of this clause, or by others to whom the recipient has released or disclosed the data, software, or documentation and to seek relief solely from the party who has improperly used, modified, reproduced, released, performed, displayed, or disclosed Contractor data or software marked with restrictive legends.

(9) **Covered Government support contractors.** The Contractor acknowledges that—

(i) Limited rights technical data and restricted rights computer software are authorized to be released or disclosed to covered Government support contractors;

(ii) The Contractor will be notified of such release or disclosure;

(iii) The Contractor may require each such covered Government support contractor to enter into a non-disclosure agreement directly with the Contractor (or the party asserting restrictions as identified in a restrictive legend) regarding the covered Government support contractor's use of such data or software, or alternatively that the Contractor (or party asserting restrictions) may waive in writing the requirement for an non-disclosure agreement; and

(iv) Any such non-disclosure agreement shall address the restrictions on the covered Government support contractor's use of the data or software as set forth in the clause at [252.227-7025](https://fedreg.access.gpo.gov/). Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends. The non-disclosure agreement shall not
include any additional terms and conditions unless mutually agreed to by the parties to the non-disclosure agreement.

(c) **Rights in derivative computer software or computer software documentation.** The Government shall retain its rights in the unchanged portions of any computer software or computer software documentation delivered under this contract that the Contractor uses to prepare, or includes in, derivative software or documentation.

(d) **Third party copyrighted technical data and computer software.** The Contractor shall not, without the written approval of the Contracting Officer, incorporate any copyrighted technical data, including computer software documentation, or computer software in the data or software to be delivered under this contract unless the Contractor is the copyright owner or has obtained for the Government the license rights necessary to perfect a license or licenses in the deliverable data or software of the appropriate scope set forth in paragraph (b) of this clause and, prior to delivery of such—

1. Technical data, has affixed to the transmittal document a statement of the license rights obtained; or

2. Computer software, has provided a statement of the license rights obtained in a form acceptable to the Contracting Officer.

(e) **Identification and delivery of technical data or computer software to be furnished with restrictions on use, release, or disclosure.**

1. This paragraph does not apply to technical data or computer software that were or will be generated under this contract or to restrictions based solely on copyright.

2. Except as provided in paragraph (e)(3) of this clause, technical data or computer software that the Contractor asserts should be furnished to the Government with restrictions on use, release, or disclosure is identified in an attachment to this contract (the Attachment). The Contractor shall not deliver any technical data or computer software with restrictive markings unless the technical data or computer software are listed on the Attachment.

3. In addition to the assertions made in the Attachment, other assertions may be identified after award when based on new information or inadvertent omissions unless the inadvertent omissions would have materially affected the source selection decision. Such identification and assertion shall be submitted to the Contracting Officer as soon as practicable prior to the scheduled date for delivery of the technical data or computer software, in the following format, and signed by an official authorized to contractually obligate the Contractor:

   Identification and Assertion of Restrictions on the Government's Use, Release, or Disclosure of Technical Data or Computer Software.

   The Contractor asserts for itself, or the persons identified below, that the Government's rights to use, release, or disclose the following technical data or computer software should be restricted:
**Class Deviation 2020-O0007**

**Protection of Data Under Small Business Innovation Research Program Contracts**

*Changes are indicated by a change bar in the right-hand margin.*

Technical Data or Computer Software to be Furnished With Restrictions*

<table>
<thead>
<tr>
<th>Basis for Assertion**</th>
<th>Asserted Rights Category***</th>
<th>Name of Person Asserting Restrictions****</th>
</tr>
</thead>
<tbody>
<tr>
<td>(LIST)</td>
<td>(LIST)</td>
<td>(LIST)</td>
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</tbody>
</table>

*If the assertion is applicable to items, components, or processes developed at private expense, identify both the technical data and each such item, component, or process.

**Generally, development at private expense, either exclusively or partially, is the only basis for asserting restrictions on the Government's rights to use, release, or disclose technical data or computer software. Indicate whether development was exclusively or partially at private expense. If development was not at private expense, enter the specific reason for asserting that the Government's rights should be restricted.

***Enter asserted rights category (e.g., limited rights, restricted rights, government purpose rights, or government purpose license rights from a prior contract, SBIR data rights under another contract, or specifically negotiated licenses).

****Corporation, individual, or other person, as appropriate.

Date
Printed Name and Title
Signature

(End of identification and assertion)

(4) When requested by the Contracting Officer, the Contractor shall provide sufficient information to enable the Contracting Officer to evaluate the Contractor's assertions. The Contracting Officer reserves the right to add the Contractor's assertions to the Attachment and validate any listed assertions, at a later date, in accordance with the procedures of the Validation of Asserted Restrictions—Computer Software and/or Validation of Restrictive Markings on Technical Data clauses of this contract.

(f) **Marking requirements.** The Contractor, and its subcontractors or suppliers, may only assert restrictions on the Government's rights to use, modify, reproduce, release, perform, display, or disclose technical data or computer software to be delivered under this contract by marking the deliverable data or software subject to restriction. Except as provided in paragraph (f)(7) of this clause, only the following markings are authorized under this contract: the limited rights legend at paragraph (f)(3) of this clause; the restricted rights legend at paragraph (f)(4) of this clause, the SBIR data rights legend at paragraph (f)(5) of this clause, or the special license rights legend at paragraph (f)(6) of this clause; and/or a notice of copyright as prescribed under 17 U.S.C. 401 or 402.

(1) **General marking instructions.** The Contractor, or its subcontractors or suppliers, shall conspicuously and legibly mark the appropriate legend to all technical
data and computer software that qualify for such markings. The authorized legends shall be placed on the transmittal document or storage container and, for printed material, each page of the printed material containing technical data or computer software for which restrictions are asserted. When only portions of a page of printed material are subject to the asserted restrictions, such portions shall be identified by circling, underscoring, with a note, or other appropriate identifier. Technical data or computer software transmitted directly from one computer or computer terminal to another shall contain a notice of asserted restrictions. However, instructions that interfere with or delay the operation of computer software in order to display a restrictive rights legend or other license statement at any time prior to or during use of the computer software, or otherwise cause such interference or delay, shall not be inserted in software that will or might be used in combat or situations that simulate combat conditions, unless the Contracting Officer’s written permission to deliver such software has been obtained prior to delivery. Reproductions of technical data, computer software, or any portions thereof subject to asserted restrictions shall also reproduce the asserted restrictions.

(2) Government purpose rights markings. Data delivered or otherwise furnished to the Government with government purpose rights shall be marked as follows:

GOVERNMENT PURPOSE RIGHTS

Contract No. ________________________________
Contractor Name ________________________________
Contractor Address ________________________________
Expiration Date ________________________________

The Government’s rights to use, modify, reproduce, release, perform, display, or disclose these data are restricted by paragraph (b)(2) of the Rights in Noncommercial Technical Data and Computer Software—Small Business Innovation Research (SBIR) Program clause contained in the above identified contract. No restrictions apply after the expiration date shown above. Any reproduction of data or portions thereof marked with this legend must also reproduce the markings.

(End of legend)

(3) Limited rights markings. Technical data not generated under this contract that pertain to items, components, or processes developed exclusively at private expense and delivered or otherwise furnished with limited rights shall be marked with the following legend:

LIMITED RIGHTS

Contract No. ________________________________
Contractor Name ________________________________
Contractor Address ________________________________
The Government's rights to use, modify, reproduce, release, perform, display, or disclose these technical data are restricted by paragraph (b)(3) of the Rights in Noncommercial Technical Data and Computer Software—Small Business Innovation Research (SBIR) Program clause contained in the above identified contract. Any reproduction of technical data or portions thereof marked with this legend must also reproduce the markings. Any person, other than the Government, who has been provided access to such data must promptly notify the above named Contractor.

(End of legend)

(4) Restricted rights markings. Computer software delivered or otherwise furnished to the Government with restricted rights shall be marked with the following legend:

RESTRICTED RIGHTS

Contract No. __________________________
Contractor Name ______________________
Contractor Address _____________________

The Government's rights to use, modify, reproduce, release, perform, display, or disclose this software are restricted by paragraph (b)(4) of the Rights in Noncommercial Technical Data and Computer Software—Small Business Innovation Research (SBIR) Program clause contained in the above identified contract. Any reproduction of computer software or portions thereof marked with this legend must also reproduce the markings. Any person, other than the Government, who has been provided access to such software must promptly notify the above named Contractor.

(End of legend)

(5) SBIR data rights markings. Except for technical data or computer software in which the Government has acquired unlimited rights under paragraph (b)(1) of this clause, or negotiated special license rights as provided in paragraph (b)(6) of this clause, technical data or computer software generated under this contract shall be marked with the following legend. The Contractor shall enter the expiration date for the SBIR data protection period on the legend:

SBIR DATA RIGHTS

Contract No. __________________________
Contractor Name ______________________
Contractor Address _____________________

Expiration of SBIR Data ________________
The Government's rights to use, modify, reproduce, release, perform, display, or disclose technical data or computer software marked with this legend are restricted during the period shown as provided in paragraph (b)(5) of the Rights in Noncommercial Technical Data and Computer Software–Small Business Innovation Research (SBIR) Program clause contained in the above identified contract. After the expiration date shown above, the Government has perpetual government purpose rights as provided in paragraph (b)(5) of that clause. Any reproduction of technical data, computer software, or portions thereof marked with this legend must also reproduce the markings.

(End of legend)

(6) Special license rights markings.

(i) Technical data or computer software in which the Government's rights stem from a specifically negotiated license shall be marked with the following legend:

SPECIAL LICENSE RIGHTS

The Government's rights to use, modify, reproduce, release, perform, display, or disclose this technical data or computer software are restricted by Contract No. _____(Insert contract number)____, License No. ____ (Insert license identifier)____. Any reproduction of technical data, computer software, or portions thereof marked with this legend must also reproduce the markings.

(End of legend)

(ii) For purposes of this clause, special licenses do not include government purpose license rights acquired under a prior contract (see paragraph (b)(7) of this clause).

(7) Pre-existing data markings. If the terms of a prior contract or license permitted the Contractor to restrict the Government's rights to use, modify, reproduce, release, perform, display, or disclose technical data or computer software, and those restrictions are still applicable, the Contractor may mark such data or software with the appropriate restrictive legend for which the data or software qualified under the prior contract or license. The marking procedures in paragraph (f)(1) of this clause shall be followed.

(g) Contractor procedures and records. Throughout performance of this contract, the Contractor, and its subcontractors or suppliers that will deliver technical data or computer software with other than unlimited rights, shall—

(1) Have, maintain, and follow written procedures sufficient to assure that restrictive markings are used only when authorized by the terms of this clause; and
(2) Maintain records sufficient to justify the validity of any restrictive markings on technical data or computer software delivered under this contract.

(h) *Removal of unjustified and nonconforming markings.*

(1) **Unjustified markings.** The rights and obligations of the parties regarding the validation of restrictive markings on technical data or computer software furnished or to be furnished under this contract are contained in the Validation of Restrictive Markings on Technical Data and the Validation of Asserted Restrictions—Computer Software clauses of this contract, respectively. Notwithstanding any provision of this contract concerning inspection and acceptance, the Government may ignore or, at the Contractor's expense, correct or strike a marking if, in accordance with the applicable procedures of those clauses, a restrictive marking is determined to be unjustified.

(2) **Nonconforming markings.** A nonconforming marking is a marking placed on technical data or computer software delivered or otherwise furnished to the Government under this contract that is not in the format authorized by this contract. Correction of nonconforming markings is not subject to the Validation of Restrictive Markings on Technical Data or the Validation of Asserted Restrictions—Computer Software clause of this contract. If the Contracting Officer notifies the Contractor of a nonconforming marking or markings and the Contractor fails to remove or correct such markings within sixty (60) days, the Government may ignore or, at the Contractor's expense, remove or correct any nonconforming markings.

(i) *Relation to patents.* Nothing contained in this clause shall imply a license to the Government under any patent or be construed as affecting the scope of any license or other right otherwise granted to the Government under any patent.

(j) *Limitation on charges for rights in technical data or computer software.*

(1) The Contractor shall not charge to this contract any cost, including but not limited to, license fees, royalties, or similar charges, for rights in technical data or computer software to be delivered under this contract when—

(i) The Government has acquired, by any means, the same or greater rights in the data or software; or

(ii) The data are available to the public without restrictions.

(2) The limitation in paragraph (j)(1) of this clause—

(i) Includes costs charged by a subcontractor or supplier, at any tier, or costs incurred by the Contractor to acquire rights in subcontractor or supplier technical data or computer software, if the subcontractor or supplier has been paid for such rights under any other Government contract or under a license conveying the rights to the Government; and

(ii) Does not include the reasonable costs of reproducing, handling, or mailing the documents or other media in which the technical data or computer software will be delivered.
MEMORANDUM FOR COMMANDER, UNITED STATES CYBER
COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES SPECIAL OPERATIONS
COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES TRANSPORTATION
COMMAND (ATTN: ACQUISITION EXECUTIVE)
DEPUTY ASSISTANT SECRETARY OF THE ARMY
(PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE NAVY
(PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE
(CONTRACTING)
DIRECTORS, DEFENSE AGENCIES
DIRECTORS, DEFENSE FIELD ACTIVITIES

SUBJECT: Class Deviation—Prohibition on Contracting with Persons that have Business Operations with the Maduro Regime

Effective immediately, contracting officers shall include the attached provision 252.225-7974, Representation Regarding Persons that have Business Operations with the Maduro Regime, in all solicitations, including solicitations using Federal Acquisition Regulation part 12 procedures for the acquisition of commercial items, except for contracts that are—

- Jointly determined by the Secretary of Defense and Secretary of State to be—
  - Necessary for purposes of—
    - Providing humanitarian assistance to the people of Venezuela;
    - Disaster relief and other urgent lifesaving measures; or
    - Carrying out noncombatant evacuations; or
  - Vital to the national security interests of the United States; or
- Related to the operation and maintenance of the United States Government’s consular offices and diplomatic posts in Venezuela.

This class deviation implements section 890 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2020 (Pub. L. 116-92). Section 890 prohibits entering into a contract for the procurement of products or services with any person that has business operations
with an authority of the government of Venezuela that is not recognized as the legitimate
government of Venezuela by the United States Government, unless an exception applies.

Contracting officers shall notify Contract Policy, Defense Pricing and Contracting, via
e-mail at osd.pentagon.ousd-a-s.mbx.dpc-cp@mail.mil, upon entering into a contract on the basis
of an exception. The notification shall include a copy of the joint determination made by the
Secretary of Defense and the Secretary of State. A copy of the joint determination shall be
included in the contract file.

This class deviation remains in effect until it is incorporated in the Defense Federal
Acquisition Regulation Supplement, or is otherwise rescinded. My point of contact is Mr. Jeff
Grover, who is available at 703-697-9352 or jeffrey.c.grover.civ@mail.mil.

Kim Herrington
Acting Principal Director,
Defense Pricing and Contracting
Prohibition on Contracting with Persons that have Business Operations with the Maduro Regime

252.225-7974   Representation Regarding Business Operations with the Maduro Regime. (Deviation 2020-O0005)

Use the following provision in all solicitations, including solicitations using FAR part 12 procedures for the acquisition of commercial items, unless the solicitation is—

(a) Jointly determined by the Secretary of Defense and the Secretary of State to be—

(1) Necessary for purposes of—

   (i) Providing humanitarian assistance to the people of Venezuela;

   (ii) Disaster relief and other urgent lifesaving measures; or

   (iii) Carrying out noncombatant evacuations; or

(2) Vital to the national security interests of the United States; or

(b) Related to the operation and maintenance of the United States Government’s consular offices and diplomatic posts in Venezuela.

REPRES’NTATION REGARDING BUSINESS OPERATIONS WITH THE MADURO REGIME (DEVIATION 2020-O0005) (FEB 2020)

(a) Definitions. As used in this provision—

“Agency or instrumentality of the government of Venezuela” means an agency or instrumentality of a foreign state as defined in section 28 U.S.C. 1603(b), with each reference in such section to “a foreign state” deemed to be a reference to “Venezuela.”

“Business operations” means engaging in commerce in any form, including acquiring, developing, maintaining, owning, selling, possessing, leasing, or operating equipment, facilities, personnel, products, services, personal property, real property, or any other apparatus of business or commerce.

“Government of Venezuela” means the government of any political subdivision of Venezuela, and any agency or instrumentality of the government of Venezuela.

“Person” means—

(1) A natural person, corporation, company, business association, partnership, society, trust, or any other nongovernmental entity, organization, or group;
Prohibition on Contracting with Persons that have Business Operations with the Maduro Regime

(2) Any governmental entity or instrumentality of a government, including a multilateral development institution (as defined in section 1701(c)(3) of the International Financial Institutions Act (22 U.S.C. 262r(c)(3)); and

(3) Any successor, subunit, parent entity, or subsidiary of, or any entity under common ownership or control with, any entity described in paragraphs (1) or (2) of this definition.

(b) **Prohibition.** In accordance with section 890 of the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116-92), contracting officers are prohibited from entering into a contract for the procurement of products or services with any person that has business operations with an authority of the government of Venezuela that is not recognized as the legitimate government of Venezuela by the United States Government, unless the person has a valid license to operate in Venezuela issued by the Office of Foreign Assets Control of the Department of the Treasury.

(c) **Representation.** By submission of its offer, the Offeror represents that the Offeror—

(1) Does not have any business operations with an authority of the Maduro regime or the government of Venezuela that is not recognized as the legitimate government of Venezuela by the United States Government; or

(2) Has a valid license to operate in Venezuela issued by the Office of Foreign Assets Control of the Department of the Treasury.

(End of provision)
MEMORANDUM FOR COMMANDER, UNITED STATES CYBER COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES SPECIAL OPERATIONS COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES TRANSPORTATION COMMAND (ATTN: ACQUISITION EXECUTIVE)
DEPUTY ASSISTANT SECRETARY OF THE ARMY (PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE NAVY (PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE (CONTRACTING)
DIRECTORS, DEFENSE AGENCIES
DIRECTORS, DEFENSE FIELD ACTIVITIES

SUBJECT: Class Deviation—Reporting Loss of Government Property

Effective immediately, for solicitations and contracts that include the clause at FAR 52.245-1, Government Property, DoD contracting officers shall use the text and clause provided in the attachment in lieu of the text at DFARS 245.102(5) and clause at DFARS 252.245-7002, Reporting Loss of Government Property.

The clause provided in the attachment requires contractors to report the loss of Government property in the Government-Furnished Property (GFP) Module of the Procurement Integrated Enterprise Environment, in lieu of the Defense Contract Management Agency (DCMA) eTool software application. Losses previously reported in the DMCA eTool will be processed to completion and will not be transferred into the GFP Module.

This class deviation remains in effect until incorporated in the DFARS or otherwise rescinded. My point of contact is Ms. Carol Vigna, who may be reached at 703-697-4373 or carol.a.vigna.civ@mail.mil.

Kim Herrington
Acting Principal Director, Defense Pricing and Contracting

Attachment:
As stated
245.102 Policy. (DEVIATION 2020-O0004)

*****

(5) Reporting loss of Government property. The Property Loss Function in the Government Furnished Property (GFP) Module of the Procurement Integrated Enterprise Environment (PIEE) is the DoD data repository for reporting loss of Government property in the possession of contractors. The requirements and procedures for reporting loss of Government property to the GFP Module are set forth in the clause at 252.245-7002, Reporting Loss of Government Property (DEVIATION 2020-O0004).

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252.245-7002 Reporting Loss of Government Property (DEVIATION 2020-O0004).

Use the following clause in lieu of the clause at 252.245–7002, Reporting Loss of Government Property, in solicitations and contracts that contain the clause at FAR 52.245–1, Government Property:

REPORTING LOSS OF GOVERNMENT PROPERTY (DEVIATION 2020-O0004) (FEB 2020)

(a) Definitions. As used in this clause—

“Government property” is defined in the clause at FAR 52.245-1, Government Property.

“Loss of Government property” means unintended, unforeseen, or accidental loss, damage, or destruction of Government property that reduces the Government’s expected economic benefits of the property. Loss of Government property does not include purposeful destructive testing, obsolescence, normal wear and tear, or manufacturing defects. Loss of Government property includes, but is not limited to—

(1) Items that cannot be found after a reasonable search;

(2) Theft;

(3) Damage resulting in unexpected harm to property requiring repair to restore the item to usable condition; or

(4) Destruction resulting from incidents that render the item useless for its intended purpose or beyond economical repair.

“Unit acquisition cost” means—

(1) For Government-furnished property, the dollar value assigned by the Government and identified in the contract; and
(2) For Contractor-acquired property, the cost derived from the Contractor’s records that reflect consistently applied, generally acceptable accounting principles.

(b) Reporting loss of Government property.

(1) The Contractor shall use the Property Loss Function in the Government Furnished Property (GFP) Module of the Procurement Integrated Enterprise Environment (PIEE) for reporting loss of Government property. Reporting value shall be at unit acquisition cost. Current PIEE users can access the GFP Module by logging into their account. New users may register for access and obtain training on the PIEE home page https://wawf.eb.mil/piee-landing.

(2) Unless otherwise provided for in this contract, the requirements of paragraph (b)(1) of this clause do not apply to normal and reasonable inventory adjustments, i.e., losses of low-risk consumable material such as common hardware, as agreed to by the Contractor and the Government Property Administrator. Such losses are typically a product of normal process variation. The Contractor shall ensure that its property management system provides adequate management control measures, e.g., statistical process controls, as a means of managing such variation.

(3) The Contractor shall report losses of Government property outside normal process variation, e.g., losses due to—

(i) Theft;

(ii) Inadequate storage;

(iii) Lack of physical security; or


(4) This reporting requirement does not change any liability provisions or other reporting requirements that may exist under this contract.

(End of clause)
MEMORANDUM FOR COMMANDER, UNITED STATES CYBER
COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES SPECIAL OPERATIONS
COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES TRANSPORTATION
COMMAND (ATTN: ACQUISITION EXECUTIVE)
DEPUTY ASSISTANT SECRETARY OF THE ARMY
(PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE NAVY
(PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE
(CONTRACTING)
DIRECTORS, DEFENSE AGENCIES
DIRECTORS, DEFENSE FIELD ACTIVITIES

SUBJECT: Class Deviation—Use of Fixed-Price Contracts for Foreign Military Sales

Effective immediately, until December 31, 2020, contracting officers are not required to use firm-fixed-price contracts for foreign military sales in accordance with Defense Federal Acquisition Regulation Supplement (DFARS) 225.7301-1.

This class deviation implements section 807 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2020 (Pub. L. 116-92). Section 807 of the NDAA for FY 2020 delays the effective date of the regulations that implement section 830 of the NDAA for FY 2017 (Pub. L. 114-328). Section 830 is implemented at DFARS 225.7301-1.

This class deviation remains in effect until December 31, 2020, or until it is otherwise rescinded. My point of contact is Mr. Jeff Grover, who is available at (703) 697-9352 or jeffrey.c.grover.civ@mail.mil.

Kim Herrington
Acting Principal Director,
Defense Pricing and Contracting
MEMORANDUM FOR COMMANDER, UNITED STATES SPECIAL OPERATIONS COMMAND (ATTN: ACQUISITION EXECUTIVE)  
COMMANDER, UNITED STATES TRANSPORTATION COMMAND (ATTN: ACQUISITION EXECUTIVE)  
COMMANDER, UNITED STATES CYBER COMMAND (ATTN: ACQUISITION EXECUTIVE)  
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE  
DEPUTY ASSISTANT SECRETARY OF THE ARMY (PROCUREMENT), ASA (ALT)  
DEPUTY ASSISTANT SECRETARY OF THE NAVY (PROCUREMENT), ASN (RDA)  
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE (CONTRACTING), SAF/AQC  
DIRECTORS, DEFENSE AGENCIES  
DIRECTORS, DEFENSE FIELD ACTIVITIES  

SUBJECT: Class Deviation—Authority to Acquire Products and Services Produced in Afghanistan or in Countries Along a Major Route of Supply to Afghanistan  

This class deviation rescinds and supersedes class deviation 2019-O0004. Effective immediately, to the extent feasible, contracting officers shall use the procedures and clauses provided in the attachment to this class deviation, in lieu of the procedures and clauses at Defense Federal Acquisition Regulation Supplement (DFARS) 225.7703, 252.225-7023, 252.225-7024, and 252.225-7026, when acquiring products or services in support of military or stability operations in Afghanistan. Specifically, if the acquisition is in support of operations in Afghanistan, unless an exception for AbilityOne products applies—

- Prepare and execute a written determination in accordance with DFARS 225.7799-1 and 225.7799-2 (DEVIATION 2020-O0002);  
- Evaluate offers in accordance with DFARS 225.7799-3 (DEVIATION 2020-O0002); and  
- Include the appropriate provision and/or clause in the solicitation and contract in accordance with DFARS 225.7799-4 (DEVIATION 2020-O0002).  

This class deviation implements section 801 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2010 (Pub. L. 111-84), as amended by section 886 of the NDAA for FY 2016 (Pub. L. 114-92) and, most recently, section 1212 of the NDAA for FY 2020 (Pub. L. 116-92). This class deviation also implements section 886 of the NDAA for FY 2008 (Pub. L. 110-181), as amended by section 842 of the NDAA for FY 2013 (Pub. L. 112-239) and section
886 of the NDAA for FY 2016. These sections authorize DoD to provide a preference for or limit competition to products or services from Afghanistan, a Central Asian state, Pakistan, or the South Caucasus when acquiring products or services, other than small arms, in support of operations in Afghanistan.

Contracting officers shall provide to Contract Policy, Defense Pricing and Contracting, via email at osd.pentagon.ousd-atl.mbx.contingency-contracting@mail.mil, copies of any written determinations made to utilize the authority provided in this class deviation to acquire products or services from a Central Asian state, Pakistan, or the South Caucasus. Copies of the determinations shall be submitted upon contract award. Written determinations made to utilize the authority provided in this class deviation to acquire products or services from Afghanistan do not need to be submitted.

This class deviation remains in effect until December 31, 2021, or until otherwise rescinded. My point of contact is Lt Col Bryan Lamb, DPC/CP, at 703-693-0497 or bryan.d.lamb.mil@mail.mil.

Attachment:
As stated
PART 225—FOREIGN ACQUISITION

225.401-71  Products or services in support of operations in Afghanistan.
(DEVIATION 2020-O0002)
When acquiring products or services, other than small arms, in support of operations in Afghanistan—

(a) If using the procedures specified in 225.7799-1(a)(1) (DEVIATION 2020-O0002), the purchase restriction at FAR 25.403(c) does not apply if products or services are from Afghanistan, a Central Asian state, Pakistan, or the South Caucasus.

(b) If using a procedure specified in 225.7799-1(a)(2) (DEVIATION 2020-O0002) to acquire products or services from Afghanistan, a Central Asian state, Pakistan, or the South Caucasus, the procedures of FAR subpart 25.4 are not applicable (but see DFARS 225.7503(b)(3) and (b)(4)) for applicability of trade agreements to construction material under construction contracts in support of operations in Afghanistan.

SUBPART 225.75—BALANCE OF PAYMENTS PROGRAM

225.7501  Policy. (DEVIATION 2020-O0002)
Acquire only domestic end products for use outside the United States, and use only domestic construction material for construction to be performed outside the United States, including end products and construction material for foreign military sales, unless—

(a) Before issuing the solicitation—

(5) Use of a procedure specified in 225.7799-1(a) (DEVIATION 2020-O0002) is authorized for an acquisition of supplies in support of military or stability operations in Afghanistan;
SUBPART 225.77—ACQUISITIONS IN SUPPORT OF OPERATIONS IN AFGHANISTAN

225.7700 Scope. (DEVIATION 2020-O0002)

This subpart implements—

* * * * *


225.7701 Definitions. (DEVIATION 2020-O0002)

As used in this subpart—

“Central Asian state” means the Republic of Kazakhstan, the Kyrgyz Republic, the Republic of Tajikistan, Turkmenistan, or the Republic of Uzbekistan.

* * * * *

“Product from Afghanistan, a Central Asian state, Pakistan, or the South Caucasus” means a product (including a commercial item) that is mined, produced, or manufactured in Afghanistan, a Central Asian state, Pakistan, or the South Caucasus. This term does not include construction material brought to the construction site by the contractor or subcontractor for incorporation into the building or work, but does cover material separately purchased by the Government to be incorporated into the building or work.

* * * * *

“Service from Afghanistan, a Central Asian state, Pakistan, or the South Caucasus” means a service (including construction) that is performed in Afghanistan, a Central Asian state, Pakistan, or the South Caucasus by citizens or permanent resident aliens of these countries.
“South Caucasus” means the Republic of Armenia, the Republic of Azerbaijan, or Georgia.

**225.7799 Authority to acquire products and services (including construction) from Afghanistan or from countries along a major route of supply to Afghanistan. (DEVIATION 2020-O0002)**

225.7799-1 Acquisition procedures.

(a) Subject to the requirements of 225.7799-2 and except as provided in paragraph (c) of this section, a product or a service (including construction) from Afghanistan or from a country along a major route of supply to Afghanistan, other than small arms, in support of operations in Afghanistan, may be acquired by—

1. Providing a preference for products or services from Afghanistan, a Central Asian state, Pakistan, or the South Caucasus, in accordance with the evaluation procedures at 225.7799-3; or

2. Limiting competition to products or services from Afghanistan, a Central Asian state, Pakistan, or the South Caucasus.

(b) For acquisitions conducted using a procedure specified in paragraph (a) of this section—

1. The justification and approval addressed in FAR subpart 6.3 is not required; and

2. The trade agreements purchase restrictions at FAR 25.403(c) and the Balance of Payments Program (see DFARS 225.7501) do not apply with regard to acquisition of products or services from Afghanistan, a Central Asian state, Pakistan, or the South Caucasus, but construction material brought to the construction site by the contractor or subcontractor for incorporation into the work may be subject to trade agreements and Balance of Payments Program (see DFARS 225.7503).

(c) The authority under paragraph (a) of this section is not available for the procurement of any product that is contained in the Procurement List described in 41 U.S.C. 8503(a) (see FAR subpart 8.7), if such product can be produced and delivered by a qualified nonprofit agency for the blind or a qualified nonprofit
agency for other severely disabled in a timely fashion to support mission requirements.

225.7799-2 Determination requirements. Before use of a procedure specified in 225.7799-1(a), a written determination must be prepared and executed as follows:

(a) The appropriate official authorized to make the determination, as specified in paragraph (b)(1) of this section, must determine in writing that—

(1) The product or service concerned is to be—

(i) Used or performed in the country that is the source of the product or service;

(ii) Used in the course of efforts by the United States and the North Atlantic Treaty Organization Forces to ship goods to or from Afghanistan in support of military or stability operations in Afghanistan;

(iii) Used by the military forces, police, or other security personnel of Afghanistan; or

(iv) Used by the United States or coalition forces in Afghanistan; and

(2)(i) For products or services from a Central Asian state, Pakistan, or the South Caucasus, it is in the national security interest of the United States to use a procedure specified in 225.7799-1(a), because—

(A) The procedure is necessary to—

(1) Reduce overall United States transportation costs and risks in shipping goods in support of operations in Afghanistan;

(2) Encourage Central Asian states, Pakistan, and the South Caucasus to cooperate in expanding supply routes through their territory in support of operations in Afghanistan; or

(3) Help develop more robust and enduring routes of supply to Afghanistan; and

(B) Use of the procedure will not adversely affect—

(1) Operations in Afghanistan; or
(2) The U.S. industrial base.

(ii) The authorizing official generally may presume that there will not be an adverse effect on the U.S. industrial base. However, when in doubt, the authorizing official should coordinate with the applicable subject matter expert specified in PGI 225.7703-2(b).

(b)(1) Determinations may be made for an individual acquisition or a class of acquisitions meeting the criteria in paragraph (a) of this section as follows:

(i) The contracting officer is authorized to make a determination that applies to an individual acquisition with a value of less than $93 million.

(ii) The head of the contracting activity, without power of redelegation, is authorized to make a determination that applies to an individual acquisition with a value of $93 million or more or to a class of acquisitions.

(2) The contracting officer shall—

(i) Include the applicable written determination in the contract file; and

(ii) Ensure that each contract action taken pursuant to the authority of a class determination is within the scope of the class determination and document the contract file for each action accordingly.

(c) See PGI 225.7703-2(c) for formats for use in preparation of the determinations required by this section.

225.7799-3 Evaluating offers.
Evaluate offers submitted in response to solicitations that include the provision at 252.225-7998, Preference for Products or Services From Afghanistan, a Central Asian State, Pakistan, or the South Caucasus (DEVIATION 2020-O0002), as follows:

(a) For supplies, when comparing offers, consider the total price of the supplies, including any transportation costs that would be incurred if shipped via the Defense Transportation System and compare this total price to the price of the local item plus any transportation costs, if separately broken out by contract line item.

(b)(1) If the solicitation specifies award on the basis of non-price factors in addition to cost or price, apply the evaluation percentage specified in the solicitation (see 252.225-7998(d) (DEVIATION 2020-O0002) and use the evaluated cost or price in determining the offer that represents the best value to the Government.
(2) If the solicitation does not specify non-price factors in addition to cost or price, apply the evaluation percentage specified in the solicitation, if applicable, and then award to the lowest evaluated offer.

225.7799-4 Solicitation provisions and contract clauses.
Use the following provisions and clauses in solicitations that meet the specified criteria, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items:

(a) In solicitations and contracts that limit competition to products or services from Afghanistan, a Central Asian state, Pakistan, or the South Caucasus in accordance with 225.7799-1(a)(2), use the clause at 252.225-7996, Acquisition Restricted to Products or Services from Afghanistan, a Central Asian state, Pakistan, or the South Caucasus (DEVIATION 2020-O0002).

(b) In solicitations and contracts that provide a preference for products or services from Afghanistan, a Central Asian state, Pakistan, or the South Caucasus in accordance with 225.7799-1(a)(1), use the clause at 252.225-7999, Requirement for Products or Services from Afghanistan, a Central Asian state, Pakistan, or the South Caucasus (DEVIATION 2020-O0002).

(c) In solicitations that include the clause at 252.225-7999, Requirement for Products or Services from Afghanistan, a Central Asian state, Pakistan, or the South Caucasus (DEVIATION 2020-O0002) in accordance with 225.7799-1(a)(1), use the provision at 252.225-7998, Preference for Products or Services from Afghanistan, a Central Asian state, Pakistan, or the South Caucasus (DEVIATION 2020-O0002).

(d) When the Trade Agreements Act applies to the acquisition, use the appropriate clause and provision as prescribed at DFARS 225.1101(5) and (6) or DFARS 225.7503(b)(3) or (b)(4).

(e)(1) Do not use any of the following DFARS provisions or clauses in solicitations or contracts that include the provision at 252.225-7998 (DEVIATION 2020-O0002) or the clauses at 252.225-7996 (DEVIATION 2020-O0002) or 252.225-7999 (DEVIATION 2020-O0002):

(i) 252.225-7000, Buy American—Balance of Payments Program Certificate.

(ii) 252.225-7001, Buy American and Balance of Payments Program.

(iii) 252.225-7002, Qualifying Country Sources as Subcontractors.
(iv) 252.225-7035, Buy American—Free Trade Agreements—Balance of Payments Program Certificate.

(v) 252.225-7036, Buy American—Free Trade Agreements—Balance of Payments Program.

(2) Do not use the following DFARS provision and clause in solicitations or contracts for the acquisition of supplies that include the clause at 252.225-7996 (DEVIATION 2020-O0002):

(i) 252.225-7020, Trade Agreements Certificate.

(ii) 252.225-7021, Trade Agreements.

* * * * *

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

* * * * *

252.225-7996 Acquisition Restricted to Products or Services from Afghanistan, a Central Asian State, Pakistan, or the South Caucasus. (DEVIATION 2020-O0002)

As prescribed in 225.7799-4(a), use the following clause:

ACQUISITION RESTRICTED TO PRODUCTS OR SERVICES FROM AFGHANISTAN, A CENTRAL ASIAN STATE, PAKISTAN, OR THE SOUTH CAUCASUS (DEC 2019)(DEVIATION 2020-O0002)

(a) Definitions. As used in this clause—

“Central Asian state” means the Republic of Kazakhstan, the Kyrgyz Republic, the Republic of Tajikistan, Turkmenistan, or the Republic of Uzbekistan.

“Product from Afghanistan, a Central Asian state, Pakistan, or the South Caucasus” means a product (including a commercial item) that is mined, produced, or manufactured in Afghanistan, a Central Asian state, Pakistan, or the South Caucasus. This term does not include construction material brought to the construction site by the contractor or subcontractor for incorporation into the building or work, but does cover material separately purchased by the Government to be incorporated into the building or work.
“Service from Afghanistan, a Central Asian state, Pakistan, or the South Caucasus” means a service (including construction) that is performed in Afghanistan, a Central Asian state, Pakistan, or the South Caucasus by citizens or permanent resident aliens of these countries.

“South Caucasus” means the Republic of Armenia, the Republic of Azerbaijan, or Georgia.

(b) **Restrictions.**

(1) The Contractor shall provide only products from Afghanistan, a Central Asian state, Pakistan, or the South Caucasus or services from Afghanistan, a Central Asian state, Pakistan, or the South Caucasus.

(2) For construction contracts, the Contractor is encouraged, but not required, to use construction material from Afghanistan, a Central Asian state, Pakistan, or the South Caucasus. The use of construction material from other than Afghanistan, a Central Asian state, Pakistan, or the South Caucasus may also be subject to Balance of Payments Program or trade agreements restrictions, if the contract includes the clause 252.225-7044, Balance of Payments Program—Construction Material, used with its Alternate I; or 252.225-7045, Balance of Payments Program—Construction Material Under Trade Agreements, used with its Alternate II or Alternate III.

(End of clause)

252.225-7998  **Preference for Products or Services from Afghanistan, a Central Asian State, Pakistan, or the South Caucasus. (DEVIATION 2020-O0002)**

As prescribed in 225.7799-4(c), use the following provision:

PREFERENCE FOR PRODUCTS OR SERVICES FROM AFGHANISTAN, A CENTRAL ASIAN STATE, PAKISTAN, OR THE SOUTH CAUCASUS (DEC 2019)(DEVIATION 2020-O0002)

(a) **Definitions.** “Product from Afghanistan, a Central Asian state, Pakistan, or the South Caucasus” and “service from Afghanistan, a Central Asian state, Pakistan, or the South Caucasus” as used in this provision, are defined in the clause of this solicitation entitled “Requirement for Products or Services from Afghanistan, a Central Asian state, Pakistan, or the South Caucasus” (252.225-7999 (DEVIATION 2020-O0002)).

(b) **Other products or services.** Offerors that include products and services in their offer that are not products or services from Afghanistan, a Central Asian state, Pakistan, or the South Caucasus shall identify the solicitation line item number and the
country of origin for the non-Afghanistan, a non-Central Asian state, non-Pakistan, or a non-South Caucasus product or service in the offer.

(c) Representation. By submission of its offer, the Offeror represents that the offer meets the criteria set forth in paragraph (a) of this provision and that all products or services to be delivered under a contract resulting from this solicitation are products or service from Afghanistan, a Central Asian state, Pakistan, or the South Caucasus, unless, in its offer, the Offeror specified that it would provide products or services other than products or services from Afghanistan, a Central Asian state, Pakistan, or the South Caucasus.

(d) Evaluation. For the purpose of evaluating competitive offers, the Contracting Officer will increase by 100 percent the prices of offers of products or services that are not products from Afghanistan, a Central Asian state, Pakistan, or the South Caucasus or services from Afghanistan, a Central Asian state, Pakistan, or the South Caucasus.

(End of provision)

252.225-7999 Requirement for Products or Services from Afghanistan, a Central Asian State, Pakistan, or the South Caucasus.
As prescribed in 225.7799-4(b), use the following clause:

REQUIREMENT FOR PRODUCTS OR SERVICES FROM AFGHANISTAN, A CENTRAL ASIAN STATE, PAKISTAN, OR THE SOUTH CAUCASUS (DEC 2019)(DEVIATION 2020-O0002)

(a) Definitions. As used in this clause—

“Central Asian state” means the Republic of Kazakhstan, the Kyrgyz Republic, the Republic of Tajikistan, Turkmenistan, or the Republic of Uzbekistan.

“Product from Afghanistan, a Central Asian state, Pakistan, or the South Caucasus” means a product (including a commercial item) that is mined, produced, or manufactured in Afghanistan, a Central Asian state, Pakistan, or the South Caucasus. This term does not include construction material brought to the construction site by the contractor or subcontractor for incorporation into the building or work, but does cover material separately purchased by the Government to be incorporated into the building or work.

“Service from Afghanistan, a Central Asian state, Pakistan, or the South Caucasus” means a service (including construction) that is performed in Afghanistan, a Central Asian state, Pakistan, or the South Caucasus by citizens or permanent resident aliens of these countries.
“South Caucasus” means the Republic of Armenia, the Republic of Azerbaijan, or Georgia.

(b) **Requirements.**

(1) The Contractor shall provide only products from Afghanistan, a Central Asian state, Pakistan, or the South Caucasus or services from Afghanistan, a Central Asian state, Pakistan, or the South Caucasus under this contract, unless, in its offer, it specified that it would provide products or services other than products from Afghanistan, a Central Asian state, Pakistan, or the South Caucasus or services from Afghanistan, a Central Asian state, Pakistan, or the South Caucasus.

(2) For construction contracts, the Contractor is encouraged, but not required, to use construction material from Afghanistan, a Central Asian state, Pakistan, or the South Caucasus. The use of construction material from other than Afghanistan, a Central Asian state, Pakistan, or the South Caucasus may also be subject to Balance of Payments Program or trade agreements restrictions, if the contract includes the clause 252.225-7044, Balance of Payments Program—Construction Material, used with its Alternate I; or 252.225-7045, Balance of Payments Program—Construction Material Under Trade Agreements, used with its Alternate II or Alternate III.

(End of clause)

* * * * *
MEMORANDUM FOR COMMANDER, UNITED STATES SPECIAL OPERATIONS COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES TRANSPORTATION COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES CYBER COMMAND (ATTN: ACQUISITION EXECUTIVE)
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE
DEPUTY ASSISTANT SECRETARY OF THE ARMY (PROCUREMENT), ASA (ALT)
DEPUTY ASSISTANT SECRETARY OF THE NAVY (ACQUISITION & LOGISTICS MANAGEMENT), ASN (RDA)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE (CONTRACTING), SAF/AQC
DIRECTORS, DEFENSE AGENCIES
DIRECTORS, DEFENSE FIELD ACTIVITIES

SUBJECT: Class Deviation—Use of DLA Energy as a Source for Fuel

Effective immediately, notwithstanding the restriction at Federal Acquisition Regulation (FAR) 51.101(a)(1), contracting officers may authorize contractors to use Defense Logistics Agency (DLA) Energy as a source for fuel in performance of other than cost-reimbursement contracts, when the fuel is funded by the Defense Working Capital Fund. When providing this authorization to contractors, contracting officers shall—

- Comply with the requirements of FAR 51.102 and Defense Federal Acquisition Regulation Supplement (DFARS) 251.102, including the execution of a letter of authorization;

- Include FAR clause 52.251-1, Government Supply Sources, and DFARS clause 252.251-7000, Ordering From Government Supply Sources, in the contract;

- Obtain a current DLA Energy Fuel Purchase Authorization (FPA) template from DLA Energy by emailing dlaenergyfpa@dla.mil; and

- Email to DLA Energy, at dlaenergyfpa@dla.mil, a copy of the—
  o Completed FPA;
  o Letter of authorization from the contracting officer; and
  o Documentation showing inclusion of FAR clause 52.251-1 and DFARS clause 252.251-7000 in the underlying contract.
Upon receipt of the documentation, DLA Energy will work with all parties to review the FPA for accuracy and completeness. If approved, DLA will assign a Department of Defense Activity Address Code for the fuel sales.

This class deviation remains in effect until it is incorporated in the DFARS, or is otherwise rescinded. My point of contact is Mr. Jeff Grover, who is available at (703) 697-9352 or jeffrey.c.grover.civ@mail.mil.

Kim Herrington
Acting Principal Director,
Defense Pricing and Contracting
In reply refer to  
DARS Tracking Number: 2019-00010

MEMORANDUM FOR COMMANDER, UNITED STATES SPECIAL OPERATIONS COMMAND (ATTN: ACQUISITION EXECUTIVE)  
COMMANDER, UNITED STATES TRANSPORTATION COMMAND (ATTN: ACQUISITION EXECUTIVE)  
DEPUTY ASSISTANT SECRETARY OF THE ARMY (PROCUREMENT)  
DEPUTY ASSISTANT SECRETARY OF THE NAVY (ACQUISITION AND PROCUREMENT)  
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE (CONTRACTING)  
DIRECTORS OF THE DEFENSE AGENCIES  
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Class Deviation—Peer Reviews of Contracts for Supplies and Services

Effective immediately, Defense Pricing and Contracting (DPC) will no longer conduct peer reviews for competitive procurements above $1 billion, as required by Defense Federal Acquisition Regulation Supplement (DFARS) 201.170(a)(1)(i), except for procurements of major defense acquisition programs above $1 billion for which the Under Secretary of Defense for Acquisition and Sustainment (USD(A&S)) is the milestone decision authority and USD(A&S) special interest programs. DPC may conduct peer reviews upon request by a military department, defense agency, or DoD field activity.

In addition, DPC will no longer conduct postaward peer reviews for acquisitions for services with a total estimated value greater than $1 billion as required by DFARS 201.170(a)(1)(iii). DoD independent management reviews of contracts for services in accordance with section 808 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110-181) are still required; therefore, military departments, defense agencies, and DoD field activities shall establish procedures for periodic independent management reviews of contracts for services consistent with section 808.

Ongoing competitive procurements that had been covered by the requirement to conduct peer reviews, and have undergone one or more phases of peer reviews, need not undergo peer reviews associated with any remaining phases, unless they are Acquisition Category (ACAT) 1D programs or specifically requested by the cognizant contracting office.
The requirement for noncompetitive peer reviews remains unchanged.

This class deviation remains in effect until incorporated in the DFARS, or otherwise rescinded. My point of contact for noncompetitive peer reviews is Mr. Mark Gomersall, mark.r.gomersall.civ@mail.mil. My point of contact for other peer reviews is Mr. Michael Pelkey, michael.f.pelkey.civ@mail.mil.

Kim Herrington
Acting Principal Director, Defense Pricing and Contracting
MEMORANDUM FOR COMMANDER, UNITED STATES SPECIAL OPERATIONS COMMAND (ATTN: ACQUISITION EXECUTIVE) 
COMMANDER, UNITED STATES TRANSPORTATION COMMAND (ATTN: ACQUISITION EXECUTIVE) 
COMMANDER, UNITED STATES CYBER COMMAND (ATTN: ACQUISITION EXECUTIVE) 
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE 
DEPUTY ASSISTANT SECRETARY OF THE ARMY (PROCUREMENT), ASA (ALT) 
DEPUTY ASSISTANT SECRETARY OF THE NAVY (ACQUISITION & LOGISTICS MANAGEMENT), ASN (RDA) 
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE (CONTRACTING), SAF/AQC 
DIRECTORS, DEFENSE AGENCIES 
DIRECTORS, DEFENSE FIELD ACTIVITIES 

SUBJECT: Class Deviation—Quick-Closeout Procedures Threshold 

Effective immediately, contracting officers shall deviate from the quick-closeout procedures in Federal Acquisition Regulation (FAR) 42.708(a) for cost reimbursement, time and material, labor hour, fixed-price incentive, and fixed-price redeterminable contracts, task orders, and delivery orders. Specifically, in lieu of the thresholds at FAR 42.708(a)(2)(i) and (ii), contracting officers shall consider cost amounts to be relatively insignificant when the total unsettled direct and indirect costs to be allocated to any one contract, task order, or delivery order do not exceed $2 million.

Defense Contract Management Agency (DCMA) Administrative Contracting Officers (ACOs) are further authorized to deviate from FAR 42.708(a)(2) and negotiate the settlement of direct and indirect costs for a specific contract, task order, or delivery order to be closed in advance of the determination of final direct costs and indirect rates set forth in FAR 42.705 regardless of the dollar value or percent of unsettled direct or indirect costs allocable to the contract. This class deviation supersedes and incorporates the DCMA Quick-Closeout Procedure Class Deviation (DCMA 17-142), dated August 15, 2017.
This class deviation remains in effect until it is incorporated in the Defense Federal Acquisition Regulation Supplement, or is otherwise rescinded. My point of contact is Mr. Bruce Propert, who is available at 703-697-4384 or david.b.propert2.civ@mail.mil.

Kim Herrington  
Acting Principal Director, Defense Pricing and Contracting
MEMORANDUM FOR COMMANDER, UNITED STATES CYBER COMMAND (ATTN: ACQUISITION EXECUTIVE) COMMANDER UNITED STATES SPECIAL OPERATIONS COMMAND (ATTN: ACQUISITION EXECUTIVE) COMMANDER UNITED STATES TRANSPORTATION COMMAND (ATTN: ACQUISITION EXECUTIVE) DEPUTY ASSISTANT SECRETARY OF THE ARMY (PROCUREMENT) DEPUTY ASSISTANT SECRETARY OF THE NAVY (ACQUISITION & LOGISTICS MANAGEMENT) DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE (CONTRACTING) DIRECTORS, DEFENSE AGENCIES DIRECTORS, DOD FIELD ACTIVITIES

SUBJECT: Class Deviation—Section 890 Pilot Program to Accelerate Contracting and Pricing Processes

Effective immediately, subject to prior approval by the Principal Director, Defense Pricing and Contracting (DPC), Department of Defense (DoD) contracting officers may deviate from the requirements of DFARS 215.403-1(c)(4)(A) for the exceptional circumstances waiver of submission of certified cost or pricing data, and shall include the attached clause 252.215-7998, Pilot Program to Accelerate Contracting and Pricing Processes (DEVIATION 2019-O0008) in the solicitations and contracts selected to participate in the “Section 890 Pilot Program to Accelerate Contracting and Pricing Processes.”

For solicitations and contracts authorized by the Principal Director, DPC, for participation in the Pilot Program, when applying an exceptional circumstances waiver or partial waiver of submission of certified cost or pricing data, the head of the contracting activity is not required to determine that the property or services cannot reasonably be obtained under the contract, subcontract, or modification, without the granting of the waiver, or that there are demonstrated benefits to granting the waiver. However, the exceptional circumstances waiver shall only be executed if the price can be determined by the contracting officer to be fair and reasonable without the submission of certified cost or pricing data.

Departments and agencies participating in the Pilot Program shall submit the annual report of waiver of Truth in Negotiations Act requirements in accordance with DFARS 215.403-1(c)(4)(B); however, departments and agencies shall—
MEMORANDUM FOR COMMANDER, UNITED STATES CYBER COMMAND (ATTN: ACQUISITION EXECUTIVE)  
COMMANDER, UNITED STATES SPECIAL OPERATIONS COMMAND (ATTN: ACQUISITION EXECUTIVE)  
COMMANDER, UNITED STATES TRANSPORTATION COMMAND (ATTN: ACQUISITION EXECUTIVE)  
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE  
DEPUTY ASSISTANT SECRETARY OF THE ARMY (PROCUREMENT)  
DEPUTY ASSISTANT SECRETARY OF THE NAVY (ACQUISITION & PROCUREMENT)  
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE (CONTRACTING)  
DIRECTORS, DEFENSE AGENCIES  
DIRECTORS, DEFENSE FIELD ACTIVITIES

SUBJECT: Class Deviation—Accounting Firms Used to Support Department of Defense Audits

Effective immediately, contracting officers shall use the clause as prescribed in the attachment to this class deviation, when contracting with accounting firms providing financial statement auditing or audit remediation services to the Department of Defense (DoD) in support of the audits required under 31 U.S.C. 3521.

This class deviation implements section 1006 of the National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115-232). Section 1006 requires the Secretary of Defense to require any accounting firm providing financial statement auditing or audit remediation services to the Department of Defense in support of the audit required under 31 U.S.C. 3521 to provide DoD with a statement setting forth the details of any disciplinary proceedings with respect to the accounting firm or its associated persons before any entity with the authority to enforce compliance with rules or laws applying to audit services offered by accounting firms.

This class deviation remains in effect until it is incorporated in the Defense Federal Acquisition Regulation Supplement, or until it is otherwise rescinded. My point of contact is Mr. Mark Gomersall, who is available at mark.gomersall.civ@mail.mil.

Attachment: As stated
252.237-7999 Requirement for Accounting Firms Used to Support Department of Defense Audits (DEVIATION 2019-00007)

Use the following clause in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, for the acquisition of financial statement auditing or audit remediation services to the Department of Defense in support of the audits required under 31 U.S.C. 3521 that exceed the simplified acquisition threshold:

REQUIREMENT FOR ACCOUNTING FIRMS USED TO SUPPORT DEPARTMENT OF DEFENSE AUDITS (MAR 2019)

(a) This clause only applies if the Contractor is an accounting firm providing financial statement auditing or audit remediation services to the Department of Defense in support of the audits required under 31 U.S.C. 3521.

(b) For each contract action under this contract (including award, renewal, or amendment), the Contractor shall provide to the Contracting Officer a statement setting forth the details of any disciplinary proceedings with respect to the accounting firm or its associated persons before any entity with the authority to enforce compliance with rules or laws applying to audit services offered by accounting firms, if there has been any change with regard to such proceedings since the last contract action.

(c) The Government will safeguard and treat as confidential all statements provided pursuant to this provision where the statement has been marked “confidential” or “proprietary” by the Contractor. Statements so marked will not be released by the Government to the public pursuant to the Freedom of Information Act request, 5. U.S.C. 552, without prior notification to the Contractor and opportunity for the Contractor to claim an exemption from release. The Government will treat any statement provided pursuant to this section as confidential to the extent required by any other applicable law.

(End of clause)
MEMORANDUM FOR COMMANDER, UNITED STATES TRANSPORTATION COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES SPECIAL OPERATIONS COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES CYBER COMMAND (ATTN: ACQUISITION EXECUTIVE)
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE
DEPUTY ASSISTANT SECRETARY OF THE ARMY (PROCUREMENT), ASA (ALT)
DEPUTY ASSISTANT SECRETARY OF THE NAVY (ACQUISITION & LOGISTICS MANAGEMENT), ASN (RDA)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE (CONTRACTING), SAF/AQC
DIRECTORS, DEFENSE AGENCIES
DIRECTORS, DEFENSE FIELD ACTIVITIES

SUBJECT: Class Deviation—Small Business Subcontract Reporting

This class deviation rescinds and supersedes Class Deviation 2018-00007. Effective immediately, contracting officers shall—

- For orders or calls against basic ordering agreements (BOAs) or blanket purchase agreements (BPAs), use—
  - Alternate III of the clause at FAR 52.219-9, Small Business Subcontracting Plan, in lieu of the basic clause; and
  - Alternate I of the clause at DFARS 252.219-7003, Small Business Subcontracting Plan (DoD Contracts), in lieu of the basic clause; and

- When incorporating a subcontracting plan due to a modification to an order against a BOA or BPA, as specified in FAR 19.702(a)(3), use—
  - 52.219-9, Small Business Subcontracting Plan—Alternate IV (DEVIATION 2019-000005), provided in Attachment 1, in lieu of Alternate IV of the clause at FAR 52.219-9; and
  - Alternate I of the clause at DFARS 252.219-7003, Small Business Subcontracting Plan (DoD Contracts), in lieu of the basic clause.
Currently, the Electronic Subcontracting Reporting System (eSRS) does not support the submission of an Individual Subcontracting Report (ISR) for orders placed against BOAs and BPAs. Use of the deviation clause provided in Attachment 1, Alternate III of the FAR clause, and Alternate I of the DFARS clause will ensure DoD is able to capture subcontracting data for these orders, by instructing contractors to submit the Standard Form 294, Subcontracting Report for Individual Contracts, to the contracting officer while eSRS is being modified to support the submission of ISRs.

This class deviation remains in effect until eSRS is modified to support ISRs for orders against BOAs and BPAs, or until otherwise rescinded. My point of contact is Ms. Jennifer Johnson, who may be reached at 571-372-6100 or jennifer.d.johnson1.civ@mail.mil.

Kim Herrington
Acting Principal Director,
Defense Pricing and Contracting

Attachments:
As stated
52.219-9 Small Business Subcontracting Plan.

Alternate IV (DEVIATION 2019-O0005). When incorporating a subcontracting plan in orders against basic ordering agreements and blanket purchase agreements due to a modification as specified in 19.702(a)(3), substitute the following paragraphs (c), (d), and (l) for paragraphs (c), (d), and (l) of the basic clause:

(c)(1) The Contractor, upon request by the Contracting Officer, shall submit and negotiate a subcontracting plan, where applicable, that separately addresses subcontracting with small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns. If the Contractor is submitting an individual subcontracting plan, the plan shall separately address subcontracting with small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns, with a separate part for the basic contract and separate parts for each option (if any). The subcontracting plan shall be incorporated into the contract. The subcontracting plan shall be negotiated within the time specified by the Contracting Officer. The subcontracting plan does not apply retroactively.

(2)(i) The prime Contractor may accept a subcontractor's written representations of its size and socioeconomic status as a small business, small disadvantaged business, veteran-owned small business, service-disabled veteran-owned small business, or a women-owned small business if the subcontractor represents that the size and socioeconomic status representations with its offer are current, accurate, and complete as of the date of the offer for the subcontract.

(ii) The Contractor may accept a subcontractor's representations of its size and socioeconomic status as a small business, small disadvantaged business, veteran-owned small business, service-disabled veteran-owned small business, or a women-owned small business in the System for Award Management (SAM) if—

(A) The subcontractor is registered in SAM; and

(B) The subcontractor represents that the size and socioeconomic status representations made in SAM are current, accurate and complete as of the date of the offer for the subcontract.

(iii) The Contractor may not require the use of SAM for the purposes of representing size or socioeconomic status in connection with a subcontract.

(iv) In accordance with 13 CFR 121.411, 124.1015, 125.29, 126.900, and 127.700, a contractor acting in good faith is not liable for misrepresentations made by its subcontractors regarding the subcontractor's size or socioeconomic status.

(d) The Contractor's subcontracting plan shall include the following:

(1) Separate goals, expressed in terms of total dollars subcontracted and as a percentage of total planned subcontracting dollars, for the use of small business, veteran-owned small business,
service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns as subcontractors. For individual subcontracting plans, and if required by the Contracting Officer, goals shall also be expressed in terms of percentage of total contract dollars, in addition to the goals expressed as a percentage of total subcontract dollars. The Contractor shall include all subcontracts that contribute to contract performance, and may include a proportionate share of products and services that are normally allocated as indirect costs. In accordance with 43 U.S.C. 1626—

(i) Subcontracts awarded to an ANC or Indian tribe shall be counted towards the subcontracting goals for small business and small disadvantaged business concerns, regardless of the size or Small Business Administration certification status of the ANC or Indian tribe; and

(ii) Where one or more subcontractors are in the subcontract tier between the prime Contractor and the ANC or Indian tribe, the ANC or Indian tribe shall designate the appropriate Contractor(s) to count the subcontract towards its small business and small disadvantaged business subcontracting goals.

(A) In most cases, the appropriate Contractor is the Contractor that awarded the subcontract to the ANC or Indian tribe.

(B) If the ANC or Indian tribe designates more than one Contractor to count the subcontract toward its goals, the ANC or Indian tribe shall designate only a portion of the total subcontract award to each Contractor. The sum of the amounts designated to various Contractors cannot exceed the total value of the subcontract.

(C) The ANC or Indian tribe shall give a copy of the written designation to the Contracting Officer, the Contractor, and the subcontractors in between the Contractor and the ANC or Indian tribe within 30 days of the date of the subcontract award.

(D) If the Contracting Officer does not receive a copy of the ANC's or the Indian tribe's written designation within 30 days of the subcontract award, the Contractor that awarded the subcontract to the ANC or Indian tribe will be considered the designated Contractor.

(2) A statement of—

(i) Total dollars planned to be subcontracted for an individual subcontracting plan; or the Contractor's total projected sales, expressed in dollars, and the total value of projected subcontracts to support the sales for a commercial plan;

(ii) Total dollars planned to be subcontracted to small business concerns (including ANC and Indian tribes);

(iii) Total dollars planned to be subcontracted to veteran-owned small business concerns;

(iv) Total dollars planned to be subcontracted to service-disabled veteran-owned small business;

(v) Total dollars planned to be subcontracted to HUBZone small business concerns;
(vi) Total dollars planned to be subcontracted to small disadvantaged business concerns (including ANCs and Indian tribes); and

(vii) Total dollars planned to be subcontracted to women-owned small business concerns.

(3) A description of the principal types of supplies and services to be subcontracted, and an identification of the types planned for subcontracting to—

(i) Small business concerns;
(ii) Veteran-owned small business concerns;
(iii) Service-disabled veteran-owned small business concerns;
(iv) HUBZone small business concerns;
(v) Small disadvantaged business concerns; and
(vi) Women-owned small business concerns.

(4) A description of the method used to develop the subcontracting goals in paragraph (d)(1) of this clause.

(5) A description of the method used to identify potential sources for solicitation purposes (e.g., existing company source lists, SAM, veterans service organizations, the National Minority Purchasing Council Vendor Information Service, the Research and Information Division of the Minority Business Development Agency in the Department of Commerce, or small, HUBZone, small disadvantaged, and women-owned small business trade associations). The Contractor may rely on the information contained in SAM as an accurate representation of a concern's size and ownership characteristics for the purposes of maintaining a small, veteran-owned small, service-disabled veteran-owned small, HUBZone small, small disadvantaged, and women-owned small business source list. Use of SAM as its source list does not relieve a firm of its responsibilities (e.g., outreach, assistance, counseling, or publicizing subcontracting opportunities) in this clause.

(6) A statement as to whether or not the Contractor included indirect costs in establishing subcontracting goals, and a description of the method used to determine the proportionate share of indirect costs to be incurred with—

(i) Small business concerns (including ANC and Indian tribes);
(ii) Veteran-owned small business concerns;
(iii) Service-disabled veteran-owned small business concerns;
(iv) HUBZone small business concerns;
(v) Small disadvantaged business concerns (including ANC and Indian tribes); and
(vi) Women-owned small business concerns.

(7) The name of the individual employed by the Contractor who will administer the Contractor's subcontracting program, and a description of the duties of the individual.

(8) A description of the efforts the Contractor will make to assure that small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business,
small disadvantaged business, and women-owned small business concerns have an equitable opportunity to compete for subcontracts.

(9) Assurances that the Contractor will include the clause of this contract entitled “Utilization of Small Business Concerns” in all subcontracts that offer further subcontracting opportunities, and that the Contractor will require all subcontractors (except small business concerns) that receive subcontracts in excess of $700,000 ($1.5 million for construction of any public facility) with further subcontracting possibilities to adopt a subcontracting plan that complies with the requirements of this clause.

(10) Assurances that the Contractor will—

(i) Cooperate in any studies or surveys as may be required;

(ii) Submit periodic reports so that the Government can determine the extent of compliance by the Contractor with the subcontracting plan;

(iii) After November 30, 2017, include subcontracting data for each order when reporting subcontracting achievements for an indefinite-delivery, indefinite-quantity contract with an individual subcontracting plan where the contract is intended for use by multiple agencies;

(iv) Submit Standard Form (SF) 294 Subcontracting Report for Individual Contract in accordance with paragraph (l)(1) of this clause. Submit the Summary Subcontract Report (SSR) in accordance with paragraph (l) of this clause using the Electronic Subcontracting Reporting System (eSRS) at http://www.esrs.gov. The reports shall provide information on subcontract awards to small business concerns (including ANCs and Indian tribes that are not small businesses), veteran-owned small business concerns, service-disabled veteran-owned small business concerns, HUBZone small business concerns, small disadvantaged business concerns (including ANCs and Indian tribes that have not been certified by SBA as small disadvantaged businesses), and women-owned small business concerns. Reporting shall be in accordance with this clause;

(v) Ensure that its subcontractors with subcontracting plans agree to submit the SF 294 and SSR in accordance with paragraph (l) of this clause;

(11) A description of the types of records that will be maintained concerning procedures that have been adopted to comply with the requirements and goals in the plan, including establishing source lists; and a description of the Contractor's efforts to locate small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns and award subcontracts to them. The records shall include at least the following (on a plant-wide or company-wide basis, unless otherwise indicated):

(i) Source lists (e.g., SAM), guides, and other data that identify small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns.
(ii) Organizations contacted in an attempt to locate sources that are small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, or women-owned small business concerns.

(iii) Records on each subcontract solicitation resulting in an award of more than $150,000, indicating—

(A) Whether small business concerns were solicited and, if not, why not;
(B) Whether veteran-owned small business concerns were solicited and, if not, why not;
(C) Whether service-disabled veteran-owned small business concerns were solicited and, if not, why not;
(D) Whether HUBZone small business concerns were solicited and, if not, why not;
(E) Whether small disadvantaged business concerns were solicited and, if not, why not;
(F) Whether women-owned small business concerns were solicited and, if not, why not;

and

(G) If applicable, the reason award was not made to a small business concern.

(iv) Records of any outreach efforts to contact—

(A) Trade associations;
(B) Business development organizations;
(C) Conferences and trade fairs to locate small, HUBZone small, small disadvantaged, service-disabled veteran-owned, and women-owned small business sources; and
(D) Veterans service organizations.

(v) Records of internal guidance and encouragement provided to buyers through—

(A) Workshops, seminars, training, etc.; and
(B) Monitoring performance to evaluate compliance with the program's requirements.

(vi) On a contract-by-contract basis, records to support award data submitted by the Contractor to the Government, including the name, address, and business size of each subcontractor. Contractors having commercial plans need not comply with this requirement.

(12) Assurances that the Contractor will make a good faith effort to acquire articles, equipment, supplies, services, or materials, or obtain the performance of construction work from the small business concerns that it used in preparing the proposal for the modification, in the same or greater scope, amount, and quality used in preparing and submitting the modification proposal. Responding to a request for a quote does not constitute use in preparing a proposal. The Contractor used a small business concern in preparing the proposal for a modification if—

(i) The Contractor identifies the small business concern as a subcontractor in the proposal or associated small business subcontracting plan, to furnish certain supplies or perform a portion of the subcontract; or

(ii) The Contractor used the small business concern's pricing or cost information or technical expertise in preparing the proposal, where there is written evidence of an intent or understanding
that the small business concern will be awarded a subcontract for the related work when the modification is executed.

(13) Assurances that the Contractor will provide the Contracting Officer with a written explanation if the Contractor fails to acquire articles, equipment, supplies, services or materials or obtain the performance of construction work as described in (d)(12) of this clause. This written explanation must be submitted to the Contracting Officer within 30 days of contract completion.

(14) Assurances that the Contractor will not prohibit a subcontractor from discussing with the Contracting Officer any material matter pertaining to the payment to or utilization of a subcontractor.

(15) Assurances that the offeror will pay its small business subcontractors on time and in accordance with the terms and conditions of the underlying subcontract, and notify the contracting officer when the prime contractor makes either a reduced or an untimely payment to a small business subcontractor (see 52.242-5).

(i) The Contractor shall submit a SF 294 in accordance with paragraph (l)(1). The Contractor shall submit SSRs using the web-based eSRS at http://www.esrs.gov. Purchases from a corporation, company, or subdivision that is an affiliate of the Contractor or subcontractor are not included in these reports. Subcontract awards by affiliates shall be treated as subcontract awards by the Contractor. Subcontract award data reported by the Contractor and subcontractors shall be limited to awards made to their immediate next-tier subcontractors. Credit cannot be taken for awards made to lower tier subcontractors, unless the Contractor or subcontractor has been designated to receive a small business or small disadvantaged business credit from an ANC or Indian tribe. Only subcontracts involving performance in the U.S. or its outlying areas should be included in these reports.

(1) SF 294. This report is not required for commercial plans. The report is required for each contract containing an individual subcontracting plan. For Contractors the report shall be submitted to the Contracting Officer, or as specified elsewhere in this contract. In the case of a subcontract with a subcontracting plan, the report shall be submitted to the entity that awarded the subcontract.

(i) The report shall be submitted semi-annually during contract performance for the periods ending March 31 and September 30. A report is also required for each contract within 30 days of contract completion. Reports are due 30 days after the close of each reporting period, unless otherwise directed by the Contracting Officer. Reports are required when due, regardless of whether there has been any subcontracting activity since the inception of the contract or the previous reporting period. When a Contracting Officer rejects a report, the Contractor shall submit a revised report within 30 days of receiving the notice of report rejection.

(ii)(A) When a subcontracting plan contains separate goals for the basic contract and each option, as prescribed by FAR 19.704(e), the dollar goal inserted on this report shall be the sum of the base period through the current option; for example, for a report submitted after the second
option is exercised, the dollar goal would be the sum of the goals for the basic contract, the first option, and the second option.

(B) If a subcontracting plan has been added to the contract pursuant to 19.702(a)(3) or 19.301-2(e), the Contractor's achievements must be reported in the report on a cumulative basis from the date of incorporation of the subcontracting plan into the contract.

(iii) When a subcontracting plan includes indirect costs in the goals, these costs must be included in this report.

(2) SSR.

(i) Reports submitted under individual subcontracting plans.

(A) This report encompasses all subcontracting under prime contracts and subcontracts with an executive agency, regardless of the dollar value of the subcontracts. This report also includes indirect costs on a prorated basis when the indirect costs are excluded from the subcontracting goals.

(B) The report may be submitted on a corporate, company or subdivision (e.g., plant or division operating as a separate profit center) basis.

(C) If the Contractor and/or a subcontractor is performing work for more than one executive agency, a separate report shall be submitted to each executive agency covering only that agency's contracts, provided at least one of that agency's contracts is over $700,000 (over $1.5 million for construction of a public facility) and contains a subcontracting plan. For DoD, a consolidated report shall be submitted for all contracts awarded by military departments/agencies and/or subcontracts awarded by DoD prime contractors.

(D) The report shall be submitted annually by October 30, for the twelve month period ending September 30. When a Contracting Officer rejects an SSR, the Contractor is required to submit a revised SSR within 30 days of receiving the notice of report rejection.

(E) Subcontract awards that are related to work for more than one executive agency shall be appropriately allocated.

(F) The authority to acknowledge or reject SSRs in the eSRS, including SSRs submitted by subcontractors with subcontracting plans, resides with the Government agency awarding the prime contracts unless stated otherwise in the contract.

(ii) Reports submitted under a commercial plan.

(A) The report shall include all subcontract awards under the commercial plan in effect during the Government's fiscal year and all indirect costs.

(B) The report shall be submitted annually, within 30 days after the end of the Government's fiscal year.

(C) If a Contractor has a commercial plan and is performing work for more than one executive agency, the Contractor shall specify the percentage of dollars attributable to each agency.
(D) The authority to acknowledge or reject SSRs for commercial plans resides with the Contracting Officer who approved the commercial plan.

(End of clause)
MEMORANDUM FOR COMMANDER, UNITED STATES SPECIAL OPERATIONS COMMAND (ATTN: ACQUISITION EXECUTIVE)  
COMMANDER, UNITED STATES TRANSPORTATION COMMAND (ATTN: ACQUISITION EXECUTIVE)  
COMMANDER, UNITED STATES CYBER COMMAND (ATTN: ACQUISITION EXECUTIVE)  
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE  
DEPUTY ASSISTANT SECRETARY OF THE ARMY (PROCUREMENT), ASA (ALT)  
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DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE (CONTRACTING), SAF/AQC  
DIRECTORS, DEFENSE AGENCIES  
DIRECTORS, DEFENSE FIELD ACTIVITIES

SUBJECT: Class Deviation—Commercial Item Omnibus Clause for Acquisitions Using the Standard Procurement System

This class deviation rescinds and supersedes Class Deviation 2013-O0019. Effective immediately, when using the Standard Procurement System (SPS) to contract for commercial items, all Department of Defense contracting activities may deviate from the requirements at Federal Acquisition Regulation (FAR) 12.301(b)(4) and the clause at FAR 52.212-5, Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items.

The clause at FAR 52.212-5 requires the contracting officer to “check a box” to identify the clauses that are applicable to the specific acquisition of commercial items. Rather than requiring the contracting officers to “check the applicable clauses,” SPS has a clause logic capability that automatically selects the clauses under FAR clause 52.212-5.

Contracting officers may use the SPS clause logic capability to automatically select the clauses that are applicable to the specific solicitation and contract. Contracting officers shall ensure that the attached deviation clause is incorporated into these solicitations and contracts, because the deviation clause fulfills the statutory requirements on auditing and subcontract clauses applicable to commercial items. The deviation also authorizes adjustments to the attached deviation clause required by future changes to the clause at FAR 52.212-5 that are published in the FAR.
This class deviation is effective upon signature, and remains in effect for five years, or until otherwise rescinded. My point of contact is Ms. Lisa Romney who may be reached at 703-697-4396, or janice.l.romney.civ@mail.mil.

Shay D. Assad
Principal Director, Defense Pricing and Contracting

Attachment:
As stated
FAR 52.212-5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items (DEVIATION 2018-O0021)

In lieu of the clause at FAR 52.212-5, use the following clause in solicitations and contracts when utilizing FAR part 12 procedures for the acquisition of commercial items and the clause logic capability available in the Standard Procurement System.

CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES OR EXECUTIVE ORDERS—COMMERCIAL ITEMS (DEVIATION 2018-O0021) (SEP 2018)

(a) Comptroller General Examination of Record. The Contractor shall comply with the provisions of this paragraph (a) if this contract was awarded using other than sealed bid, is in excess of the simplified acquisition threshold, and does not contain the clause at 52.215-2, Audit and Records—Negotiation.

(1) The Comptroller General of the United States, or an authorized representative of the Comptroller General, shall have access to and right to examine any of the Contractor’s directly pertinent records involving transactions related to this contract.

(2) The Contractor shall make available at its offices at all reasonable times the records, materials, and other evidence for examination, audit, or reproduction, until 3 years after final payment under this contract or for any shorter period specified in FAR Subpart 4.7, Contractor Records Retention, of the other clauses of this contract. If this contract is completely or partially terminated, the records relating to the work terminated shall be made available for 3 years after any resulting final termination settlement. Records relating to appeals under the disputes clause or to litigation or the settlement of claims arising under or relating to this contract shall be made available until such appeals, litigation, or claims are finally resolved.
(3) As used in this clause, records include books, documents, accounting procedures and practices, and other data, regardless of type and regardless of form. This does not require the Contractor to create or maintain any record that the Contractor does not maintain in the ordinary course of business or pursuant to a provision of law.

(b)(1) Notwithstanding the requirements of any other clauses of this contract, the Contractor is not required to flow down any FAR clause, other than those in this paragraph (b)(1) in a subcontract for commercial items. Unless otherwise indicated below, the extent of the flow down shall be as required by the clause—


(ii) 52.203-19, Prohibition on Requiring Certain Internal Confidentiality Agreements or Statements (Jan 2017) (section 743 of Division E, Title VII, of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113-235) and its successor provisions in subsequent appropriations acts (and as extended in continuing resolutions)).

(iii) 52.204-23, Prohibition on Contracting for Hardware, Software, and Services Developed or Provided by Kaspersky Lab and Other Covered Entities (Jul 2018) (Section 1634 of Pub. L. 115-91).

(iv) 52.219-8, Utilization of Small Business Concerns (Nov 2016) (15 U.S.C. 637(d)(2) and (3)), in all subcontracts that offer further subcontracting opportunities. If the subcontract (except subcontracts to small business concerns) exceeds $700,000 ($1.5 million for construction of any public facility), the subcontractor must include 52.219-8 in lower tier subcontracts that offer subcontracting opportunities.

(v) 52.222-17, Nondisplacement of Qualified Workers (MAY 2014) (E.O. 13495). Flow down required in accordance with paragraph (1) of FAR clause 52.222-17.
(vi) 52.222-21, Prohibition of Segregated Facilities (APR 2015).

(vii) 52.222-26, Equal Opportunity (Sept 2016) (E.O. 11246).


(x) 52.222-37, Employment Reports on Veterans (FEB 2016) (38 U.S.C. 4212).

(xi) 52.222-40, Notification of Employee Rights Under the National Labor Relations Act (Dec 2010) (E.O. 13496). Flow down required in accordance with paragraph (f) of FAR clause 52.222-40.


(B) Alternate I (Mar 2015) of 52.222-50 (22 U.S.C. chapter 78 and E.O. 13627).


(xvi) 52.222-54, Employment Eligibility Verification (Oct 2015) (E.O. 12989).

(xvii) 52.222-55, Minimum Wages Under Executive Order 13658 (Dec 2015).


(B) Alternate I (JAN 2017) of 52.224-3.

(xxi) 52.226-6, Promoting Excess Food Donation to Nonprofit Organizations (May 2014) (42 U.S.C. 1792). Flow down required in accordance with paragraph (e) of FAR clause 52.226-6.

(xxii) 52.247-64, Preference for Privately Owned U.S.-Flag Commercial Vessels (Feb 2006) (46 U.S.C. Appx. 1241(b) and 10 U.S.C. 2631). Flow down required in accordance with paragraph (d) of FAR clause 52.247-64.

(2) While not required, the contractor may include in its subcontracts for commercial items a minimal number of additional clauses necessary to satisfy its contractual obligations.

(End of clause)

Alternate I (2018-O0021) (SEP 2018). As prescribed in 12.301(b)(4)(i), delete paragraph (a) from the basic clause, redesignate paragraph (b)(1) as paragraph (a), and redesignate paragraphs (b)(1)(i) through (b)(1)(xiv) as paragraphs (a)(1) through (a)(14) and redesignate paragraph (b)(2) as paragraph (b).

Alternate II (2018-O0021) (SEP 2018). As prescribed in 12.301(b)(4)(ii), substitute the following paragraphs (a)(1) and (b)(1) for paragraphs (a)(1) and (b)(1) of the basic clause as follows:

(a)(1) The Comptroller General of the United States, an appropriate Inspector General appointed under section 3 or 8G of the Inspector General Act of 1978 (5 U.S.C. App.), or an authorized representative of either of the foregoing officials shall have access to and right to—

(i) Examine any of the Contractor’s or any subcontractors’ records that pertain to, and involve transactions relating to, this contract; and

(ii) Interview any officer or employee regarding such transactions.
(b)(1) Notwithstanding the requirements of any other clause in this contract, the Contractor is not required to flow down any FAR clause in a subcontract for commercial items, other than—

(i) Paragraph (a) of this clause. This paragraph flows down to all subcontracts, except the authority of the Inspector General under paragraph (a)(1)(ii) does not flow down; and

(ii) Those clauses listed in this paragraph (b)(1). Unless otherwise indicated below, the extent of the flow down shall be as required by the clause—


(C) Prohibition on Contracting for Hardware, Software, and Services Developed or Provided by Kaspersky Lab and Other Covered Entities (Jul 2018) (Section 1634 or Pub. L. 115-91).

(D) 52.219-8, Utilization of Small Business Concerns (Dec 2010) (15 U.S.C. 637(d)(2) and (3)), in all subcontracts that offer further subcontracting opportunities. If the subcontract (except subcontracts to small business concerns) exceeds $700,000 ($1.5 million for construction of any public facility), the subcontractor must include 52.219-8 in lower tier subcontracts that offer subcontracting opportunities.

(E) 52.222-1, Prohibition on Segregated Facilities (Apr 2015)

(F) 52.222-26, Equal Opportunity (Sept 2016) (E.O. 11246).


(I) 52.222-40, Notification of Employee Rights Under the National Labor Relations Act (Dec 2010) (E.O. 13496).
Flow down required in accordance with paragraph (f) of FAR clause 52.222-40.


(N) 52.222-54, Employment Eligibility Verification (Oct 2015)(E.O. 12989).

(O) 52.222-55, Minimum Wages Under Executive Order 13658 (Dec 2015).


____(2) Alternate I (Jan 2017) of 52.224-3.


(S) 52.226-6, Promoting Excess Food Donation to Nonprofit Organizations. (May 2014) (42 U.S.C. 1792). Flow down required in accordance with paragraph (e) of FAR clause 52.226-6.

(T) 52.247-64, Preference for Privately Owned U.S.-Flag Commercial Vessels (Feb 2006) (46 U.S.C. Appx. 1241(b) and 10 U.S.C. 2631). Flow down required in accordance with paragraph (d) of FAR clause 52.247-64.
MEMORANDUM FOR COMMANDER, UNITED STATES SPECIAL OPERATIONS COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES TRANSPORTATION COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES CYBER COMMAND (ATTN: ACQUISITION EXECUTIVE)
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE
DEPUTY ASSISTANT SECRETARY OF THE ARMY (PROCUREMENT), ASA (ALT)
DEPUTY ASSISTANT SECRETARY OF THE NAVY (ACQUISITION & LOGISTICS MANAGEMENT), ASN (RDA)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE (CONTRACTING), SAF/AQC
DIRECTORS, DEFENSE AGENCIES
DIRECTORS, DEFENSE FIELD ACTIVITIES

SUBJECT: Class Deviation—Permanent Supply Chain Risk Management Authority

Effective immediately, this class deviation removes the sunset date at DFARS 239.7300(b) and changes the statutory citations in DFARS subpart 239.73 from section 806 Pub. L. 111-383 to 10 U.S.C. 2339a. Contracting officers shall use the provision and clause provided in the attachment to this deviation in lieu of the provision at DFARS 252.239-7017, Notice of Supply Chain Risk, and clause at DFARS 252.239-7018, Supply Chain Risk, as prescribed in the attachment.

This class deviation implements section 881 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115-232). Section 881 codifies the authority for requirements for information relating to supply chain risk at 10 U.S.C. 2339a and repeals the sunset date at section 806(g) of the NDAA for FY 2011 (Pub. L. 111-383), as modified by section 806(a) of the NDAA for FY 2013 (Pub. L. 112-239), to make the authority permanent.

This class deviation remains in effect until incorporated in the DFARS or otherwise rescinded. My point of contact is Mary Thomas at 703-693-7895 or mary.s.thomas.civ@mail.mil.

Shay D. Assad
Principal Director, Defense Pricing and Contracting

Attachment:
As stated
239.7300 Scope of subpart (DEVIATION 2018-O0020).


(b) The authority provided in this subpart is permanent (see 10 U.S.C. 2339a).

239.7301 Definitions (DEVIATION 2018-O0020).

As used in this subpart—

“Covered item of supply” means an item of information technology that is purchased for inclusion in a covered system, and the loss of integrity of which could result in a supply chain risk for a covered system (see 10 U.S.C. 2339a).

“Covered system” means a national security system, as that term is defined at 44 U.S.C. 3552(b) (see 10 U.S.C. 2339a). It is any information system, including any telecommunications system, used or operated by an agency or by a contractor of an agency, or other organization on behalf of an agency—

(1) The function, operation, or use of which—

(i) Involves intelligence activities;

(ii) Involves cryptologic activities related to national security;

(iii) Involves command and control of military forces;

(iv) Involves equipment that is an integral part of a weapon or weapons system; or

(v) Is critical to the direct fulfillment of military or intelligence missions, but this does not include a system that is to be used for routine administrative and business applications, including payroll, finance, logistics, and personnel management applications; or

(2) Is protected at all times by procedures established for information that have been specifically authorized under criteria established by an Executive order or an Act of Congress to be kept classified in the interest of national defense or foreign policy.

* * * * *

“Supply chain risk” means the risk that an adversary may sabotage, maliciously introduce unwanted function, or otherwise subvert the design, integrity, manufacturing, production, distribution, installation, operation, or maintenance of a covered system so as to surveil, deny, disrupt, or otherwise degrade the function, use, or operation of such system (see 10 U.S.C. 2339a).

* * * * *
252.239-7017 Notice of Supply Chain Risk (DEVIATION 2018-O0020).
Use the following provision, in lieu of the provision at DFARS 252.239-7017, in all
solicitations, including solicitations using FAR part 12 procedures for the acquisition of
commercial items, for information technology, whether acquired as a service or as a
supply, that is a covered system, is a part of a covered system, or is in support of a
covered system, as defined at 239.7301 (DEVIATION 2018-O0020):

NOTICE OF SUPPLY CHAIN RISK (SEP 2018) (DEVIATION 2018-O0020)

(a) Definition. As used in this provision—

“Supply chain risk,” means the risk that an adversary may sabotage, maliciously
introduce unwanted function, or otherwise subvert the design, integrity,
manufacturing, production, distribution, installation, operation, or maintenance of a
covered system so as to surveil, deny, disrupt, or otherwise degrade the function, use,
or operation of such system (see 10 U.S.C. 2339a).

(b) In order to manage supply chain risk, the Government may use the authorities
provided by 10 U.S.C. 2339a. In exercising these authorities, the Government may
consider information, public and non-public, including all-source intelligence, relating to
an offeror and its supply chain.

(c) If the Government exercises the authority provided in 10 U.S.C. 2339a to limit
disclosure of information, no action undertaken by the Government under such
authority shall be subject to review in a bid protest before the Government
Accountability Office or in any Federal court.

(End of provision)

252.239-7018 Supply Chain Risk (DEVIATION 2018-O0020).
Use the following clause, in lieu of the clause at DFARS 252.239-7018, in all
solicitations and contracts, including solicitations and contracts using FAR part 12
procedures for the acquisition of commercial items, for information technology, whether
acquired as a service or as a supply, that is a covered system, is a part of a covered system, or is in support of a
covered system, as defined at 239.7301 (DEVIATION 2018-O0020):

SUPPLY CHAIN RISK (SEP 2018) (DEVIATION 2018-O0020)

(a) Definitions. As used in this clause—

“Information technology” (see 40 U.S.C 11101(6)) means, in lieu of the definition at
FAR 2.1, any equipment, or interconnected system(s) or subsystem(s) of equipment,
that is used in the automatic acquisition, storage, analysis, evaluation, manipulation,
management, movement, control, display, switching, interchange, transmission, or
reception of data or information by the agency.

(1) For purposes of this definition, equipment is used by an agency if the
equipment is used by the agency directly or is used by a contractor under a contract
with the agency that requires—

(i) Its use; or
(ii) To a significant extent, its use in the performance of a service or the furnishing of a product.

(2) The term “information technology” includes computers, ancillary equipment (including imaging peripherals, input, output, and storage devices necessary for security and surveillance), peripheral equipment designed to be controlled by the central processing unit of a computer, software, firmware and similar procedures, services (including support services), and related resources.

(3) The term “information technology” does not include any equipment acquired by a contractor incidental to a contract.

“Supply chain risk,” means the risk that an adversary may sabotage, maliciously introduce unwanted function, or otherwise subvert the design, integrity, manufacturing, production, distribution, installation, operation, or maintenance of a covered system so as to surveil, deny, disrupt, or otherwise degrade the function, use, or operation of such system (see 10 U.S.C. 2339a).

(b) The Contractor shall mitigate supply chain risk in the provision of supplies and services to the Government.

(c) In order to manage supply chain risk, the Government may use the authorities provided by 10 U.S.C. 2339a. In exercising these authorities, the Government may consider information, public and non-public, including all-source intelligence, relating to a Contractor’s supply chain.

(d) If the Government exercises the authority provided in 10 U.S.C. 2339a to limit disclosure of information, no action undertaken by the Government under such authority shall be subject to review in a bid protest before the Government Accountability Office or in any Federal court.

(End of clause)
MEMORANDUM FOR COMMANDER UNITED STATES SPECIAL OPERATIONS COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER UNITED STATES TRANSPORTATION COMMAND (ATTN: ACQUISITION EXECUTIVE)
DEPUTY ASSISTANT SECRETARY OF THE ARMY, (PROCUREMENT), DASA(P)
DEPUTY ASSISTANT SECRETARY OF THE NAVY (ACQUISITION & LOGISTICS MANAGEMENT), DASN (A&LM)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE (CONTRACTING), SAF/AQC
DIRECTORS, DEFENSE AGENCIES
DIRECTORS, DOD FIELD ACTIVITIES

SUBJECT: Class Deviation—Contractor Personnel Performing in Japan

Effective immediately, contracting officers shall use the attached clause 252.225-7976, Contractor Personnel Performing in Japan (DEVIATION 2018-O0019), in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, that will require contractor personnel to perform in Japan.

This class deviation implements changes made on January 16, 2017, to the “Agreement under Article VI of the Treaty of Mutual Cooperation and Security between Japan and the United States of America, Regarding Facilities and Areas and the Status of United States Armed Forces in Japan” (SOFA), dated January 19, 1960. The deviation clause requires DoD contractors to account for contractor personnel and dependents in the Synchronized Predeployment and Operational Tracker, in order for the contractor personnel and dependents to be eligible for coverage under the SOFA.

This class deviation remains in effect until incorporated in the DFARS or otherwise rescinded. My point of contact is Patricia Foley, DPC/CP, at 703-693-1145 or patricia.g.foley.civ@mail.mil.

Attachment:
As stated
252.225-7976 Contractor Personnel Performing in Japan. (DEVIATION 2018-O0019)

Use this clause in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, that will require contractor personnel to perform in Japan.

CONTRACTOR PERSONNEL PERFORMING IN JAPAN
(DEVIATION 2018-O0019)(AUG 2018)

(a) Definitions. As used in this clause—

“Commander” means the Commander of the United States Forces Japan (USFJ).

“Dependent” means spouse, and children under 21; and parents, and children over 21, if dependent for over half their support upon a member of the United States Armed Forces or civilian component.

“Law of war” means that part of international law that regulates the conduct of armed hostilities. The law of war encompasses the international law related to the conduct of hostilities that is binding on the United States or its individual citizens, including treaties and international agreements to which the United States is a party, and applicable customary international law.

“SOFA Article I(b) status” means a designation by the Commander of contractor personnel as Members of the Civilian Component under Article I(b) of the Status of Forces Agreement (SOFA), in accordance with agreement by the Joint Committee. To receive such a designation, an individual must—

(1) Be a United States national;

(2) Not be ordinarily resident in Japan (or if ordinarily resident, complete the procedures set forth in USFJ Instruction 36-2611 (Change of Status by Persons in Japan to One of the Categories Authorized by the Status of Forces Agreement, available at http://www.usfj.mil/Portals/80/Documents/Instructions/36-2611%20(USFJI).pdf

(3) Be present in Japan at the official invitation of the United States Government and solely for official purposes in connection with the United States Armed Forces;

(4) Not have SOFA Article XIV status; and
(5) Be essential to the mission of the United States Armed Forces and has a high degree of skill or knowledge for the accomplishment of mission requirements by fulfilling the following:

(i) Has acquired the skill and knowledge through a process of higher education or specialized training and experience; or

(ii) Possesses a security clearance recognized by the United States to perform his or her duties; or

(iii) Possesses a license or certification issued by a U.S. Federal department or agency, U.S. state, U.S. Territory, or the District of Columbia to perform his or her duties; or

(iv) Be identified by the United States Armed Forces as necessary in an emergent situation and will remain in Japan for less than 91 days to fulfill specialized duties; or

(v) Is an employee of a military banking facility; or

(vi) Is specifically authorized by the Joint Committee.

“SOFA Article XIV status” means designation by the Commander to persons, including corporations organized under the laws of the United States and its personnel, that are ordinarily resident in the United States and whose presence in Japan is solely for the purpose of executing contracts with the United States for the benefit of the United States Armed Forces. Such designations are made in extremely limited circumstances and only after consultation with the Government of Japan. Article XIV designations are restricted to cases where open competitive bidding is not practicable due to—

(1) Security considerations;

(2) The technical qualification of the contractors involved;

(3) The unavailability of materials or services required by United States standards; and

(4) Limitations of United States law.

“SOFA-covered contractor personnel” means contractor personnel who have been designated as having SOFA Article I(b) status or SOFA Article XIV status, which is documented on a Letter of Authorization (LOA) signed by the Contracting Officer.
“SOFA status” means either SOFA Article I(b) status or SOFA Article XIV status or a dependent under Article I(c).


“United States national” means a citizen of the United States, or a person who, though not a citizen of the United States, owes permanent allegiance to the United States.

(b) General.

(1) This clause applies to SOFA-covered contractor personnel when performing in Japan. The requirements of paragraph (c)(2) and (e)(1) of this clause must be specified in the statement of work to be applied to non-SOFA-covered contractor personnel.

(2) The Contractor shall comply with the instructions of the Contracting Officer concerning the entry of its personnel, equipment, and supplies into Japan, applicable Japanese laws and regulations, and USFJ and USFJ-component policies and instructions during the performance of this contract. Specifically, the Contractor shall comply with—

(i) USFJ Instruction 64-100, Contract Performance in Japan;

(ii) USFJ Instruction 36-2811, Indoctrination Training Programs;

(iii) USFJ Instruction 36-2611, Change of Status by Persons in Japan to One of the Categories Authorized by the Status of Forces Agreement; and

(iv) USFJ Instruction 64-102, United States Official Contractors and Their Employees, as applicable to contractors and contractor personnel with SOFA Article XIV status.

(3) Application for status under the SOFA shall be in accordance with USFJ Instruction 64-100 and, in specific and limited circumstances, USFJ Instruction 64-102.

(i) The Contracting Officer, through consultation with their legal counsel and the USFJ/J06 office, makes the determination of status under SOFA Article I(b)
for contractor personnel.

(ii) If the Contracting Officer makes a request for status as a United States Official Contractor under Article XIV, USFJ Headquarters (HQ USFJ) shall make the final determination on the Contractor’s SOFA status upon consultation with the government of Japan.

(iii) The Contractor shall request a determination of status under the SOFA for its eligible personnel through the Synchronized Predeployment and Operational Tracker (SPOT) system (see paragraph (i) of this clause). The Contracting Officer will approve a LOA generated in SPOT (see paragraph (c)(2) of this clause) indicating the SOFA status of the contractor personnel only after verifying that eligibility criteria described in USFJ Instruction 64-100 are met.

(iv) Contractor personnel dependent information is also required to be entered into SPOT as part of the employee record.

(4) The importation and personal possession of firearms, swords, and other weapons is highly restricted and controlled in Japan. Contractor personnel considering bringing personal firearms, swords, or other weapons into Japan must comply with USFJ Instruction 31-207, “Firearms and Other Weapons in Japan” available from USFJ/J023 at pacom.yokota.usfj.mbx.j023@mail.mil. The importation and possession of firearms and weapons to perform services under a contract will be addressed separately in the contract.

(5) Offenses committed by the Contractor or contractor personnel may be subject to United States or host nation prosecution and/or civil liability (see paragraph (d) of this clause). Japan authorities have the right to exercise jurisdiction over SOFA-covered contractor personnel, including dependents, in relation to offenses committed in Japan and punishable by the law of Japan. In those cases in which the Japanese authorities have the primary right to exercise jurisdiction but decide not to do so, the United States shall have the right to exercise such jurisdiction as is conferred on it by the law of the United States.

(c) Support.

(1) Security plan. The Commander will develop a security plan that identifies contingency procedures and potential evacuation of nonessential SOFA-covered contractor personnel.

(2) Letter of authorization. A SPOT-generated LOA signed by the Contracting Officer is required for SOFA-covered contractor personnel travel to, from, or within Japan.
(i) The LOA will identify any additional authorizations, privileges, or Government support that contractor personnel are entitled to under this contract. USFJ has limited capability to provide Government-furnished routine medical services to contractors in Japan. In instances where Government-furnished routine medical services are neither available nor authorized in the contract, the SPOT-generated LOA shall be annotated with “None” checked for Government-furnished routine medical services.

(ii) Contractor personnel shall present a valid LOA to Japanese immigration officials upon entry into and exit from Japan to receive government of Japan recognition as a Member of the Civilian Component under the SOFA or as a contractor with Article XIV status.

(iii) Contractor personnel who are issued a LOA shall maintain possession a DoD-issued identification credential at all times while performing under this contract in Japan. If the contractor personnel does not possess a DoD-issued identification credential, he or she shall maintain possession of a copy of the LOA and their passport at all times while performing under this contract in Japan.

(3) SOFA-status contractor personnel privileges. Contractor personnel and their dependents granted authority to enter Japan under SOFA Article I(b) may be accorded the following benefits of the SOFA:

(i) Access to and movement between facilities and areas in use by the United States Armed Forces and between such facilities and areas and the ports or airports of Japan as provided for in paragraph 2 of the SOFA Article V.

(ii) Entry into Japan and exemption from Japanese laws and regulations on the registration and control of aliens as provided for in SOFA Article IX.

(iii) Acceptance as valid by Japan, without a driving test or fee, a USFJ Operator’s Permit for Civilian Vehicle as provided for in SOFA Article X. Issuance of such permit shall be subject to applicable military regulation.

(iv) Exemption from customs duties and other such charges on materials, supplies, and equipment which are to be incorporated into articles or facilities used by the United States Armed Forces; furniture, household goods for private use imported by person when they first arrive to work in Japan; vehicles and parts imported for private use; and reasonable quantities of clothing and household goods for everyday private use, which are mailed into Japan through United States military post offices as provided for in paragraphs 2 and 3 of SOFA Article XI.
(v) Exemption from the laws and regulations of Japan with respect to terms and conditions of employment as provided for in paragraph 7 of SOFA Article XII, except that such exemption shall not apply to the employment of local nationals in Japan.

(vi) Exemption from Japanese taxes to the government of Japan or to any other taxing agency in Japan on income received as a result of their service with the United States Armed Forces as provided for in SOFA Article XIII. The provisions of Article XIII do not exempt such persons from payment of Japanese taxes on income derived from Japanese sources.

(vii) If authorized by the installation commander or designee, permission to use exchanges, commissaries, messes, social clubs, theaters, newspapers and other non-appropriated fund organizations regulated by United States military authorities as provided for in SOFA Article XV and DoD Manual 1000.13-V2, DoD Identification (ID) Cards: Benefits for Members of the Uniformed Services, Their Dependents, and Other Eligible Individuals.

(viii) The transmission into or outside of Japan of United States dollar or dollar instruments realized as a result of contract performance as provided for in paragraph 2 of SOFA Article XIX.

(ix) Exemption from taxation in Japan on the holding, use, transfer by death, or transfer to person or agencies entitled to tax exemption under the SOFA, of movable property, tangible or intangible, the presence of which in Japan is due solely to the temporary presence of these persons in Japan, provided such exemption shall not apply to property held for the purpose of investment or the conduct of other business in Japan or to any intangible property registered in Japan.

(4) Logistical Support.

(i) Logistical support may be authorized, when the Contracting Officer determines it necessary and appropriate, for contractor personnel in Japan. Generally, the full range of logistical support listed below is not necessary for contractor personnel performing services in Japan on a short-term basis, less than 91 days. Contractor personnel granted SOFA Article I(b) status and their dependents may be provided logistical support, subject to availability as determined by the installation commander or designee. Logistical support includes the following:

(A) Base Exchange, including exchange service stations, theaters, and commissary.
(B) Military banking facilities.
(C) Transient billeting facilities.

(D) Open mess (club) membership, as determined by each respective club.

(E) Casualty assistance (mortuary services), on a reimbursable basis.

(F) Emergency medical care, on a reimbursable basis.

(G) Dental care, limited to relief of emergencies, on a reimbursable basis.

(H) Department of Defense Dependent Schools, on a space-created and tuition-paying basis.

(I) Postal support, as authorized by military postal regulations.

(J) Local recreation services, on a space-available basis.

(K) Issuance of USFJ Operator’s Permit, if the Contracting Officer determines it necessary based on the length of contract performance.

(L) Issuance of personal vehicle license plates.

(ii) No other logistical support is authorized for contractor personnel in Japan unless the Contracting Officer obtains a specific authorization from the installation commander where the support will be provided, after coordination with USFJ/J06.

(5) Unless specified elsewhere in this contract, the Contractor is responsible for all other support required for its personnel engaged in Japan under this contract. This support includes the Contractor responsibility for entry and exit from Japan to ensure compliance with Japanese laws concerning foreign personnel in their country.

(d) *Compliance with laws and regulations.*

(1) The Contractor shall comply with, and shall ensure that its personnel performing in Japan are familiar with and comply with, all applicable—

(i) United States, host country, and third-country national laws;

(ii) Provisions of applicable treaties and international agreements;
(iii) United States regulations, directives, instructions, policies, and procedures; and

(iv) Orders, directives, and instructions issued by the USFJ Commander and installation commanders, including those relating to force protection, security, health, safety, or relations and interaction with local nationals.

(2) If required by the contract, the Contractor shall institute and implement an effective program to prevent violations of the law of war by its employees and subcontractors, including law of war training.

(3) The Contractor shall ensure that all contractor personnel are aware—

(i) Of the DoD definition of “sexual assault” in DoD Directive 6495.01, Sexual Assault Prevention and Response Program; and

(ii) That sexual misconduct may constitute offenses under the law of Japan, Uniform Code of Military Justice, Federal law, such as the Military Extraterritorial Jurisdiction Act, or both. All offenses have consequences for contractor personnel, including dependents.

(4) The Contractor shall report to the appropriate investigative authorities, identified in paragraph (d)(6) of this clause, any alleged offenses under the Military Extraterritorial Jurisdiction Act (chapter 212 of title 18, United States Code) or other Federal or local laws.

(5) The Contractor shall provide to all contractor personnel who will perform work on a contract in the operational area, before beginning such work, information on the following:

(i) How and where to report an alleged crime described in paragraph (d)(4) of this clause.

(ii) Where to seek victim and witness protection and assistance available to contractor personnel in connection with an alleged offense described in paragraph (d)(4) of this clause.

(iii) That this section does not create any rights or privileges that are not authorized by law or DoD policy.

(6) The appropriate investigative authorities to which suspected crimes shall be reported include the following—


(iii) Navy Criminal Investigative Service at http://www.ncis.navy.mil/ContactUs/Pages/ReportaCrime.aspx;


(v) To any command of any supported military element or the command of any base.

(7) Personnel seeking whistleblower protection from reprisals for reporting criminal acts shall seek guidance through the DoD Inspector General hotline at 800-424-9098 or http://www.dodig.mil/Components/Administrative-Investigations/DoD-Hotline/. Personnel seeking other forms of victim or witness protections should contact the nearest military law enforcement office.

(8)(i) The Contractor shall ensure that contractor personnel supporting the U.S. Armed Forces in Japan are aware of their rights to—

(A) Hold their own identity or immigration documents, such as passport or driver's license;

(B) Receive agreed upon wages on time;

(C) Take lunch and work-breaks;

(D) Elect to terminate employment at any time;

(E) Identify grievances without fear of reprisal;

(F) Have a copy of their employment contract in a language they understand;

(G) Receive wages that are not below the legal in-country minimum wage;

(H) Be notified of their rights, wages, and prohibited activities prior to signing their employment contract; and
(I) If housing is provided, live in housing that meets host-country housing and safety standards.

(ii) The Contractor shall post these rights in work spaces in English and in any foreign language(s) spoken by a significant portion of the workforce.

(iii) The Contractor shall enforce the rights of contractor personnel and subcontractor personnel supporting the United States Armed Forces.

(e) Preliminary personnel requirements.

(1) The Contractor shall ensure that the following requirements are met prior to departure of SOFA-covered contractor personnel and, as specified in the statement of work, non-SOFA-covered contractor personnel (specific requirements for each category will be specified in the statement of work or elsewhere in the contract):

(i) All required security and background checks are complete and acceptable.

(ii) All required USFJ Form 27, Contractor Employee Acknowledgement Forms.

(iii) All such personnel performing in support of an applicable operation—

(A) Meet the minimum medical screening requirements, including theater-specific medical qualifications as established by the United States Indo-Pacific Command (USINDOPACOM) Combatant Commander (as posted to the USINDOPACOM Combatant Commander’s website or other venue); and

(B) Have received all required immunizations as specified in the foreign clearance guide.

(1) All immunizations shall be obtained prior to arrival in Japan.

(2) All such personnel, as specified in the statement of work, shall bring to Japan a copy of the U.S. Centers for Disease Control and Prevention (CDC) Form 731, International Certificate of Vaccination or Prophylaxis as approved by the World Health Organization, (also known as "shot record" or "Yellow Card") that shows vaccinations are current.

(iv) Contractor personnel have all necessary passports, visas, and other documents required to enter and exit Japan, and other appropriate DoD identity credential.
(v) Special area, country, and theater clearance is obtained for all personnel. Clearance requirements are in DoD Directive 4500.54E, DoD Foreign Clearance Program. For this purpose, SOFA-covered contractor personnel are considered non-DoD personnel traveling under DoD sponsorship.

(2) The Contractor shall notify its personnel, including dependents, who are not a host country national, or who are not ordinarily resident in the host country, that—

(i) Such personnel, and dependents, who engage in conduct outside the United States that would constitute an offense punishable by imprisonment for more than one year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States, may potentially be subject to the criminal jurisdiction of the United States in accordance with the Military Extraterritorial Jurisdiction Act of 2000 (18 U.S.C. 3621, et seq.);

(ii) Pursuant to the War Crimes Act (18 U.S.C. 2441), Federal criminal jurisdiction also extends to conduct that is determined to constitute a war crime when committed by a civilian national of the United States;

(iii) Other laws may provide for prosecution of U.S. nationals who commit offenses on the premises of U.S. diplomatic, consular, military or other U.S. Government missions outside the United States (18 U.S.C. 7(9));

(iv) In time of declared war or a contingency operation, SOFA-covered contractor personnel and selected non-SOFA covered contractor personnel may be subject to the jurisdiction of the Uniform Code of Military Justice under 10 U.S.C. 802(a)(10);

(v) Contractor personnel are required to report offenses alleged to have been committed by or against other contractor personnel to appropriate investigative authorities; and

(vi) Contractor personnel will be provided victim and witness protection and assistance.

(f) Personnel data.

(1) The Contractor shall—

(i) Use the SPOT web-based system, or its successor, to account for all SOFA-covered contractor personnel performing in Japan under the contract;
(ii) Register for a SPOT account at https://spot.dmdc.mil for unclassified contracts and at https://spot.dmdc.osd.smil.mil for classified contracts using one of the following log-in methods, after which the SPOT Customer Support Team will contact the Contractor to validate user needs:

(A) A Common Access Card (CAC) or a SPOT-approved digital certificate.

(B) A Government-sponsored SPOT user ID and password. This type of log-in method is only allowed for those individuals who are not authorized to obtain a CAC or an external digital certificate, and requires SPOT Program Management Office approval;

(iii) Comply with the SPOT Business Rules located at https://www.acq.osd.mil/log/PS/spot.html;

(iv) Enter into the SPOT the required information on contractor personnel, accompanying dependents and equipment prior to departure and continue to use the SPOT to maintain accurate, up-to-date information throughout performance in Japan for all applicable contractor personnel. Changes to status of individual contractor personnel relating to their in-theater arrival date and their duty location, including closing out the deployment with their proper status (e.g., mission complete, killed, wounded) shall be annotated within the SPOT database in accordance with the timelines established in the SPOT Business Rules at http://www.acq.osd.mil/log/PS/ctr_mgt_accountability.html; and

(v) Ensure the in-theater arrival date, closeout dates, and changes of the status of individual contractor personnel relating to their in-theater arrival date and their duty location, to include closing out the performance in the operational area with their proper status, are updated in the system in accordance with the processes and timelines established in the SPOT business rules.

(2) SPOT non-compliance and deficiencies will be relevant to past performance evaluations for future contract opportunities, in accordance with Federal Acquisition Regulation subpart 42.15.

(g) Contractor personnel.

(1) Civilian personnel supporting the United States Armed Forces in Japan are guests in a foreign country and must at all times conduct themselves in an honorable and credible manner. Criminal conduct and dishonorable personal behavior, committed either on or off duty, adversely impacts United States and Japanese relations, tarnishes the image of the DoD and USFJ, and hampers the Force’s military readiness.
(i) **Compliance with laws and regulations.** The Contractor shall comply with, and shall ensure that its personnel are familiar with, and comply with, all applicable—

(A) United States and host country laws;

(B) Treaties and international agreements;

(C) United States regulations, United States Armed Forces directives, instructions, policies, and procedures; and

(D) Orders, directives, and instructions issued by supported commanders, including those relating to force protection, security, health, safety, liberty policies, alcohol-related incidents, or relations and interaction with local nationals, should serve as guideposts in all on and off duty conduct and will be used as general principles in the application of the Government’s discretion with regard to paragraph (ii), below.

(ii) **Removal and replacement of Contractor personnel.** The Contracting Officer may direct the Contractor, at its own expense, to remove and replace any Contractor personnel who fail to comply with or violate applicable requirements of the contract, including those stipulated in this section. Such action may be taken at the Government’s discretion without prejudice to its rights under any other provision of this contract, including the termination for default or cause.

(2) The Contractor shall identify all personnel who occupy a position designated as mission essential and ensure the continuity of essential Contractor services during designated operations, unless, after consultation with the Contracting Officer, Contracting Officer’s Representative, or installation commander, the Contracting Officer directs withdrawal due to security conditions.

(3) The Contractor shall ensure that contractor personnel follow the guidance at paragraph (e)(2)(v) of this clause and any specific Commander guidance on reporting offenses alleged to have been committed by or against contractor personnel to appropriate investigative authorities.

(4) Contractor personnel shall return all U.S. Government-issued identification, including the Common Access Card, to appropriate U.S. Government authorities at the end of their employment under this contract.

(h) **Protective equipment.**
(1) Contractor personnel may wear military-unique organizational clothing and individual equipment required for safety and security, such as ballistic, nuclear, biological, or chemical protective equipment. Any required protective equipment should be identified in the statement of work in the contract.

(2) The Commander may issue organizational clothing and individual equipment and provide training, if necessary, as part of the security plan.

(3) The Contractor shall ensure that any issued organizational clothing is returned to the point of issue, unless otherwise directed by the Contracting Officer.

(j) Evacuation.

(1) If the Commander orders a mandatory evacuation of some or all personnel, the Government will provide assistance, to the extent available, to contractor personnel who are U.S. citizens and third-country nationals.

(2) In the event of a non-mandatory evacuation order, unless authorized in writing by the Contracting Officer, the Contractor shall maintain personnel on location sufficient to meet obligations under this contract.

(k) Next of kin notification and personnel recovery.

(1) The Contractor shall be responsible for notification of its personnel’s designated next of kin in the event an individual dies, requires evacuation due to an injury, or is isolated, missing, detained, captured, or abducted.

(2) The Government will assist in personnel recovery actions in accordance with DoD Directive 3002.01, Personnel Recovery in the Department of Defense.

(l) Mortuary affairs. Contractor personnel authorized to accompany United States Armed Forces may be covered by the DoD mortuary affairs program in accordance with DoD Directive 1300.22, Mortuary Affairs Policy, and DoD Instruction 3020.41, Operational Contract Support.

(m) Subcontracts. The Contractor shall incorporate the substance of this clause, including this paragraph (m), in all subcontracts that will require subcontractor personnel to perform in Japan.

(End of clause)
MEMORANDUM FOR: COMMANDER, UNITED STATES SPECIAL OPERATIONS COMMAND (ATTN: ACQUISITION EXECUTIVE)  
COMMANDER, UNITED STATES TRANSPORTATION COMMAND (ATTN: ACQUISITION EXECUTIVE)  
DEPUTY ASSISTANT SECRETARY OF THE ARMY (PROCUREMENT)  
DEPUTY ASSISTANT SECRETARY OF THE NAVY (ACQUISITION AND PROCUREMENT)  
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE (CONTRACTING)  
DIRECTORS OF THE DEFENSE AGENCIES  
DIRECTORS OF THE DOD FIELD ACTIVITIES  

SUBJECT: Negotiations of Sole Source Major Systems for U.S. and U.S./FMS Combined Procurements

The Department is continuing to examine its contracting practices in an effort to be more timely and effective. Accordingly, with regard to the development of acquisition and contracting strategies for sole source major systems procurements for U.S. and U.S./FMS combined requirements, we encourage program managers and Contracting Officers to use strategies that address more than a single year's procurement requirements, whenever possible, through the use of priced options.

The practice of year-over-year annual procurements is both administratively costly in terms of Procurement Administrative Lead Time (PALT) and the resources (proposal preparation and manpower) to get annual requirements under contract. Contracting Officers are encouraged to establish priced options for two years beyond the instant procurement year such that negotiations of major systems would be conducted approximately every three years. In those cases where exact quantities are subject to variation or FMS customers are not yet identified, range option pricing for both U.S. and FMS quantities should be established. This practice will allow us to avoid the routine use of undefinitized contract actions (UCAs) for U.S. and FMS requirements and it will provide more responsive availability of priced contractual instruments for emerging FMS requirements.

For economies of scale and efficiency, it is in the best interests of the taxpayers to combine U.S. and FMS requirements under the same contract whenever possible. In terms of contract type for U.S. or combined U.S. and FMS requirements, most production type requirements are typically contracted for on a fixed price basis (firm fixed price or fixed price incentive (firm target) FPIF)). It is not in the best interest of the taxpayers to concurrently use mixed contract types for the same or similar items.
With regard to contract types, it is the general rule that contracting officers should follow the guidance in PGI 216.403-1(1) (ii) (B) which states:

It is also not in the Government's best interest to use firm-fixed-price (FFP) contracts on production programs until costs have become stable. Therefore, FPIF contracts should be considered in sole source follow-on programs where actual costs on prior FFP contracts have varied by more than 3-4 percent from the costs considered negotiated. Contracting officers are reminded that actual costs on prior contracts for the same item or essentially the same item, regardless of contract type or data reporting requirements of the prior contract, are cost and pricing data on the pending contract, and must be obtained from the contractor on production programs when certified cost or pricing data are required.

Contracting Officers should utilize FPIF contracts instead of FFP contracts unless the reasons for significant variation are well understood and actions have been taken to ensure that significant variation will not recur. In addition, because both parties will be assuming more risk in pricing multiple years of requirements, the use of more FPIF contracts is both highly recommended and encouraged.

Accordingly, in those cases when we are contracting for both U.S. and FMS requirements, Contracting Officers are reminded that they must address each procurement involving FMS requirements on a case by case basis and a request for the waiver provided for in section 830 of the National Defense Acquisition Act for Fiscal Year 2017 should be processed when the U.S. portions of these contracts alone would otherwise be FPIF.

For contracts addressing standalone FMS requirements, where no concurrent U.S. requirements are being produced, Contracting Officers shall ensure that all of those actions are consistent with section 830. DoD Class Deviation 2018-00017, "Determining Contract Type for FMS Contracts," provides implementing guidance for section 830 until it is incorporated into the DFARS.

Before a firm fixed-price contract type, with a value greater than $500 million, is to be used for a sole source contract for U.S. or U.S./FMS combined requirements for a major system (as defined at FAR Part 2.101) consult with the Director, DP/DPAP prior to the issuance of the solicitation for the subject procurement.

If you have any questions regarding the above, please contact the undersigned.

Shay D. Assad
Director, Defense Pricing/Defense Procurement and Acquisition Policy
MEMORANDUM FOR COMMANDER, UNITED STATES SPECIAL OPERATIONS COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES TRANSPORTATION COMMAND (ATTN: ACQUISITION EXECUTIVE)
DEPUTY ASSISTANT SECRETARY OF THE ARMY (PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE NAVY (ACQUISITION AND PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE (CONTRACTING)
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Class Deviation—Defense Commercial Solutions Opening Pilot Program

Effective immediately, contracting officers may acquire innovative commercial items, technologies, or services using a competitive procedure called a commercial solutions opening (CSO) by following the procedures provided in this class deviation. Use of a CSO is authorized by section 879 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Pub. L. 114-328). Under a CSO, DoD may competitively select proposals received in response to a general solicitation, similar to a broad agency announcement, based on a review of proposals by scientific, technological, or other subject-matter expert peers.

Use of a CSO in accordance with this class deviation is considered to be a competitive procedure for the purposes of 10 U.S.C. chapter 127 and FAR 6.102.

Contracting officers shall treat items, technologies, and services acquired using a CSO as commercial items. Notwithstanding the limitation in DFARS 235.006-71, a CSO may be used to fulfill requirements for research and development, ranging from advanced component development through operational systems development. When using a CSO in acquisitions for research and development, contracting officers shall use the procedures in this class deviation in conjunction with FAR part 35.

Contracting officers may use a CSO only—

- To obtain solutions or potential new capabilities that fulfill requirements, close capability gaps, or provide potential technological advancements;
- When meaningful proposals with varying technical or scientific approaches can be reasonably anticipated; and
- When the contract entered into under the pilot program will be fixed-price, including fixed-price incentive contracts.

When using a CSO, contracting officers shall ensure the CSO—

- Describes the agency’s interest, either for an individual program requirement or for broadly defined areas of interest covering the full range of the agency’s requirements;
- Describes the criteria for selecting proposals, their relative importance, and the method of evaluation, including, where applicable, the potential type of data rights that may be determined necessary to meet DoD’s minimum needs;
- Specifies the period of time during which proposals submitted in response to the CSO will be accepted;
- Contains instructions for the preparation and submission of proposals; and
- Uses “S” in position 9 and “C” in position 10 of the procurement instrument identifier to identify the solicitation as a CSO.

Contracting officers shall publicize a notice of availability of a CSO through the Governmentwide point of entry at least annually, and, if authorized pursuant to FAR subpart 5.5, may also publish a notice in noted scientific, technical, or engineering periodicals. Synopsis under FAR subpart 5.2 of individual contract actions under the CSO is not required. The notice published pursuant to this paragraph fulfills the synopsis requirement.

The primary evaluation factors for selecting proposals for award shall be technical, importance to agency programs, and funds availability. Price shall be considered to the extent appropriate, but at a minimum, to determine that the price is fair and reasonable.

Proposals received as a result of a CSO shall be evaluated in accordance with evaluation criteria specified therein through the review of such proposals by scientific, technological, or other subject-matter expert peers. Written evaluation reports on individual proposals are required, but proposals need not be evaluated against each other since they are not submitted in response to a common performance work statement or statement of work.

The requirements of DFARS 215.371-2 do not apply to acquisitions of innovative commercial items, technologies, or services under a CSO pursuant to this class deviation.

Contracting officers shall not award contracts in excess of $100 million pursuant to a CSO without a written determination from the Under Secretary of Defense for Acquisition and Sustainment (USD(A&S)) or the cognizant service acquisition executive of a military department of the efficacy of the effort to meet mission needs of DoD or the relevant military department. In order to secure USD(A&S) approval, send the written determination, along with a request for USD(A&S) review and approval, via email to the Defense Procurement and Acquisition Policy (DPAP) Contract Policy and International Contracting Directorate (CPIC) at osd.pentagon.ousd-
Not later than 45 days after the award of a contract under a CSO for an amount exceeding $100 million, the USD(A&S) will notify the congressional defense committees of such award. To facilitate reporting, not later than 1 day after the award of a contract exceeding $100 million under the pilot program authority, the contracting officer shall—

- Prepare a notice of award for the congressional defense committees that includes—
  - A description of the innovative commercial item, technology, or service acquired;
  - A description of the requirement, capability gap, or potential technological advancement with respect to which the innovative commercial item, technology, or service acquired provides a solution or a potential new capability;
  - The contract award amount; and
  - Identification of the contractor awarded the contract; and
- Submit the notice of award to USD(A&S) via the cognizant service acquisition executive of a military department for signature, if applicable.
  - In order to secure USD(A&S) signature, send the notice of award, along with a request for USD(A&S) signature, via email to DPAP/CPIC at osd.pentagon.ousd-atl.mbx.cpic@mail.mil.
  - Requests for approval of a notice of award by the cognizant service acquisition executive shall follow military department policy and procedures.

Contracting officers shall ensure that contract files fully and adequately document the market research and rationale supporting a conclusion that the requirements of this class deviation have been satisfied.

The authority to enter into a contract under the pilot program expires on September 30, 2022. The expiration of this authority will not affect the validity of any contract awarded under the pilot program before the expiration date.

As used in this class deviation, “innovative” means any technology, process, or method, including research and development, that is new as of the date of submission of a proposal, or any application that is new as of the date of submission of a proposal of a technology, process, or method existing as of such date.

This class deviation remains in effect until September 30, 2022, or otherwise rescinded. My point of contact is Mr. Larry McLaury, DPAP/CPIC, who may be reached at 703-697-6710.

Shay D. Assad,
Director, Defense Pricing/Defense Procurement and Acquisition Policy
MEMORANDUM FOR COMMANDER, UNITED STATES SPECIAL OPERATIONS COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES TRANSPORTATION COMMAND (ATTN: ACQUISITION EXECUTIVE)
DEPUTY ASSISTANT SECRETARY OF THE ARMY (PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE NAVY (ACQUISITION AND PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE (CONTRACTING)
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Class Deviation—Enhanced Postaward Debriefing Rights

Effective immediately, when providing a postaward debriefing of offerors in accordance with Federal Acquisition Regulation (FAR) 15.506(d), contracting officers shall include in the debriefing information provided to unsuccessful offerors an opportunity to submit additional questions related to the debriefing within two business days after receiving the debriefing. The agency shall respond in writing to the additional questions submitted by an unsuccessful offeror within five business days after receipt of the questions. The agency shall not consider the postaward debriefing to be concluded until the agency delivers its written responses to the unsuccessful offeror.

Furthermore, the agency shall comply with the requirements of FAR 33.104(c) regarding the suspension of contract performance or termination of the awarded contract, upon receipt of a protest filed by an unsuccessful offeror at the U.S. Government Accountability Office (GAO) within—

- Ten days after the date of contract award;
- Five days after a debriefing date offered to the protester under a timely debriefing request and no additional questions related to the debriefing are submitted; or
- Five days after the Government delivers its written response to additional questions submitted by the unsuccessful offerors, whichever is later.

This class deviation implements paragraphs (b) and (c) of section 818 of the National Defense Authorization Act for Fiscal Year 2018 (Pub. L. 115-91), which amends 10 U.S.C. 2305(b)(5) and 31 U.S.C. 3553(d)(4) to provide enhanced postaward debriefing rights for unsuccessful offerors and revise the GAO protest timelines.
This class deviation remains in effect until it is incorporated in the DFARS or otherwise rescinded. My point of contact is Mr. Greg Snyder, who is available at (703) 614-0719, or at gregory.d.snyder.civ@mail.mil.

Shay D. Assad,
Director, Defense Pricing/Defense Procurement and Acquisition Policy

Attachment:
As stated
MEMORANDUM FOR COMMANDER, UNITED STATES SPECIAL OPERATIONS COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES TRANSPORTATION COMMAND (ATTN: ACQUISITION EXECUTIVE)
DEPUTY ASSISTANT SECRETARY OF THE ARMY (PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE NAVY (ACQUISITION AND PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE (CONTRACTING)
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Class Deviation—Evaluation Factors for Certain Multiple-Award Task- or Delivery-Order Contracts

Effective immediately, contracting officers, at their discretion, when issuing a solicitation that will result in multiple-award contracts issued for the same or similar services, may exclude price or cost as an evaluation factor for the contract awards, if the solicitation states that the Government intends to make an award to each and all qualifying offerers. The contracting officer shall consider price or cost as one of the factors in the selection decision for each task or delivery order under the multiple-award contract, in accordance with FAR 16.505(b)(1)(ii)(E).

For purposes of this deviation, a qualifying offeror is an offeror that is determined to be a responsible source, submits a technically acceptable proposal that conforms to the requirements of the solicitation, and the contracting officer has no reason to believe would be likely to offer other than fair and reasonable pricing.

Currently, contracting officers must evaluate price or cost as a factor in the selection decision for both the award of a multiple-award contract and each order placed against the multiple-award contract. This deviation permits contracting officers to evaluate cost or price only at the task- or delivery-order level, as long as the multiple-award contracts under which the orders are being placed are for the same or similar services and a contract award was made to each and all qualifying offerors.

This deviation implements section 825 of the National Defense Authorization Act for Fiscal Year 2017. This deviation does not apply to solicitations for multiple-award contracts that provide for sole source orders pursuant to section 8(a) of the Small Business Act (15 U.S.C. 637(a)).
This class deviation remains in effect until it is incorporated in the FAR, or until this class deviation is otherwise rescinded. My point of contact is Mr. Mike Canales, who is available at (703) 695-8571, or at michael.j.canales4.civ@mail.mil.

Shay D. Assad,
Director, Defense Pricing/Defense Procurement and Acquisition Policy
MEMORANDUM FOR COMMANDER, UNITED STATES SPECIAL OPERATIONS COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES TRANSPORTATION COMMAND (ATTN: ACQUISITION EXECUTIVE)
DEPUTY ASSISTANT SECRETARY OF THE ARMY (PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE NAVY (ACQUISITION AND PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE (CONTRACTING)
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Class Deviation—Educational Service Agreements for Training in the Legal Profession

Effective immediately, DoD contracting officers may enter into educational service agreements for training in any legal profession.

DFARS 237.7202(a) prohibits contracting officers from making an educational service agreement that would result in the payment of Government funds for tuition or other expenses for training in any legal profession, except in connection with the detailing of commissioned officers to law schools under 10 U.S.C. 2004. This deviation removes DFARS 237.7202(a), and the prohibition contained therein.

This class deviation remains in effect until it is incorporated in the DFARS, or until it is otherwise rescinded. My point of contact is Ms. Carrie Moore, DPAP/DARS, who is available at 571-372-6093, or at carrie.m.moore8.civ@mail.mil.

Shay D. Assad,
Director, Defense Pricing/Defense Procurement and Acquisition Policy
MEMORANDUM FOR COMMANDER, UNITED STATES SPECIAL OPERATIONS COMMAND 
(ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES TRANSPORTATION COMMAND 
(ATTN: ACQUISITION EXECUTIVE)
DEPUTY ASSISTANT SECRETARY OF THE ARMY (PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE NAVY (ACQUISITION AND 
PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE 
(CONTRACTING)
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: One Time Deviations—Section 830(d) Pilot Program for Acceleration of Foreign Military Sales

It is imperative that we find ways to reduce procurement administrative lead time (PALT). In that vein, Congress provided the Department an authority that enables us to significantly improve our ability to respond to Foreign Military Sales (FMS) requirements. Section 830(d) of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 114-328), authorizes a pilot program to reform and accelerate the contracting and pricing processes for certain FMS requirements.

The Director, Defense Pricing (DP)/Defense Procurement and Acquisition Policy (DPAP), is conducting a comprehensive pilot program to accelerate the contracting and pricing process for up to 10 FMS contracts for full rate production of major weapon systems. To participate, contracting officers shall obtain prior approval by the Director, DP/DPAP, using the attached application template. Submit applications to: osd.pentagon.ousd-atl.mbx.dpap@mail.mil.

Once the deviation is granted for a particular contract action in lieu of using the procedures at FAR 15.4, Contract Pricing, contracting officers participating in the pilot shall base price reasonableness determinations on actual cost and pricing data for purchases of the same product for the Department of Defense; and shall reduce the cost and pricing data to be submitted in accordance with 10 U.S.C. 2306a. This pilot authority provides contracting officers broad discretion in determining the amount of certified cost and pricing data required to support any particular applicable procurement.

My point of contact is Ms. Jill Stiglich who is available at 703-571-9013, or at jill.e.stiglich.civ@mail.mil.

Shay D. Assad,
Director, Defense Pricing/Defense Procurement and Acquisition Policy
Section 830(d) Pilot Program for Foreign Military Sales (FMS)

Contracting Officer Application for Participation

1. Identify Major Weapon System Program.
   a. Program Manager name and contact information.
   b. Contracting Officer name and contact information.

2. Identify existing DoD full rate production contracts.

3. Identify Contract Business Analysis Repository (CBAR) point of contact, if available.

4. FMS Case Identifier Code and point of contact.
MEMORANDUM FOR

COMMANDER, UNITED STATES SPECIAL OPERATIONS COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES TRANSPORTATION COMMAND, (ATTN: ACQUISITION EXECUTIVE)
DEPUTY ASSISTANT SECRETARY OF THE ARMY (PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE NAVY (ACQUISITION AND PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE (CONTRACTING)
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Class Deviation—Products and Services from the African Host Nation—Djibouti

Effective immediately, contracting officers shall use the procedures and clauses provided in this class deviation when acquiring products or services from the African host nation—Djibouti in support of covered activities in Djibouti. This class deviation implements section 899A of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017. This enhanced authority is to limit competition to, or provide a preference for, products or services from the African host nation—Djibouti when in support of operations in Djibouti. Section 899A of the NDAA for FY 2017 repeals section 1263 of the NDAA for FY 2015; therefore, this class deviation rescinds and supersedes Class Deviation 2016-00005, dated February 4, 2016.

Section 899A provides enhanced procurement authority to limit competition to, or provide a preference for, products and services from an African host nation or a covered African country other than the African host nation, for acquisitions in support of Department of Defense activities in a covered African country. Currently, Djibouti is the only African country that has adequate processes in place to function as an African host nation or covered African country, as those terms are defined in section 899A. As provided in section 899A, however, this authority is not available for the procurement of any product on the AbilityOne Procurement List, if such a product can be delivered by a qualified nonprofit agency for the blind or a qualified nonprofit agency for other severely disabled in a timely fashion to support mission requirements. When utilizing this authority, the contracting officer shall—

• Follow the procedures in attachment 1, which addresses the use of appropriate solicitation provisions, contract clauses, and evaluation of offers;
- Prepare a written individual or class determination, using a format substantially the same as provided at attachments 2 and 3 respectively, to be executed by the appropriate official:

- Report to DPAP/PACC, the following information within 10 calendar days of award when an individual or class determination is used during calendar year 2017:
  a) Whether the acquisition procedure at 225.7798-3(a)(1) or (a)(2) was used.
  b) A description of the products and services acquired.
  c) The extent to which the use of the authority has met the one or more of the objectives of section 899A of the NDAA for FY 2017; and

- Submit all reports no later than 1 Nov 2017 to DPAP/PACC at contingencycontracting@osd.mil for required Secretary of Defense report to Congress.

This class deviation remains in effect until it is incorporated in the DFARS or otherwise rescinded. My point of contact is COL Ralph Borja, DPAP/PACC, at 703-697-9351 or ralph.t.borja.mil@mail.mil.

Attachments:
As stated
PART 206—COMPETITION REQUIREMENTS

SUBPART 206.3—OTHER THAN FULL AND OPEN COMPETITION

206.303 Justifications.

206.303-71 Acquisitions in support of operations in Africa. (DEVIATION 2017-O0009)

The justification and approval addressed in FAR 6.303 is not required for acquisitions conducted using a procedure specified in 225.7798-3(a) (DEVIATION 2017-O0009)

PART 225—FOREIGN ACQUISITION

SUBPART 225.4—TRADE AGREEMENTS

225.401 Exceptions. (DEVIATION 2017-O0009)

(a)(2)

(S-70) If using a procedure specified in 225.7798-3(a)(1) (DEVIATION 2017-O0009) to acquire products or services in support of DoD activities in Djibouti, the procedures of FAR subpart 25.4 are not applicable.
SUBPART 225.5—EVALUATING FOREIGN OFFERS—SUPPLY CONTRACTS

225.502 Application. (DEVIATION 2017-O0009)

(c) Use the following procedures instead of those in FAR 25.502(c) for acquisitions subject to the Buy American statute or the Balance of Payments Program:

(v) If the solicitation includes the provision at 252.225-7985, Preference for Products or Services from the African Host Nation—Djibouti (DEVIATION 2017-O0009), use the evaluation procedures at 225.7798-5 (DEVIATION 2017-O0009).

SUBPART 225.75—BALANCE OF PAYMENTS PROGRAM

225.7501 Policy. (DEVIATION 2017-O0009)
Acquire only domestic end products for use outside the United States, and use only domestic construction material for construction to be performed outside the United States, including end products and construction material for foreign military sales, unless—

(a) Before issuing the solicitation—

(8) Use of a procedure specified in 225.7798-3(a) (DEVIATION 2017-O0009) is authorized for an acquisition in support of DoD activities in Djibouti.
225.7798 Enhanced authority to acquire products and services from Djibouti in support of DoD activities in Djibouti. (DEVIATION 2017-O0009)

225.7798-1 Scope.

225.7798-2 Definitions.

As used in this subpart—

“African host nation” means the African nation in which there is a requirement for supplies or services in support of DoD activities in a covered African country, and which allows the Armed Forces and supplies of the United States to be located on, to operate in, or to be transported through its territory.

“Covered African country” means a country in Africa that has signed a long-term agreement with the United States related to the basing or operational needs of the United States Armed Forces. Djibouti is a covered African country.

“Product or service from the African host nation—Djibouti” means—

(1) A product from Djibouti that is wholly grown, mined, manufactured, or produced in Djibouti; or

(2) A service, including construction, from Djibouti that is performed by a person or entity that—

(i) Is properly licensed or registered by appropriate authorities of Djibouti; and

(ii) As determined by the Chief of Mission concerned—

(A) Is operating primarily in Djibouti; or

(B) Is making a significant contribution to the economy of Djibouti through payment of taxes or use of products, materials, or labor that are primarily grown, mined, manufactured, produced, or sourced from Djibouti.
225.7798-3 Acquisition procedures.

(a) Subject to the requirements of 225.7798-4 and except as provided in paragraph (c) of this section, a product or service to be acquired in support of DoD activities in a covered African country—Djibouti may be obtained by—

(1) Limiting competition to products or services from the African host nation—Djibouti; or

(2) Providing a preference for products or services from the African host nation—Djibouti, in accordance with the evaluation procedures at 225.7798-5.

(b) For acquisitions conducted using a procedure specified in paragraph (a) of this section—

(1) The justification and approval addressed in FAR subpart 6.3 is not required; and

(2) The Balance of Payments Program (see 225.7501) does not apply when use of a procedure specified in paragraph (a) of this section is authorized for an acquisition in support of DoD activities in Djibouti.

(c) The authority under paragraph (a) of this section is not available for the procurement of any product that is contained in the Procurement List described in 41 U.S.C. 8503(a) (see FAR subpart 8.7), if such product can be produced and delivered by a qualified nonprofit agency for the blind or a nonprofit agency for other severely disabled in a timely fashion to support mission requirements.

225.7798-4 Determination requirements.

Before use of a procedure specified in 225.7798-3(a), a written determination must be prepared and executed as provided in this section.

(a) The appropriate official authorized to make the determination, as specified in paragraph (b) of this section, shall determine in writing that—

(1) At least one of the following applies:

(i) The product or service concerned is to be used only in support of DoD activities in Djibouti.

(ii) It is in the national security interests of the United States to limit competition or provide a preference as described in paragraph (a) of this section because such limitation or preference is necessary to—
(A) Reduce overall United States transportation costs and risks in shipping products in support of operations, exercises, theater security cooperation activities, and other missions in the African region;

(B) Reduce delivery times in support of DoD activities in Djibouti; or

(C) Promote regional security and stability in Africa.

(iii) The product or service is of equivalent quality to a product or service that would have otherwise been acquired without such limitation or preference;

(2) In the case of air transportation, an air carrier holding a certificate under 49 U.S.C. 41102 is not reasonably available to provide the air transportation; and

(3) The limitation or preference will not adversely affect—

(i) United States military operations or stability operations in the African region; or

(ii) The United States industrial base. The approving official may contact the following officials in order to obtain factual information to meet this statutory element of the determination:

(A) For Army: SAAL-PA, Army Industrial Base Policy, telephone 703-695-2488.

(B) For DLA: DLA J-74, Acquisition Programs and Industrial Capabilities Division, telephone 703-767-1427.

(C) For Navy: Ship Programs, DASN Ships, telephone 703-697-1710.

(D) For Air Force: Air Force Research Laboratory, Materials Manufacturing Directorate, telephone 703-588-7777.

(E) For other Defense Agencies: Personnel at defense agencies without industrial base expertise on staff should contact the Office of the Deputy Assistant Secretary of Defense for Manufacturing and Industrial Base Policy, telephone 703-697-0051, or email osd.mibp.inquiries@mail.mil.

(b)(1) Determinations may be made for an individual acquisition or a class of acquisitions meeting the criteria in paragraph (a) of this subsection as follows:

(i) The contracting officer is authorized to make a determination that applies to an individual acquisition with a value of less than $93 million.
(ii) The head of the contracting activity, without power of re-delegation, is authorized to make a determination that applies to an individual acquisition with a value of $93 million or more or to a class of acquisitions.

(2) The contracting officer shall—

(i) Include the applicable written determination in the contract file; and

(ii) Ensure that each contract action taken pursuant to the authority of a class determination is within the scope of the class determination, and document the contract file for each action accordingly.

225.7798-5 Evaluating offers.

Evaluate offers submitted in response to solicitations that include the provision at 252.225-7985, Preference for Products or Services from the African Host Nation—Djibouti (DEVIATION 2017-O0009) as follows:

(a) For supplies, when evaluating offers, consider the total price of the supplies, including any transportation costs that would be incurred if shipped via the Defense Transportation System, and compare this total price to the price of the local items plus any transportation costs, if separately broken out by contract line item.

(b) If the solicitation specifies award on the basis of non-price factors in addition to cost or price, apply the evaluation percentage as specified in the solicitation and use the evaluated cost or price in determining the offer that represents the best value to the Government.

(c) If the solicitation does not specify non-price factors in addition to cost or price, apply the evaluation percentage as specified in the solicitation, if applicable, and then award to the lowest evaluated offer.

225.7798-6 Solicitation provisions and contract clauses.

Use the following provisions and clauses in solicitations and contracts that meet the specified criteria, including solicitations and contracts for the acquisition of commercial items using FAR part 12 procedures:

(a)(1) Use the provision at 252.225-7985, Preference for Products or Services from the African Host Nation—Djibouti (DEVIATION 2017-O0009), in solicitations that include the clause at 252.225-7986, Requirement for Products or Services from the African Host Nation—Djibouti (DEVIATION 2017-O0009).

(2) Insert in paragraph (d) of the provision, in accordance with the USAFRICOM Commander’s policy and contracting activity procedures, the price evaluation factor to be applied to offers of products or services that are not products or services from the African host nation—Djibouti.
(b) Use the clause at 252.225-7986, Requirement for Products or Services from the African Host Nation—Djibouti (DEVIATION 2017-O0009), in solicitations and contracts that provide a preference for products or services from the African host nation—Djibouti in accordance with 225.7798-3(a)(2) (DEVIATION 2017-O0009).

(c) Use the clause at 252.225-7977, Acquisition Restricted to Products or Services from the African Host Nation—Djibouti (DEVIATION 2017-O0009), in solicitations and contracts that limit competition to products or services from the African host nation—Djibouti in accordance with 225.7798-3(a)(1) (DEVIATION 2017-O0009).

(d) Except as provided in paragraph (e)(2) of this section, when the Trade Agreements Act applies to the acquisition, use the appropriate provision and clause as prescribed at 225.1101(5) and (6).

(e)(1) Do not use any of the following provisions or clauses in solicitations or contracts that include the provision at 252.225-7985 (DEVIATION 2017-O0009), the clause at 252.225-7986 (DEVIATION 2017-O0009), or the clause at 252.225-7977 (DEVIATION 2017-O0009):

(i) 252.225-7000, Buy American—Balance of Payments Program Certificate.

(ii) 252.225-7001, Buy American and Balance of Payments Program.

(iii) 252.225-7002, Qualifying Country Sources as Subcontractors.

(iv) 252.225-7035, Buy American—Free Trade Agreements—Balance of Payments Program Certificate.

(v) 252.225-7036, Buy American—Free Trade Agreements—Balance of Payments Program.


(2) Do not use the following provision or clause in solicitations or contracts that include the clause at 252.225-7977 (DEVIATION 2017-O0009):

(i) 252.225-7020, Trade Agreements Certificate.

(ii) 252.225-7021, Trade Agreements.

* * * * *
PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

252.225-7985 Preference for Products or Services from the African Host Nation—Djibouti. (DEVIATION 2017-O0009)
As prescribed in 225.7798-6(a), use the following provision:

PREFERENCE FOR PRODUCTS OR SERVICES FROM THE AFRICAN HOST NATION—DJIBOUTI (SEP 2017) (DEVIATION 2017-O0009)

(a) Definitions. “African host nation” and “products or services from the African host nation—Djibouti,” as used in this provision, are defined in the clause of this solicitation entitled “Requirement for Products or Services from the African Host Nation—Djibouti” (252.225-7986) (DEVIATION 2017-O0009).

(b) Representation. By submission of its offer, the Offeror represents that all products or services to be delivered under a contract resulting from this solicitation are products or services from the African host nation—Djibouti, unless, in its offer, the Offeror specifies that it will provide products or services other than products or services from the African host nation—Djibouti.

(c) Other products or services. Offerors that include products or services in their offer that are not products or services from the African host nation—Djibouti shall identify in the offer the solicitation line item number and the country of origin for the product or service that is not a product or service from the African host nation—Djibouti, unless the product is listed in paragraph (c)(2) of the provision entitled “Trade Agreements Certificate,” if included in this solicitation.

(d) Evaluation. For the purpose of evaluating competitive offers, the Contracting Officer will increase by [Contracting Officer to specify percent in accordance with the USAFRICOM Commander’s policy and contracting activity procedures] percent the prices of offers of products or services that are not products or services from the African host nation—Djibouti.

(End of provision)
252.225-7986 Requirement for Products or Services from the African Host Nation—Djibouti. (DEVIAION 2017-O0009)
As prescribed in 225.7798-6(b), use the following clause:

REQUIREMENT FOR PRODUCTS OR SERVICES FROM THE AFRICAN HOST NATION—DJIBOUTI (SEP 2017) (DEVIAION 2017-O0009)

(a) Definitions. As used in this clause—

“African host nation” means the African nation in which there is a requirement for supplies or services in support of DoD activities in a covered African country, and which allows the Armed Forces and supplies of the United States to be located on, to operate in, or to be transported through its territory.

“Covered African country” means a country in Africa that has signed a long-term agreement with the United States related to the basing or operational needs of the United States Armed Forces. Djibouti is a covered African country.

“Product or service from the African host nation—Djibouti” means—

(1) A product from Djibouti that is wholly grown, mined, manufactured, or produced in Djibouti; or

(2) A service, including construction, from Djibouti that is performed by a person or entity that—

(i) Is properly licensed or registered by appropriate authorities of Djibouti; and

(ii) As determined by the Chief of Mission concerned—

(A) Is operating primarily in Djibouti; or

(B) Is making a significant contribution to the economy of Djibouti through payment of taxes or use of products, materials, or labor that are primarily grown, mined, manufactured, produced, or sourced from Djibouti.

(b)(1) The Contractor shall provide only products or services from the African host nation—Djibouti, unless, in its offer, it specified that it would provide products or services other than products or services from the African host nation—Djibouti.

(2) For construction contracts, the Contractor is encouraged, but not required, to use construction material from the African host nation—Djibouti.

(End of clause)
252.225-7977 Acquisition Restricted to Products or Services from the African Host Nation—Djibouti. (DEVIATION 2017-O0009)

As prescribed in 225.7798-6(c), use the following clause:

ACQUISITION RESTRICTED TO PRODUCTS OR SERVICES FROM THE AFRICAN HOST NATION—DJIBOUTI (SEP 2017) (DEVIATION 2017-O0009)

(a) Definition. As used in this clause—

“African host nation” means the African nation in which there is a requirement for supplies or services in support of DoD activities in a covered African country, and which allows the Armed Forces and supplies of the United States to be located on, to operate in, or to be transported through its territory.

“Product or service from the African host nation—Djibouti” means—

(1) A product from Djibouti that is wholly grown, mined, manufactured, or produced in Djibouti; or

(2) A service, including construction, from Djibouti that is performed by a person or entity that—

   (i) Is properly licensed or registered by appropriate authorities of Djibouti; and

   (ii) As determined by the Chief of Mission concerned—

      (A) Is operating primarily in Djibouti; or

      (B) Is making a significant contribution to the economy of Djibouti through payment of taxes or use of products, materials, or labor that are primarily grown, mined, manufactured, produced, or sourced from Djibouti.

(b)(1) The Contractor shall provide only products or services from the African host nation—Djibouti.

(2) For construction contracts, the Contractor is encouraged, but not required, to use construction material from the African host nation—Djibouti.

(End of clause)
DEPARTMENT OR AGENCY

Authority to Acquire Products or Services from the African Host Nation—Djibouti

Individual Determination and Findings

Upon the basis of the following findings and determination, which I hereby make in accordance with the provisions of DFARS 225.7798-4 (DEVIATION 2017-O0009), the acquisition of products or services from the African host nation—Djibouti) may be made as follows:

1. The [contracting office] proposes to award under solicitation/contract number [provide solicitation/contract number], [describe the types of products or services]. The total estimated cost of this acquisition is [provide total estimated value].

2. The product or service is to be used in support of the following DoD activity(ies) in Djibouti: [Describe the DoD activities being supported]. The products or services to be acquired under this solicitation/contract are to be used by [describe the entity(ies) intended to use the products or services].

3. The contracting officer recommends conducting the acquisition using the following procedure, which, given this determination, is authorized by section 899A of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 114-328): [Select one of the following:]

   [ ] Limit competition to products or services from the African host nation—Djibouti; or

   [ ] Provide a preference for products or services from the African host nation—Djibouti.

4. To implement the recommended procedure, the solicitation will contain [title and number of the applicable provision and/or clause prescribed at DFARS 225.7798-6 (DEVIATION 2017-O0009)].
5. The limitation or preference under paragraph 3 above will not adversely affect United States military operations or stability operations in Africa or the United States industrial base. An air carrier holding a certificate under 49 U.S.C. 41102 is not reasonably available to provide the air transportation. The product or service to be acquired is to be used or performed only in support of the covered activities.

**OR**

Use of this procedure to limit competition to, or provide a preference for, products or services from the African host nation–Djibouti is—

Vital to the national security interests of the United States, because use of the procedure [Select at least one of the following:]

(a) Reduces overall United States transportation costs and/or risks in shipping products in support of operations, exercises, theater security cooperate activities and other missions in the African region;

(b) Reduces delivery times in support of covered activities; or

(c) Promotes regional security and stability in Africa.

**OR**

The product or service to be acquired is of equivalent quality of a product or service that would have otherwise been acquired. [Provide a description of market research.]

6. Acquisitions conducted using the procedures specified in DFARS 225.7798-3(a) (DEVIATION 2017-00009) (see paragraph 3 above) are authorized to use other than full and open competition procedures and do not require the justification and approval addressed in FAR subpart 6.3. [Include a description of efforts made to ensure offers are solicited from as many potential sources as is practicable.]

7. [Identify whether a notice was or will be publicized as required by FAR subpart 5.2 and, if not, which exception in FAR 5.202 applies.]
DETERMINATION

In accordance with the authorization outlined in DFARS 225.7798-3 (DEVIATION 2017-O0009) and under the authority of section 899A of the National Defense Authorization Act for Fiscal Year 2017, I have hereby determined that limiting competition to, or providing procurement preference for, goods or services from the African host nation—Djibouti is necessary to support the USAFRICOM mission in the region and is in the best interest of the United States.

________________________  __________________
Date: _____________

CONTRACTING OFFICER (Individual acquisitions valued at less than $93M)
Name: ______________________
Office Symbol: ________________

________________________  __________________
Date: _____________

HEAD OF CONTRACTING ACTIVITY (Individual acquisitions valued at $93M or more)
Name: ______________________
Contracting Activity: ____________
DEPARTMENT OR AGENCY

Authority to Acquire Products or Services from the African Host Nation—Djibouti

Class Determination and Findings

Upon the basis of the following findings and determination, which I hereby make in accordance with the provisions of DFARS 225.7798-4 (DEVIATION 2017-O0009), the acquisition of products or services from the African host nation (Djibouti) may be made as follows:

1. The [contracting office] proposes to award under solicitation/contract number [provide solicitation/contract number], [describe the types of products or services]. The total estimated cost of this acquisition is [provide total estimated value].

2. The product or service is to be used in support of the following DoD activity(ies) in Djibouti: [Describe the DoD activities being supported]. The products or services to be acquired under this solicitation/contract are to be used by [describe the entity(ies) intended to use the products or services].

3. The contracting officer recommends conducting the acquisition using the following procedure, which, given this determination, is authorized by section 899A of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 114-328): [Select one of the following:]

   [ ] Limit competition to products or services from the African host nation (Djibouti); or

   [ ] Provide a preference for products or services from the African host nation country (Djibouti).

4. To implement the recommended procedure, the solicitation will contain [title and number of the applicable provision and/or clause prescribed at DFARS 225.7798-6 (DEVIATION 2017-O0009)].
5. The limitation or preference under paragraph 3 above will not adversely affect United States military operations or stability operations in Africa or the United States industrial base. [If this acquisition involves air transportation, include the following:] An air carrier holding a certificate under 49 U.S.C. 41102 is not reasonably available to provide the air transportation. [For this paragraph, select at least one of the following:]

The product or service to be acquired is to be used or performed only in support of the covered activities.

OR

Use of this procedure to limit competition to, or provide a preference for, products or services from the African host nation—Djibouti is—

Vital to the national security interests of the United States, because use of the procedure [Select at least one of the following:]

(a) Reduces overall United States transportation costs and/or risks in shipping products in support of operations, exercises, theater security cooperate activities and other missions in the African region; or

(b) Reduces delivery times in support of covered activities; or

(c) Promotes regional security and stability in Africa.

OR

The product or service to be acquired is of equivalent quality of a product or service that would have otherwise been acquired. [Provide a description of market research.]

6. Acquisitions conducted using the procedures specified in DFARS 225.7798-3(a) (DEVIATION 2017-O0009) (see paragraph 3 above) are authorized to use other than full and open competition procedures and do not require the justification and approval addressed in FAR subpart 6.3. [Include a description of efforts made to ensure offers are solicited from as many potential sources as is practicable.]

7. [Identify whether a notice was or will be publicized as required by FAR subpart 5.2 and, if not, which exception in FAR 5.202 applies.]
DETERMINATION

In accordance with the authorization outlined in DFARS 225.7798-3 (DEVIATION 2017-0009) and under the authority of section 899A of the National Defense Authorization Act for Fiscal Year 2017, I have hereby determined that limiting competition to, or providing procurement preference for, goods or services of an African host nation is necessary to support the USAFRICOM mission in the region and is in the best interest of the United States.

__________________________
HEAD OF CONTRACTING ACTIVITY
Name: _______________________
Contracting Activity: ____________

Date: ________________
MEMORANDUM FOR COMMANDER, UNITED STATES SPECIAL OPERATIONS COMMAND (ATTN: ACQUISITION EXECUTIVE)  
COMMANDER, UNITED STATES TRANSPORTATION COMMAND (ATTN: ACQUISITION EXECUTIVE)  
DEPUTY ASSISTANT SECRETARY OF THE ARMY (PROCUREMENT)  
DEPUTY ASSISTANT SECRETARY OF THE NAVY (ACQUISITION AND PROCUREMENT)  
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE (CONTRACTING)  
DIRECTORS OF THE DEFENSE AGENCIES  
DIRECTORS OF THE DOD FIELD ACTIVITIES  

SUBJECT: Class Deviation—Contractor Personnel Performing in the United States Africa Command Area of Responsibility  

Effective immediately, this class deviation rescinds and supersedes Class Deviation 2016-00006. Contracting officers shall incorporate the attached clause 252.225-7980, Contractor Personnel Performing in the United States Africa Command Area of Responsibility (DEVIATION 2016-00008), in lieu of the clause at DFARS 252.225-7040, Contractor Personnel Supporting U.S. Armed Forces Deployed Outside the United States, in all solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, that will require contractor personnel to perform in the United States Africa Command (USAFRICOM) area of responsibility (AOR). In addition, to the extent practicable, contracting officers shall modify current, active contracts with performance in the USAFRICOM AOR to incorporate the attached clause 252.225-7980.  

The USAFRICOM Commander has identified a need to utilize the Synchronized Predeployment and Operational Tracker to identify contractors employed under all contracts performed in their area of responsibility, regardless of the length of performance or contract value, during all operational phases (including Phase 0), and not limited to contracts in support of declared contingency operations. This clause facilitates enforcement of the USAFRICOM Commander’s requirement.
This class deviation remains in effect until incorporated in the DFARS, or otherwise rescinded. My point of contact is Mr. Scott Calisti, DPAP/PACC, at 571-256-7011, or scott.r.calisti.civ@mail.mil.

Claire M. Grady
Director, Defense Procurement and Acquisition Policy

Attachments:
As stated
Attachment 1
Class Deviation 2016-00008
Contractor Personnel Performing in the USAFRICOM AOR

252.225-7980 Contractor Personnel Performing in the United States Africa Command Area of Responsibility. (DEVIATION 2016-O00008)

Use this clause, in lieu of the clause at DFARS 252.225-7040, Contractor Personnel Supporting U.S. Armed Forces Deployed Outside the United States, in all solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, that will require contractor personnel to perform in the United States Africa Command (USAFRICOM) area of responsibility.

CONTRACTOR PERSONNEL PERFORMING IN THE UNITED STATES AFRICA COMMAND AREA OF RESPONSIBILITY
(DEVIATION 2016-O00008)(JUN 2016)

(a) Definitions. As used in this clause—

"Combatant Commander" means the Commander of the United States Africa Command (USAFRICOM).

"Contractors authorized to accompany the Force,” or “CAAF,” means contractor personnel, including all tiers of subcontractor personnel, who are authorized to accompany U.S. Armed Forces in applicable operations and have been afforded CAAF status through a letter of authorization. CAAF generally include all U.S. citizen and third-country national employees not normally residing within the operational area whose area of performance is in the direct vicinity of U.S. Armed Forces and who routinely are collocated with the U.S. Armed Forces (especially in non-permissive environments). Personnel collocated with U.S. Armed Forces in applicable operations shall be afforded CAAF status through a letter of authorization. In some cases, Combatant Commander or subordinate joint force commanders may designate mission-essential host nation or local national contractor employees (e.g., interpreters) as CAAF. CAAF includes contractors previously identified as contractors deploying with the U.S. Armed Forces. CAAF status does not apply to contractor personnel in support of applicable operations within the boundaries and territories of the United States.

"Designated reception site” means the designated place for the reception, staging, integration, and onward movement of contractors deploying to the USAFRICOM area of responsibility. The designated reception site includes assigned joint reception centers and other Service or private reception sites.

"Law of war" means that part of international law that regulates the conduct of armed hostilities. The law of war encompasses the international law related to the conduct of hostilities that is binding on the United States or its individual citizens, including treaties and international agreements to which the United States is a party, and applicable customary international law.

"Non-CAAF” means personnel in applicable operations who are not designated as CAAF, such as local national employees and non-local national employees who are permanent residents in the operational area or third-country nationals not routinely residing with U.S. Armed Forces (and third-country national expatriates who are permanent residents in the operational area) who perform support functions away from the close proximity of, and do not reside with, the U.S. Armed Forces...
Forces. Government-furnished support to non-CAAF is typically limited to force protection, emergency medical care, and basic human needs (e.g., bottled water, latrine facilities, security, and food when necessary) when performing their jobs in the direct vicinity of U.S. Armed Forces. Non-CAAF status does not apply to contractor personnel in support of applicable operations within the boundaries and territories of the United States.

“Subordinate joint force commander” means a sub-unified commander or joint task force commander.

“U.S. Africa Command (USAFRICOM) area of responsibility,” as used in this clause, means—

(1) The entire continent of Africa, excluding Egypt;

(2) The Atlantic Ocean east and south of the line from Antarctica at 024°W, north to 4°N/024°W, west to 30°W, then north to 21°N/030°W, then east to the African continent; and

(3) The Indian Ocean west and south of the line from Antarctica at 68°E, north to 01°40'S/068°E, and west to the African coast at 01°40'S.

(b) General.

(1) This clause applies to all contractor personnel when performing in the USAFRICOM area of responsibility.

(2) Certain requirements in paragraphs (c)(3), (e)(1), and (f) must be specified in the statement of work to be applied to non-CAAF personnel.

(3) Contract performance in the USAFRICOM area of responsibility may require work in dangerous or austere conditions. Except as otherwise provided in the contract, the Contractor accepts the risks associated with required contract performance in such operations.

(4) When authorized in accordance with paragraph (j) of this clause to carry arms for personal protection, contractor personnel are only authorized to use force for individual self-defense.

(5) Unless immune from host nation jurisdiction by virtue of an international agreement or international law, inappropriate use of force by contractor personnel authorized to accompany the U.S. Armed Forces can subject such personnel to United States or host nation prosecution and civil liability (see paragraphs (d) and (j)(3) of this clause).

(6) Service performed by contractor personnel subject to this clause is not active duty or service under 38 U.S.C. 106 note.

(c) Support.

(1)(i) The Combatant Commander will develop a security plan for protection of
contractor personnel in locations where there is not sufficient or legitimate civil authority, when the Combatant Commander decides it is in the interests of the Government to provide security because—

(A) The Contractor cannot obtain effective security services;

(B) Effective security services are unavailable at a reasonable cost; or

(C) Threat conditions necessitate security through military means.

(ii) In appropriate cases, the Combatant Commander may provide security through military means, commensurate with the level of security provided DoD civilians.

(2)(i) Generally, CAAF will be afforded emergency medical and dental care if injured while supporting applicable operations. Additionally, all non-CAAF who are injured while in the vicinity of U. S. Armed Forces will normally receive emergency medical and dental care. Emergency medical and dental care includes medical care situations in which life, limb, or eyesight is jeopardized. Examples of emergency medical and dental care include examination and initial treatment of victims of sexual assault; refills of prescriptions for life-dependent drugs; repair of broken bones, lacerations, infections; and traumatic injuries to the dentition. Hospitalization will be limited to stabilization and short-term medical treatment with an emphasis on return to duty or placement in the patient movement system.

(ii) When the Government provides medical treatment or transportation of contractor personnel to a selected civilian facility, the Contractor shall ensure that the Government is reimbursed for any costs associated with such treatment or transportation.

(iii) Medical or dental care beyond this standard is not authorized.

(3)(i) A Synchronized Predeployment and Operational Tracker (SPOT)-generated letter of authorization signed by the Contracting Officer is required for certain contractor personnel to process through a deployment center or to travel to, from, or within the USAFRICOM area of responsibility. The requirement applies to CAAF and, as specified in the statement of work, non-CAAF personnel.

(ii) The letter of authorization will identify any additional authorizations, privileges, or Government support that contractor personnel are entitled to under this contract. USAFRICOM has limited capability to provide Government-furnished life-support services to contractors in the USAFRICOM area of responsibility. In instances where Government-furnished life support services are neither available nor authorized in the contract, the SPOT-generated letter of authorization, signed by the Contracting Officer, shall be annotated with “None” checked for Government-furnished life-support services.

(iii) Contractor personnel who are issued a letter of authorization shall carry it with them at all times while deployed.

(4) Unless specified elsewhere in this contract, the Contractor is responsible for all other support required for its personnel engaged in the USAFRICOM area of
responsibility under this contract.

(d) Compliance with laws and regulations.

(1) The Contractor shall comply with, and shall ensure that its personnel performing in the USAFRICOM area of responsibility are familiar with and comply with, all applicable—

(i) United States, host country, and third country national laws;

(ii) Provisions of the law of war, as well as any other applicable treaties and international agreements;

(iii) United States regulations, directives, instructions, policies, and procedures; and

(iv) Orders, directives, and instructions issued by the Combatant Commander, including those relating to force protection, security, health, safety, or relations and interaction with local nationals.

(2) The Contractor shall institute and implement an effective program to prevent violations of the law of war by its employees and subcontractors, including law of war training in accordance with paragraph (e)(1)(vii) of this clause.

(3) The Contractor shall ensure that all contractor personnel are aware—

(i) Of the DoD definition of “sexual assault” in DoDD 6495.01, Sexual Assault Prevention and Response Program;

(ii) That the offenses addressed by the definition are covered under the Uniform Code of Military Justice (see paragraph (e)(2)(iv) of this clause). Other sexual misconduct may constitute offenses under the Uniform Code of Military Justice, Federal law, such as the Military Extraterritorial Jurisdiction Act, or host nation laws; and

(iii) That the offenses not covered by the Uniform Code of Military Justice may nevertheless have consequences for the contractor employees (see paragraph (h)(1) of this clause).

(4) The Contractor shall report to the appropriate investigative authorities, identified in paragraph (d)(6) of this clause, any alleged offenses under—

(i) The Uniform Code of Military Justice (chapter 47 of title 10, United States Code) (applicable to contractors serving with or accompanying an armed force in the field during a declared war or contingency operations); or


(5) The Contractor shall provide to all contractor personnel who will perform work on a contract in the deployed area, before beginning such work, information on the following:
(i) How and where to report an alleged crime described in paragraph (d)(4) of this clause.

(ii) Where to seek victim and witness protection and assistance available to contractor personnel in connection with an alleged offense described in paragraph (d)(4) of this clause.

(iii) This section does not create any rights or privileges that are not authorized by law or DoD policy.

(6) The appropriate investigative authorities to which suspected crimes shall be reported include the following—


(iii) Navy Criminal Investigative Service at http://www.ncis.navy.mil/Pages/publicdefault.aspx;

(iv) Defense Criminal Investigative Service at http://www.dodig.mil/HOTLINE/index.html; and

(v) To any command of any supported military element or the command of any base.

(7) Personnel seeking whistleblower protection from reprisals for reporting criminal acts shall seek guidance through the DoD Inspector General hotline at 800-424-9098 or www.dodig.mil/HOTLINE/index.html. Personnel seeking other forms of victim or witness protections should contact the nearest military law enforcement office.

(8) The Contractor shall ensure that Contractor employees supporting the U.S. Armed Forces deployed outside the United States are aware of their rights to—

(i) Hold their own identity or immigration documents, such as passport or driver's license;

(ii) Receive agreed upon wages on time;

(iii) Take lunch and work-breaks;

(iv) Elect to terminate employment at any time;

(v) Identify grievances without fear of reprisal;

(vi) Have a copy of their employment contract in a language they understand;

(vii) Receive wages that are not below the legal in-country minimum wage;
(viii) Be notified of their rights, wages, and prohibited activities prior to signing their employment contract; and

(ix) If housing is provided, live in housing that meets host-country housing and safety standards.

(e) Preliminary personnel requirements.

(1) The Contractor shall ensure that the following requirements are met prior to deploying CAAF and, as specified in the statement of work, non-CAAF (specific requirements for each category will be specified in the statement of work or elsewhere in the contract):

(i) All required security and background checks are complete and acceptable.

(ii) All such personnel deploying in support of an applicable operation—

(A) Are medically, dentally, and psychologically fit for deployment and performance of their contracted duties;

(B) Meet the minimum medical screening requirements, including theater-specific medical qualifications as established by the Geographic Combatant Commander (as posted to the Geographic Combatant Commander’s website or other venue); and

(C) Have received all required immunizations as specified in the contract.

(1) During predeployment processing, the Government will provide, at no cost to the Contractor, any military-specific immunizations and/or medications not available to the general public.

(2) All other immunizations shall be obtained prior to arrival at the deployment center.

(3) All such personnel, as specified in the statement of work, shall bring to the USAFRICOM area of responsibility a copy of the U.S. Centers for Disease Control and Prevention (CDC) Form 731, International Certificate of Vaccination or Prophylaxis as approved by the World Health Organization, (also known as "shot record" or "Yellow Card") that shows vaccinations are current.

(iii) Deploying personnel have all necessary passports, visas, and other documents required to enter and exit the USAFRICOM area of responsibility and have a Geneva Conventions identification card, or other appropriate DoD identity credential, from the deployment center.

(iv) Special area, country, and theater clearance is obtained for all personnel deploying. Clearance requirements are in DoD Directive 4500.54E, DoD Foreign Clearance Program. For this purpose, CAAF are considered non-DoD personnel traveling under DoD sponsorship.
(v) All deploying personnel have received personal security training. At a minimum, the training shall—

(A) Cover safety and security issues facing employees overseas;

(B) Identify safety and security contingency planning activities; and

(C) Identify ways to utilize safety and security personnel and other resources appropriately.

(vi) All personnel have received isolated personnel training, if specified in the contract, in accordance with DoD Instruction 1300.23, Isolated Personnel Training for DoD Civilian and Contractors.

(vii) Personnel have received law of war training as follows:

(A) Basic training is required for all such personnel. The basic training will be provided through—

(I) A military-run training center; or

(2) A web-based source, if specified in the contract or approved by the Contracting Officer.

(B) Advanced training, commensurate with their duties and responsibilities, may be required for some Contractor personnel as specified in the contract.

(2) The Contractor shall notify all personnel who are not a host country national, or who are not ordinarily resident in the host country, that—

(i) Such employees, and dependents residing with such employees, who engage in conduct outside the United States that would constitute an offense punishable by imprisonment for more than one year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States, may potentially be subject to the criminal jurisdiction of the United States in accordance with the Military Extraterritorial Jurisdiction Act of 2000 (18 U.S.C. 3621, et seq.);

(ii) Pursuant to the War Crimes Act (18 U.S.C. 2441), Federal criminal jurisdiction also extends to conduct that is determined to constitute a war crime when committed by a civilian national of the United States;

(iii) Other laws may provide for prosecution of U.S. nationals who commit offenses on the premises of U.S. diplomatic, consular, military or other U.S. Government missions outside the United States (18 U.S.C. 7(9));

(iv) In time of declared war or a contingency operation, CAAF and selected non-CAAF are subject to the jurisdiction of the Uniform Code of Military Justice under 10 U.S.C. 802(a)(10);

(v) Such employees are required to report offenses alleged to have been committed by or against contractor personnel to appropriate investigative authorities;
and,

(vi) Such employees will be provided victim and witness protection and assistance.

(f) \textit{Processing and departure points.} CAAF and, as specified in the statement of work, non-CAAF personnel shall—

(1) Process through the deployment center designated in the contract, or as otherwise directed by the Contracting Officer, prior to deploying. The deployment center will conduct deployment processing to ensure visibility and accountability of contractor personnel and to ensure that all deployment requirements are met, including the requirements specified in paragraph (e)(1) of this clause;

(2) Use the point of departure and transportation mode directed by the Contracting Officer; and

(3) Process through a designated reception site upon arrival at the deployed location. The designated reception site will validate personnel accountability, ensure that specific USAFRICOM area of responsibility entrance requirements are met, and brief contractor personnel on theater-specific policies and procedures.

(g) \textit{Personnel data.} The Contractor shall—

(1) Use the SPOT web-based system, or its successor, to account for—

(i) Data for all CAAF supporting the U.S. Armed Forces deployed outside the United States.

(ii) All contractor personnel who are United States citizens and third-country nationals, when the personnel will be performing in the USAFRICOM area of responsibility regardless of the length of performance or contract value; and

(iii) All private security contractor personnel and their equipment, and all other contractor personnel authorized to carry weapons, when the personnel are performing in the USAFRICOM area of responsibility regardless of the length of performance or contract value.

(2) Enter the required information about their Contractor personnel and their equipment prior to deployment and shall continue to use the SPOT web-based system at \url{https://spot.dmdc.mil} to maintain accurate, up-to-date information throughout the deployment for all Contractor personnel. Changes to status of individual Contractor personnel relating to their in-theater arrival date and their duty location, including closing out the deployment with their proper status (e.g., mission complete, killed, wounded) shall be annotated within the SPOT database in accordance with the timelines established in the SPOT Business Rules at \url{http://www.acq.osd.mil/log/PS/ctr_mgt_accountability.html}.

(3) The Contractor shall submit to the Contracting Officer for SPOT reporting, not later than the 10th day of each month, an aggregate count of all local national employees performing in the USAFRICOM area of responsibility, by country of performance, for 30 days or longer under a contract valued at or above $150,000
Annually. Contractors using local national day laborers shall count each individual hired during the 30-day period only once.

(4) For classified contracts, users shall access SPOT at https://spot.dmdc.osd.smil.mil. To obtain access, contact the SPOT Customer Support Team via email: dodhra.beau-alex.dmdc.mbx.spot-helpdesk@mail.mil.

(h) **Contractor personnel.**

(1) The Contracting Officer may direct the Contractor, at its own expense, to remove and replace any contractor personnel who jeopardize or interfere with mission accomplishment or who fail to comply with or violate applicable requirements of this contract. Such action may be taken at the Government’s discretion without prejudice to its rights under any other provision of this contract, including the Termination for Default clause.

(2) The Contractor shall identify all personnel who occupy a position designated as mission essential and ensure the continuity of essential Contractor services during designated operations, unless, after consultation with the Contracting Officer, Contracting Officer’s Representative, or local commander, the Contracting Officer directs withdrawal due to security conditions.

(3) The Contractor shall ensure that contractor personnel follow the guidance at paragraph (e)(2)(v) of this clause and any specific Combatant Commander guidance on reporting offenses alleged to have been committed by or against contractor personnel to appropriate investigative authorities.

(4) Contractor personnel shall return all U.S. Government-issued identification, including the Common Access Card, to appropriate U.S. Government authorities at the end of their deployment (or, for non-CAAF, at the end of their employment under this contract).

(i) **Military clothing and protective equipment.**

(1) Contractor personnel are prohibited from wearing military clothing unless specifically authorized in writing by the Combatant Commander or subordinate joint force commanders. If authorized to wear military clothing, contractor personnel must—

(i) Wear distinctive patches, arm bands, nametags, or headgear, in order to be distinguishable from military personnel, consistent with force protection measures; and

(ii) Carry the written authorization with them at all times.

(2) Contractor personnel may wear military-unique organizational clothing and individual equipment required for safety and security, such as ballistic, nuclear, biological, or chemical protective equipment.

(3) The deployment center, or the Combatant Commander, shall issue organizational clothing and individual equipment and shall provide training, if necessary, to ensure the safety and security of contractor personnel.
(4) The Contractor shall ensure that all issued organizational clothing is returned to the point of issue, unless otherwise directed by the Contracting Officer.

(j) Weapons.

(1) If the Contractor requests that its personnel performing in the USAFRICOM area of responsibility be authorized to carry weapons for individual self-defense, the request shall be made through the Contracting Officer to the Combatant Commander, in accordance with DoD Instruction 3020.41. The Combatant Commander will determine whether to authorize in-theater contractor personnel to carry weapons and what weapons and ammunition will be allowed.

(2) If contractor personnel are authorized to carry weapons in accordance with paragraph (j)(1) of this clause, the Contracting Officer will notify the Contractor what weapons and ammunition are authorized.

(3) The Contractor shall ensure that its personnel who are authorized to carry weapons—

(i) Are adequately trained to carry and use them—

(A) Safely;

(B) With full understanding of, and adherence to, the rules of the use of force issued by the Combatant Commander; and

(C) In compliance with applicable agency policies, agreements, rules, regulations, and other applicable law;

(ii) Are not barred from possession of a firearm by 18 U.S.C. 922;

(iii) Adhere to all guidance and orders issued by the Combatant Commander regarding possession, use, safety, and accountability of weapons and ammunition;

(iv) Comply with applicable Combatant Commander, subordinate joint force commander, and local commander force-protection policies; and

(v) Understand that the inappropriate use of force could subject them to U.S. or host-nation prosecution and civil liability.

(4) Whether or not weapons are Government-furnished, all liability for the use of any weapon by contractor personnel rests solely with the Contractor and the Contractor employee using such weapon.

(5) Upon redeployment or revocation by the Combatant Commander of the Contractor’s authorization to issue firearms, the Contractor shall ensure that all Government-issued weapons and unexpended ammunition are returned as directed by the Contracting Officer.

(k) Vehicle or equipment licenses. Contractor personnel shall possess the required licenses to operate all vehicles or equipment necessary to perform the contract in the
Attachment 1
Class Deviation 2016-O0008
Contractor Personnel Performing in the USAFRICOM AOR

USAFRICOM area of responsibility.

(l) Purchase of scarce goods and services. If the Combatant Commander has established an organization for the USAFRICOM area of responsibility whose function is to determine that certain items are scarce goods or services, the Contractor shall coordinate with that organization local purchases of goods and services designated as scarce, in accordance with instructions provided by the Contracting Officer.

(m) Evacuation.

(1) If the Combatant Commander orders a mandatory evacuation of some or all personnel, the Government will provide assistance, to the extent available, to contractor personnel who are U.S. citizens and third country nationals.

(2) In the event of a non-mandatory evacuation order, unless authorized in writing by the Contracting Officer, the Contractor shall maintain personnel on location sufficient to meet obligations under this contract.

(n) Next of kin notification and personnel recovery.

(1) The Contractor shall be responsible for notification of the employee-designated next of kin in the event an employee dies, requires evacuation due to an injury, or is isolated, missing, detained, captured, or abducted.

(2) The Government will assist in personnel recovery actions in accordance with DoD Directive 3002.01E, Personnel Recovery in the Department of Defense.

(o) Mortuary affairs. Contractor personnel who die while in support of the U.S. Armed Forces shall be covered by the DoD mortuary affairs program as described in DoD Directive 1300.22, Mortuary Affairs Policy, and DoD Instruction 3020.41, Operational Contract Support.

(p) Changes. In addition to the changes otherwise authorized by the Changes clause of this contract, the Contracting Officer may, at any time, by written order identified as a change order, make changes in the place of performance or Government-furnished facilities, equipment, material, services, or site. Any change order issued in accordance with this paragraph (p) shall be subject to the provisions of the Changes clause of this contract.

(q) Subcontracts. The Contractor shall incorporate the substance of this clause, including this paragraph (q), in all subcontracts that require subcontractor personnel to perform in the USAFRICOM area of responsibility.

(End of clause)
In reply refer to  
DARS Tracking Number: 2016-00005

MEMORANDUM FOR COMMANDER, UNITED STATES SPECIAL OPERATIONS COMMAND (ATTN: ACQUISITION EXECUTIVE)  
COMMANDER, UNITED STATES TRANSPORTATION COMMAND (ATTN: ACQUISITION EXECUTIVE)  
DEPUTY ASSISTANT SECRETARY OF THE ARMY (PROCUREMENT)  
DEPUTY ASSISTANT SECRETARY OF THE NAVY (ACQUISITION AND PROCUREMENT)  
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE (CONTRACTING)  
DIRECTORS OF THE DEFENSE AGENCIES  
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Class Deviation—Enhanced Authority to Acquire Products and Services of Djibouti

Effective immediately, contracting officers shall use the attached deviation to limit competition to, or provide a preference for, products or services of Djibouti for procurements in support of DoD operations in the Republic of Djibouti (Djibouti). This class deviation supersedes class deviation 2015-00012. This class deviation implements section 1263 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2015 (Pub. L. 113-291), as amended by section 886(c) of the NDAA for FY 2016 (Pub. L. 114-92).

The Under Secretary of Defense for Acquisition, Technology, and Logistics (USD (AT&L)) signed a Class Determination and Findings on February 19, 2015, authorizing use of the enhanced authority provided in section 1263 when acquiring products and services in support of DoD operations in Djibouti. As provided in section 886(c), however, this authority is not available for the procurement of any product on the AbilityOne Procurement List, if such a product can be delivered by a qualified nonprofit agency in a timely fashion to support mission requirements. When utilizing this authority, the contracting officer shall—

- Ensure a written determination is properly executed in accordance with DFARS 225.7798-3 and 225.7798-4 (DEVIATION 2016-00005), using a format substantially the same as those provided at attachments 2 and 3 to this deviation;
- Evaluate offers in accordance with DFARS 225.7798-5 (DEVIATION 2016-00005); and
- Include the appropriate provision and/or clause in the solicitation and contract in accordance with DFARS 225.7798-6 (DEVIATION 2016-00005).

This class deviation remains in effect until September 30, 2018, unless incorporated in the DFARS or otherwise rescinded. My point of contact is Mr. Jeff Grover, DPAP/CPIC, at 703-697-9352 or Jeffrey.c.grover.civ@mail.mil.

Claire M. Grady  
Director, Defense Procurement and Acquisition Policy

Attachments: 
As stated
PART 206—COMPETITION REQUIREMENTS

SUBPART 206.3—OTHER THAN FULL AND OPEN COMPETITION

206.303 Justifications.

206.303-71 Acquisitions in support of operations in Djibouti. (DEVIATION 2016-O0005)

The justification and approval addressed in FAR 6.303 is not required for acquisitions conducted using a procedure specified in 225.7798-3(a) (DEVIATION 2016-O0005).

PART 225—FOREIGN ACQUISITION

SUBPART 225.4—TRADE AGREEMENTS

225.401 Exceptions. (DEVIATION 2016-O0005)

(a)(2) *

(S-70) If using a procedure specified in 225.7798-3(a)(2) (DEVIATION 2016-O0005) to acquire products or services of Djibouti in support of DoD operations in the Republic of Djibouti, the procedures of FAR subpart 25.4 are not applicable.

SUBPART 225.5—EVALUATING FOREIGN OFFERS—SUPPLY CONTRACTS

225.502 Application. (DEVIATION 2016-O0005)

(c) Use the following procedures instead of those in FAR 25.502(c) for acquisitions subject to the Buy American statute or the Balance of Payments Program:
(v) If the solicitation includes the provision at 252.225-7982, Preference for Products or Services of Djibouti (DEVIATION 2016-O0005), use the evaluation procedures at 225.7798-5 (DEVIATION 2016-O0005).

SUBPART 225.75—BALANCE OF PAYMENTS PROGRAM

225.7501 Policy. (DEVIATION 2016-O0005)
Acquire only domestic end products for use outside the United States, and use only domestic construction material for construction to be performed outside the United States, including end products and construction material for foreign military sales, unless—

(a) Before issuing the solicitation—

(8) Use of a procedure specified in 225.7798-3(a) (DEVIATION 2016-O0005) is authorized for an acquisition in support of DoD operations in Djibouti.

SUBPART 225.77—ACQUISITIONS IN SUPPORT OF OPERATIONS IN AFGHANISTAN OR DJIBOUTI (DEVIATION 2016-O0005)

225.7798 Enhanced authority to acquire products or services of Djibouti in support of DoD operations in Djibouti. (DEVIATION 2016-O0005)

225.7798-1 Scope.
This subpart implements—


225.7798-2 Definitions.
As used in this subpart—

"Product of Djibouti" means a product (including a commercial item) that is wholly grown, produced or manufactured in Djibouti. This term does not include construction
material brought to a construction site by a contractor or subcontractor for
incorporation into the building or work, but does cover material separately purchased
by the Government to be incorporated into the building or work.

"Service of Djibouti" means a service (including construction) that is performed by a
person that is—

(a) Operating primarily in Djibouti or is making a significant contribution to the
economy of Djibouti through payment of taxes or use of products, materials, or labor of
Djibouti, as determined by the Secretary of State; and

(b) Properly licensed or registered by authorities of the Government of Djibouti, as
determined by the Secretary of State.

225.7798-3 Acquisition procedures.

(a) Subject to the requirements of 225.7798-4 and except as provided in paragraph
(c) of this section, a product or service of Djibouti may be acquired in support of DoD
operations in Djibouti by—

(1) Providing a preference for products or services of Djibouti, in accordance
with the evaluation procedures at 225.7798-5; or

(2) Limiting competition to products or services of Djibouti.

(b) For acquisitions conducted using a procedure specified in paragraph (a) of this
subsection—

(1) The justification and approval addressed in FAR subpart 6.3 is not required;
and

(2) The Balance of Payments Program (see 225.7501) does not apply with
regard to acquisition of products or services of Djibouti, but construction material
brought to the construction site by the contractor or subcontractor for incorporation into
the work may be subject to trade agreements and Balance of Payments Program (see
225.7503).

(c) The authority under paragraph (a) of this section is not available for the
procurement of any product that is contained in the Procurement List described in
41 U.S.C. 8503(a) (see FAR subpart 8.7), if such product can be produced and
delivered by a qualified nonprofit agency for the blind or a nonprofit agency for
other severely disabled in a timely fashion to support mission requirements.

225.7798-4 Determination requirements.

Before using a procedure specified in 225.7798-3(a), a written determination must be
prepared and executed as follows:

(a) The appropriate official authorized to make the determination, as specified in
paragraph (b)(1) of this subsection, must determine in writing that—

(1) The product or service of Djibouti is to be used or performed only in support
of DoD operations in Djibouti;
(2) The product or service of Djibouti is of equivalent quality of a product or service that would have otherwise been acquired; or

(3) It is vital to the national security interests of the United States to provide a preference or limit competition as described in 225.7798-3(a), because—

(i) The procedure is necessary to—

(A) Reduce United States transportation costs;
(B) Reduce delivery times in support of DoD operations in Djibouti; or
(C) Promote the regional security, stability, and economic prosperity of Africa; and

(ii) Use of the procedure will not adversely affect—

(A) United States military operations or stability operations in Djibouti; or

(B) The United States industrial base. The approving official may contact the following officials in order to obtain factual information to meet this statutory element of the determination:

(1) For Army: SAAL-PA, Army Industrial Base Policy, telephone 703-695-2488.

(2) For DLA: DLA J-74, Acquisition Programs and Industrial Capabilities Division, telephone 703-767-1427.

(3) For Navy: Ship Programs, DASN Ships, telephone 703-697-1710.


(5) For Other Defense Agencies: Personnel at defense agencies without industrial base expertise on staff should contact the Office of the Deputy Assistant Secretary of Defense for Manufacturing and Industrial Base Policy, telephone 703-697-0051, or email osd.mibp.inquiries@mail.mil.

(b)(1) Determinations may be made for an individual acquisition or a class of acquisitions meeting the criteria in paragraph (a) of this subsection as follows:

(i) The contracting officer is authorized to make a determination that applies to an individual acquisition with a value of less than $93 million.

(ii) The head of the contracting activity, without power of re-delegation, is authorized to make a determination that applies to an individual acquisition with a value of $93 million or more or to a class of acquisitions.

(2) The contracting officer shall—
(i) Include the applicable written determination in the contract file; and

(ii) Ensure that each contract action taken pursuant to the authority of a class determination is within the scope of the class determination, and shall document the contract file for each action accordingly.

225.7798-5 Evaluating offers.

Evaluate offers submitted in response to solicitations that include the provision at 252.225-7982, Preference for Products or Services of Djibouti (DEVIATION 2016-00005) as follows:

(a) For supplies, when comparing offers, consider the total price of the products, including any transportation costs that would be incurred if shipped via the Defense Transportation System, and compare this total price to the price of the local items plus any transportation costs, if separately broken out by contract line item.

(b) If the solicitation specifies award on the basis of non-price factors in addition to cost or price, apply the evaluation percentage specified in the solicitation (see 252.225-7982(d)(DEVIATION 2016-00005)) and use the evaluated cost or price in determining the offer that represents the best value to the Government.

(c) If the solicitation does not specify non-price factors in addition to cost or price, apply the evaluation percentage specified in the solicitation, if applicable, and then award to the lowest evaluated offer.

225.7798-6 Solicitation provisions and contract clauses.

Use the following provisions and clauses in solicitations and contracts that meet the specified criteria, including solicitations and contracts for the acquisition of commercial items using FAR Part 12 procedures:

(a) Use the provision at 252.225-7982, Preference for Products or Services of Djibouti (DEVIATION 2016-00005), in solicitations that include the clause at 252.225-7983, Requirement for Products or Services of Djibouti (DEVIATION 2016-00005).

(b) Use the clause at 252.225-7983, Requirement for Products or Services of Djibouti (DEVIATION 2016-00005) in solicitations and contracts that provide a preference for products or services of Djibouti in accordance with 225.7798-3(a)(1).

(c) Use the clause at 252.225-7984, Acquisition Restricted to Products or Services of Djibouti (DEVIATION 2016-00005) in solicitations and contracts that limit competition to products or services of Djibouti in accordance with 225.7798-3(a)(2).

(d) Except as provided in paragraph (e)(2) of this section, when the Trade Agreements Act applies to the acquisition, use the appropriate clause and provision as prescribed at 225.1101(5) and (6) or 225.7503(b).

(e)(1) Do not use any of the following provisions or clauses in solicitations or contracts that include the provision at 252.225-7982 (DEVIATION 2016-00005) or the clause at 252.225-7983 (DEVIATION 2016-00005) or 252.225-7984 (DEVIATION 2016-00005):

(ii) 252.225-7001, Buy American Act and Balance of Payments Program.

(iii) 252.225-7002, Qualifying Country Sources as Subcontractors.


(v) 252.225-7036, Buy American Act—Free Trade Agreements—Balance of Payments Program.

(2) Do not use any of the following provisions or clauses in solicitations or contracts for the acquisition of supplies that include the clause at 252.225-7984 (DEVIATION 2016-O0005):

(i) 252.225-7020, Trade Agreement Certificate.

(ii) 252.225-7021, Trade Agreements.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

252.225-7982 Preference for Products or Services of Djibouti. (DEVIATION 2016-O0005)

As prescribed in 225.7798-6(a), use the following provision:

PREFERENCE FOR PRODUCTS OR SERVICES OF DJIBOUTI (FEB 2016) (DEVIATION 2016-O0005)

(a) Definitions. “Product of Djibouti” and “service of Djibouti” as used in this provision, are defined in the clause of this solicitation entitled “Requirement for Products or Services of Djibouti” (252.225-7983 (DEVIATION 2016-O0005)).

(b) Representation. The Offeror represents that all products or services to be delivered under a contract resulting from this solicitation are products of Djibouti or services of Djibouti, except those listed in paragraph (c) of this provision.

(c) Other products or services. The following offered products or services are not products of Djibouti or services of Djibouti:

<table>
<thead>
<tr>
<th>(Line Item Number)</th>
<th>(Country of Origin)</th>
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(d) Evaluation. For the purpose of evaluating competitive offers, the Contracting Officer will increase by [Contracting Officer to specify percent in accordance with the USAFRICOM Commander's policy and contracting activity procedures] percent the
prices of offers of products or services that are not products of Djibouti or services of Djibouti.

(End of provision)

252.225-7983 Requirement for Products or Services of Djibouti. (DEVIATION 2016-00005)
As prescribed in 225.7798-6(b), use the following clause:

REQUIREMENT FOR PRODUCTS OR SERVICES OF DJIBOUTI (FEB 2016) (DEVIATION 2016-00005)

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

(1) “Product of Djibouti” means a product (including a commercial item) that is wholly grown, produced or manufactured in Djibouti. This term does not include construction material brought to a construction site by a contractor or subcontractor for incorporation into the building or work, but does cover material separately purchased by the Government to be incorporated into the building or work.

(2) “Service of Djibouti” means a service (including construction) that is performed by a person that is—

(i) Operating primarily in Djibouti or is making a significant contribution to the economy of Djibouti through payment of taxes or use of products, materials, or labor of Djibouti, as determined by the Secretary of State; and

(ii) Is properly licensed or registered by authorities of the Government of Djibouti, as determined by the Secretary of State.

(b) The Contractor shall provide only products of Djibouti or services of Djibouti, unless, in its offer, it specified that it would provide products or services other than products of Djibouti or services of Djibouti.

(End of clause)

252.225-7984 Acquisition Restricted to Products or Services of Djibouti. (DEVIATION 2016-00005)
As prescribed in 225.7798-6(c), use the following clause:

ACQUISITION RESTRICTED TO PRODUCTS OR SERVICES OF DJIBOUTI (FEB 2016) (DEVIATION 2016-00005)

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

(1) “Product of Djibouti” means a product (including a commercial item) that is wholly grown, produced or manufactured in Djibouti. This term does not include construction material brought to a construction site by a contractor or subcontractor for incorporation into the building or work, but does cover material separately purchased by the Government to be incorporated into the building or work.

(2) “Service of Djibouti” means a service (including construction) that is performed by a person that is—
(i) Operating primarily in Djibouti or is making a significant contribution to the economy of Djibouti through payment of taxes or use of products, materials, or labor of Djibouti, as determined by the Secretary of State; and

(ii) Properly licensed or registered by authorities of the Government of Djibouti, as determined by the Secretary of State.

(b) The Contractor shall provide only products of Djibouti or services of Djibouti.

(End of clause)
DEPARTMENT OR AGENCY
Authority to Acquire Products or Services of Djibouti
Individual Determination and Findings

Upon the basis of the following findings and determination, which I hereby make in accordance with the provisions of DFARS 225.7798 (DEVIATION 2016-00005), the acquisition of products or services of Djibouti in support of DoD operations in Djibouti may be made as follows:

FINDINGS

1. The [contracting office] proposes to purchase under solicitation number [provide solicitation number], [describe the types of products or services]. The total estimated cost of this acquisition is [provide total estimated value].

2. The product or service is to be used in support of the following DoD operations in Djibouti: [Describe the DoD activities being supported.] The products or services to be acquired under the contemplated contracts are to be used by [describe the entity(ies) intended to use the products or services].

3. The contracting officer recommends conducting the acquisition using the following procedure, which, given this determination, is authorized by section 1263 of the National Defense Authorization Act for Fiscal Year 2015 (Pub. L. 113-291), as amended by section 886 of the National Defense Authorization Act for Fiscal Year 2016 (Pub. L. 114-92): [Select one of the following: Provide a preference for products or services of Djibouti OR Limit competition to products or services of Djibouti].

4. To implement the recommended procedure, the solicitation will contain: [Select one of the following: DFARS 252.225-7982, Preference for Products or Services of Djibouti (DEVIATION 2016-00005) and 252.225-7983, Requirement for Products or Services of Djibouti (DEVIATION 2016-00005) OR DFARS 252.225-7984, Acquisition Restricted to Products or Services of Djibouti (DEVIATION 2016-00005)].

5. [For paragraph 5, select one of the following:

The product or service to be acquired is to be used or performed only in support of the DoD operations identified in paragraph 2.

OR

The product or service to be acquired is of equivalent quality of a product or service that would have otherwise been acquired. (Provide a description of market research.)

OR

Use of this procedure is—

a. Vital to the national security interests of the United States, because use of the procedure (Select one of the following: reduces United States transportation costs and/or reduces delivery times in
support of DoD operations in Djibouti OR promotes the regional security, stability, and economic prosperity of Africa); and

b. Will not adversely affect United States military operations or stability operations in Djibouti or the United States industrial base.]

6. Acquisitions conducted using the procedures specified in DFARS 225.7798-3(a) (DEVIATION 2016-00005) (see paragraph 3 above) are authorized to use other than full and open competition procedures and do not require the justification and approval addressed in FAR Subpart 6.3. [Include a description of efforts made to ensure offers are solicited from as many potential sources as is practicable.]

7. [Identify whether a notice was or will be publicized as required by FAR subpart 5.2 and, if not, which exception in FAR 5.202 applies.]

______________________________ Date: ___________
CONTRACTING OFFICER
Name: ______________________
Office Symbol: ________________

DETERMINATION

In accordance with the authorization outlined in DFARS 225.7798-3(b)(1)(i) or (ii) (DEVIATION 2016-00005) and under the authority of section 1263 if the National Defense Authorization Act for Fiscal Year 2015, as amended by section 886 of the National Defense Authorization Act for Fiscal Year 2016, I hereby determine [Select one of the following:

The product or service to be acquired is to be used or performed only in support of DoD operations in Djibouti.

OR

The product or service to be acquired is of equivalent quality of the product or service that would have otherwise been acquired.

OR

Use of the acquisition procedure described above to acquire product or services of Djibouti is vital to the national security interests of the United States. This procedure will not adversely affect military or stability operations in Djibouti or the United States industrial base.]

______________________________ Date: ___________
CONTRACTING OFFICER (For individual acquisitions valued at less than $93 million)
Name: ______________________
Office Symbol: ________________
HEAD OF CONTRACTING ACTIVITY (For individual acquisitions valued at $93 million or more)
Name: ____________________________
Contracting Activity: ________________
DEPARTMENT OR AGENCY

Authority to Acquire Products or Services of Djibouti
Class Determination and Findings

Upon the basis of the following findings and determination, which I hereby make in accordance with the provisions of DFARS 225.7798 (DEVIAITION 2016-00005), the acquisition of products or services of Djibouti in support of DoD operations in Djibouti may be made as follows:

FINDINGS

1. It is anticipated that [applicable departments/agencies/components] will need to award contracts during the period from [start date] to [end date] in order to acquire [describe the types of products or services].

2. The products or services to be acquired under the contemplated contracts are to be used in support of the following DoD operations in Djibouti: [Describe the DoD activities being supported.] The products or services to be acquired under the contemplated contracts are to be used by [describe the entity(ies) intended to use the products or services].

3. This class of acquisition should be conducted using the following procedure, which, given this determination, is authorized by section 1263 of the National Defense Authorization Act for Fiscal Year 2015 (Pub. L. 113-291), as amended by section 886 of the National Defense Authorization Act for Fiscal Year 2016 (Pub. L. 114-92): [Select one of the following: Provide a preference for products or services of Djibouti OR Limit competition to products or services of Djibouti].

4. To implement the recommended procedure, solicitations will contain: [Select one of the following: DFARS 252.225-7982, Preference for Products or Services of Djibouti (DEVIAITION 2016-00005) and 252.225-7983, Requirement for Products or Services of Djibouti (DEVIAITION 2016-00005) OR DFARS 252.225-7984, Acquisition Restricted to Products or Services of Djibouti (DEVIAITION 2016-00005)].

5. [For paragraph 5, select one of the following:]

The products or services to be acquired are to be used or performed only in support of the DoD activities identified in paragraph 2.

OR

The product or service to be acquired is of equivalent quality of a product or service that would have otherwise been acquired. (Provide a description of market research.)

OR

Use of this procedure is—

a. Vital to the national security interests of the United States, because use of the procedure (Select one of the following: will reduce United States transportation costs and/or reduce delivery times
in support of operations in Djibouti OR will promote the regional security, stability, and economic prosperity of Africa); and

b. Will not adversely affect United States military operations or stability operations in Djibouti or the United States industrial base.

6. Acquisitions conducted using the procedures specified in DFARS 225.7798-3(a) (DEVIATION 2016-00005) (see paragraph 3 above) are authorized to use other than full and open competition procedures and do not require the justification and approval addressed in FAR Subpart 6.3. [Include a description of efforts made to ensure offers are solicited from as many potential sources as is practicable.]

7. [Identify whether a notice was or will be publicized as required by FAR subpart 5.2 and, if not, which exception in FAR 5.202 applies.]

Date: ______________

CONTRACTING OFFICER
Name: __________________________
Office Symbol: __________

DETERMINATION

In accordance with the authorization outlined in DFARS 225.7798-3(b)(1)(ii) (DEVIATION 2016-OZZZZ) and under the authority of section 1263 of the National Defense Authorization Act for Fiscal Year 2015, as amended by section 886 of the National Defense Authorization Act for Fiscal Year 2016, I hereby determine [Select one of the following:

The products or services to be acquired are to be used or performed only in support of DoD operations in Djibouti.

OR

The product or service to be acquired is of equivalent quality of the product or service that would have otherwise been acquired.

OR

Use of the acquisition procedure described above to acquire product or services of Djibouti is vital to the national security interests of the United States. This procedure will not adversely affect military or stability operations in Djibouti or the United States industrial base.]

Date: ______________

HEAD OF CONTRACTING ACTIVITY
Name: __________________________
Contracting Activity: __________
MEMORANDUM FOR COMMANDER, UNITED STATES SPECIAL OPERATIONS COMMAND (ATTN: ACQUISITION EXECUTIVE) 
COMMANDER, UNITED STATES TRANSPORTATION COMMAND (ATTN: ACQUISITION EXECUTIVE) 
DEPUTY ASSISTANT SECRETARY OF THE ARMY (PROCUREMENT) 
DEPUTY ASSISTANT SECRETARY OF THE NAVY (ACQUISITION AND PROCUREMENT) 
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE (CONTRACTING) 
DIRECTORS OF THE DEFENSE AGENCIES 
DIRECTORS OF THE DOD FIELD ACTIVITIES 

SUBJECT: Class Deviation— Earned Value Management System Threshold 

This class deviation rescinds and supersedes Class Deviation 2015-00015. Effective immediately, the Earned Value Management System (EVMS) compliance review threshold at DFARS 234.201(1)(ii), DFARS provision 252.234-7001, and DFARS clause 252.234-7002 is raised from $50 million to $100 million. In lieu of DFARS provision 252.234-7001, Notice of Earned Value Management System (APR 2008), and DFARS clause 252.234-7002, Earned Value Management System (MAY 2011), contracting officers shall use the attached DFARS provision 252.234-7001, Notice of Earned Value Management System (DEVIATION 2015-00017)(SEP 2015), and DFARS Clause 252.234-7002, Earned Value Management System (DEVIATION 2015-00017)(SEP 2015), in accordance with the current solicitation provision and contract clause prescriptions at DFARS 234.203. 

This $100 million threshold applies to cost or incentive contracts and subcontracts for which the contractor is required to have an Earned Value Management System that has been determined by the Cognizant Federal Agency (CFA) to be in compliance with the guidelines in the Electronic Industries Alliance Standard 748, Earned Value Management Systems (EIA-748). For cost or incentive contracts and subcontracts valued greater than $20 million, the contractor is required to utilize an EVMS that complies with the guidelines in the EIA-748 to provide Earned Value Management (EVM) reporting to the program management office. However, no EVMS compliance surveillance activities will be routinely conducted by the Defense Contract Management Agency (DCMA) on cost or incentive contracts and subcontracts valued from $20 million to $100 million. 

Nevertheless, the Government reserves the right to review the EVMS if the EVM reporting data quality appears suspect, e.g., when a contracting officer, program office, buying
command, or higher headquarters asks for DCMA assistance due to a concern about the quality of EVM data reported on a given contract, or when the EVM data is not in compliance with one or more of the 32 EIA-748 guidelines.

This class deviation is effective until it is incorporated in the DFARS or is otherwise rescinded. My point of contact is Mr. Mark Gomersall, who may be reached at 571-372-6099, or mark.r.gomersall.civ@mail.mil.

Claire M. Grady
Director, Defense Procurement and Acquisition Policy

Attachment:
As stated
252.234-7001 Notice of Earned Value System.
As prescribed in 234.203(1), use the following provision:

NOTICE OF EARNED VALUE MANAGEMENT SYSTEM (DEVIATION 2015-O0017)(SEP 2015)

(a) If the offeror submits a proposal in the amount of $100,000,000 or more—

(1) The offeror shall provide documentation that the Cognizant Federal Agency (CFA) has determined that the proposed Earned Value Management System (EVMS) complies with the EVMS guidelines in the American National Standards Institute/Electronic Industries Alliance Standard 748, Earned Value Management Systems (ANSI/EIA-748) (current version at time of solicitation). The Government reserves the right to perform reviews of the EVMS when deemed necessary to verify compliance.

(2) If the offeror proposes to use a system that has not been determined to be in compliance with the requirements of paragraph (a)(1) of this provision, the offeror shall submit a comprehensive plan for compliance with the guidelines in ANSI/EIA-748.

(i) The plan shall—

(A) Describe the EVMS the offeror intends to use in performance of the contract, and how the proposed EVMS complies with the EVMS guidelines in ANSI/EIA-748;

(B) Distinguish between the offeror’s existing management system and modifications proposed to meet the EVMS guidelines;

(C) Describe the management system and its application in terms of the EVMS guidelines;

(D) Describe the proposed procedure for administration of the EVMS guidelines as applied to subcontractors; and

(E) Describe the process the offeror will use to determine subcontractor compliance with ANSI/EIA-748.

(ii) The offeror shall provide information and assistance as required by the Contracting Officer to support review of the plan.

(iii) The offeror’s EVMS plan must provide milestones that indicate when the offeror anticipates that the EVMS will be compliant with the guidelines in ANSI/EIA-748.

(b) If the offeror submits a proposal in an amount less than $100,000,000—

(1) The offeror shall submit a written description of the management procedures it will use and maintain in the performance of any resultant contract to comply with the requirements
of the Earned Value Management System clause of the contract. The description shall include—

(i) A matrix that correlates each guideline in ANSI/EIA-748 (current version at time of solicitation) to the corresponding process in the offeror’s written management procedures; and

(ii) The process the offeror will use to determine subcontractor compliance with ANSI/EIA-748.

(2) If the offeror proposes to use an EVMS that has been determined by the CFA to be in compliance with the EVMS guidelines in ANSI/EIA-748, the offeror may submit a copy of the documentation of such determination instead of the written description required by paragraph (b)(1) of this provision.

(c) The offeror shall identify the subcontractors (or the subcontracted effort if subcontractors have not been selected) to whom the EVMS requirements will apply. The offeror and the Government shall agree to the subcontractors or the subcontracted effort selected for application of the EVMS requirements. The offeror shall be responsible for ensuring that the selected subcontractors comply with the requirements of the Earned Value Management System clause of the contract.

(End of provision)

252.234-7002 Earned Value Management System. As prescribed in 234.203(2), use the following clause:

EARNED VALUE MANAGEMENT SYSTEM (DEVIAITION 2015-O0017)(SEP 2015)

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

“Acceptable earned value management system” means an earned value management system that generally complies with system criteria in paragraph (b) of this clause.

“Earned value management system” means an earned value management system that complies with the earned value management system guidelines in the ANSI/EIA-748.

“Significant deficiency” means a shortcoming in the system that materially affects the ability of officials of the Department of Defense to rely upon information produced by the system that is needed for management purposes.

(b) System criteria. In the performance of this contract, the Contractor shall use—

(1) An Earned Value Management System (EVMS) that complies with the EVMS guidelines in the American National Standards Institute/Electronic Industries Alliance Standard 748, Earned Value Management Systems (ANSI/EIA-748); and
(2) Management procedures that provide for generation of timely, reliable, and verifiable information for the Contract Performance Report (CPR) and the Integrated Master Schedule (IMS) required by the CPR and IMS data items of this contract.

(c) If this contract has a value of $100 million or more, the Contractor shall use an EVMS that has been determined to be acceptable by the Cognizant Federal Agency (CFA). If, at the time of award, the Contractor’s EVMS has not been determined by the CFA to be in compliance with the EVMS guidelines as stated in paragraph (b)(1) of this clause, the Contractor shall apply its current system to the contract and shall take necessary actions to meet the milestones in the Contractor’s EVMS plan.

(d) If this contract has a value of less than $100 million, the Government will not make a formal determination that the Contractor’s EVMS complies with the EVMS guidelines in ANSI/EIA-748 with respect to the contract. The use of the Contractor’s EVMS for this contract does not imply a Government determination of the Contractor’s compliance with the EVMS guidelines in ANSI/EIA-748 for application to future contracts. The Government will allow the use of a Contractor’s EVMS that has been formally reviewed and determined by the CFA to be in compliance with the EVMS guidelines in ANSI/EIA-748.

(e) The Contractor shall submit notification of any proposed substantive changes to the EVMS procedures and the impact of those changes to the CFA. If this contract has a value of $100 million or more, unless a waiver is granted by the CFA, any EVMS changes proposed by the Contractor require approval of the CFA prior to implementation. The CFA will advise the Contractor of the acceptability of such changes as soon as practicable (generally within 30 calendar days) after receipt of the Contractor’s notice of proposed changes. If the CFA waives the advance approval requirements, the Contractor shall disclose EVMS changes to the CFA at least 14 calendar days prior to the effective date of implementation.

(f) The Government will schedule integrated baseline reviews as early as practicable, and the review process will be conducted not later than 180 calendar days after—

(1) Contract award;

(2) The exercise of significant contract options; and

(3) The incorporation of major modifications.

During such reviews, the Government and the Contractor will jointly assess the Contractor’s baseline to be used for performance measurement to ensure complete coverage of the statement of work, logical scheduling of the work activities, adequate
resourcing, and identification of inherent risks.

(g) The Contractor shall provide access to all pertinent records and data requested by the Contracting Officer or duly authorized representative as necessary to permit Government surveillance to ensure that the EVMS complies, and continues to comply, with the performance criteria referenced in paragraph (b) of this clause.

(h) When indicated by contract performance, the Contractor shall submit a request for approval to initiate an over-target baseline or over-target schedule to the Contracting Officer. The request shall include a top-level projection of cost and/or schedule growth, a determination of whether or not performance variances will be retained, and a schedule of implementation for the rebaselining. The Government will acknowledge receipt of the request in a timely manner (generally within 30 calendar days).

(i) *Significant deficiencies.* (1) The Contracting Officer will provide an initial determination to the Contractor, in writing, of any significant deficiencies. The initial determination will describe the deficiency in sufficient detail to allow the Contractor to understand the deficiency.

(2) The Contractor shall respond within 30 days to a written initial determination from the Contracting Officer that identifies significant deficiencies in the Contractor's EVMS. If the Contractor disagrees with the initial determination, the Contractor shall state, in writing, its rationale for disagreeing.

(3) The Contracting Officer will evaluate the Contractor's response and notify the Contractor, in writing, of the Contracting Officer's final determination concerning—

(i) Remaining significant deficiencies;

(ii) The adequacy of any proposed or completed corrective action;

(iii) System noncompliance, when the Contractor's existing EVMS fails to comply with the earned value management system guidelines in the ANSI/EIA-748; and

(iv) System disapproval, if initial EVMS validation is not successfully completed within the timeframe approved by the Contracting Officer, or if the Contracting Officer determines that the Contractor's earned value management system contains one or more significant deficiencies in high-risk guidelines in ANSI/EIA-748 standards (guidelines 1, 3, 6, 7, 8, 9, 10, 12, 16, 21, 23, 26, 27, 28, 30, or 32). When the Contracting Officer determines that the existing earned value management system contains one or more significant deficiencies in one or more of the remaining 16
guidelines in ANSI/EIA-748 standards, the Contracting Officer will use discretion to disapprove the system based on input received from functional specialists and the auditor.

(4) If the Contractor receives the Contracting Officer’s final determination of significant deficiencies, the Contractor shall, within 45 days of receipt of the final determination, either correct the significant deficiencies or submit an acceptable corrective action plan showing milestones and actions to eliminate the significant deficiencies.

(j) *Withholding payments*. If the Contracting Officer makes a final determination to disapprove the Contractor’s EVMS, and the contract includes the clause at 252.242-7005, Contractor Business Systems, the Contracting Officer will withhold payments in accordance with that clause.

(k) With the exception of paragraphs (i) and (j) of this clause, the Contractor shall require its subcontractors to comply with EVMS requirements as follows:

(1) For subcontracts valued at $100 million or more, the following subcontractors shall comply with the requirements of this clause:

[Contracting Officer to insert names of subcontractors (or subcontracted effort if subcontractors have not been selected) designated for application of the EVMS requirements of this clause.]

(2) For subcontracts valued at less than $100 million, the following subcontractors shall comply with the requirements of this clause, excluding the requirements of paragraph (c) of this clause:

[Contracting Officer to insert names of subcontractors (or subcontracted effort if subcontractors have not been selected) designated for application of the EVMS requirements of this clause.]

(End of clause)
MEMORANDUM FOR COMMANDER, UNITED STATES SPECIAL OPERATIONS COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES TRANSPORTATION COMMAND (ATTN: ACQUISITION EXECUTIVE)
DEPUTY ASSISTANT SECRETARY OF THE ARMY (PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE NAVY (ACQUISITION AND PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE (CONTRACTING)
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Class Deviation—Requirements for Contractor Personnel Performing in the U.S. Southern Command Area of Responsibility

Effective immediately, contracting officers shall use the attached clause, entitled “Requirements for Contractor Personnel Performing in the U.S. Southern Command (USSOUTHCOM) Area of Responsibility,” in all solicitations and contracts with performance in the USSOUTHCOM area of responsibility. The USSOUTHCOM Commander has identified a need to utilize the attached clause, including requirements for personnel recovery, medical suitability screening and the use of the Synchronized Predeployment and Operational Tracker (SPOT) during operational phases (to include Phase 0) when the clause at DFARS 252.225-7040 does not apply.

This class deviation remains in effect until incorporated in the DFARS or otherwise rescinded. My point of contact is Mr. William Reich, who may be reached at 571-256-7009, or at william.f.reich2.civ@mail.mil.

Attachment:
As stated
252.225-7987 REQUIREMENTS FOR CONTRACTOR PERSONNEL PERFORMING IN USSOUTHCOM AREA OF RESPONSIBILITY (DEVIATION 2014-00016)

Clause prescription:
Insert the following clause in solicitations and contracts for performance in the USSOUTHCOM area of responsibility, unless the clause at 252.225-7040 applies.

* * * * *

REQUIREMENTS FOR CONTRACTOR PERSONNEL PERFORMING IN USSOUTHCOM AREA OF RESPONSIBILITY (CLASS DEVIATION 2014-00016) (OCT 2014)

(a) Definitions.

“The U.S. Southern Command (USSOUTHCOM) area of responsibility (AOR),” as used in this clause, includes the geographic areas of Antigua and Barbuda, Argentina, Aruba, Barbados, Belize, Bolivia, Brazil, British Virgin Islands, Cayman Islands, Chile, Colombia, Costa Rica, Cuba, Curacao, Dominica, Dominican Republic, Ecuador, El Salvador, Falkland Islands, French Guiana, Grenada, Guadeloupe, Guatemala, Guyana, Haiti, Honduras, Jamaica, Martinique, Mayotte, Montserrat Nicaragua, Panama, Paraguay, Peru, Saint Barthelemy, Saint Martin, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Sint Maarten, Suriname, Trinidad and Tobago, Turks and Caicos Islands, Uruguay, and Venezuela.

(b) General.

(1) Contract performance in support of U.S. Armed Forces outside the United States may require work in dangerous or austere conditions. Except as otherwise provided in the contract, the Contractor accepts the risks associated with required contract performance in such operations.

(2) Unless immune from host-nation jurisdiction by virtue of an international agreement or international law, inappropriate use of force by contractor personnel can subject such personnel to United States or host-nation prosecution and civil liability.

(c) Support.

(1) U.S. citizen and third country national (TCN) contractor personnel must have a Synchronized Predeployment and Operational Tracker (SPOT)-generated letter of authorization signed by the contracting officer in order to travel to, from, or within
the USSOUTHCOM AOR. The letter of authorization also will identify any additional authorizations, privileges, or Government support to which Contractor personnel are entitled under this contract.

(2) Unless specified elsewhere in this contract, the Contractor is responsible for all other support required for its personnel engaged in the USSOUTHCOM AOR under this contract.

(d) Pre-travel requirements.

The Contractor shall ensure that the following requirements are met prior to sending or using Contractor personnel in the USSOUTHCOM AOR. Specific requirements for each category may be specified in the statement of work or elsewhere in the contract.

(1) All required security and background checks are complete and acceptable.

(2) All Contractor personnel must be medically, dentally, and psychologically fit for performance of their contracted duties. All U.S. citizen and TCN Contractor personnel must meet the medical screening requirements established by the USSOUTHCOM Commander in the Medical Suitability Screening Regulation, SC Regulation 40-501, as well as the requirements identified in FORCE HEALTH PROTECTION (FHP) GUIDANCE FOR DEPLOYMENT in the USSOUTHCOM AOR or their successors and follow immunization and health protection guidelines outlined therein. All immunizations must be obtained prior to traveling to the USSOUTHCOM AOR. U.S. citizen contractor personnel and TCN Contractor personnel traveling from a country outside of the USSOUTHCOM AOR must travel into the USSOUTHCOM AOR with a current copy of the Public Health Service Form 791, “International Certificate of Vaccination.” In addition, U.S. citizen contractor personnel and TCN contractor personnel traveling to the USSOUTHCOM AOR are required to be beneficiaries of a medical evacuation plan and service through an insurance plan provided by their employer or paid for individually.

(3) The Contractor shall collect a DNA record for all U.S. citizen Contractor personnel traveling to the USSOUTHCOM AOR and shall have arrangements for storage of the DNA reference specimen through a private facility or arrange for the storage of the specimen by contacting the Armed Forces Repository of Specimen Samples for the Identification of Remains (AFRSSIR) at http://www.afmes.mil/index.cfm?pageid=afdil.afrssir.overview or phone: (302) 346-8800. In addition, U.S. citizen contractor personnel shall comply with the requirements of DoDI 3020.41, Enclosure 3, paragraph 8.b., or its successor.
(4) U.S. citizen contractor personnel and TCN Contractor personnel traveling to the USSOUTHCOM AOR must follow the requirements identified in the Electronic Foreign Clearance Guide available at https://www.fcg.pentagon.mil/fgc.cfm and must have all necessary passports, visas, and other documents required to enter, exit or work in the USSOUTHCOM AOR; and must also have the appropriate DoD identity credential(s). Contractor personnel shall return all U.S. Government-issued identification, to include the Common Access Card, to appropriate U.S. Government authorities within 5 days of the end of their travel or contractual duties.

(5) Special area, country, and theater clearance is obtained for U.S. citizen contractor personnel and TCN Contractor personnel traveling in the USOUTHCOM AOR. Clearance requirements are in DoD Directive 4500.54E, DoD Foreign Clearance Program (FCP). For this purpose, U.S. citizen and TCN Contractor personnel are considered non-DoD Contractor personnel traveling under DoD sponsorship.

(6) All U.S. citizen contractor personnel and TCN Contractor personnel must receive personal security training. At a minimum, the training shall—

(i) Cover safety and security issues facing employees within the USSOUTHCOM AOR;

(ii) Identify safety and security contingency planning activities; and

(iii) Identify ways to utilize safety and security personnel and other resources appropriately.

(7) All U.S. citizen DOD sponsored contractors must comply with current force protection, personnel recovery and theater entry requirements as posted in DODI 3020.41 Operational Contract Support, DODI 3002.03 DOD Personnel Recovery – Reintegration of Recovered Personnel, the DOD Foreign Clearance Guide at https://www.fcg.pentagon.mil/ and current USSOUTHCOM guidance prior to travel to any country in the USSOUTHCOM AOR. All U.S. citizen Contractor personnel must complete the following:

(i) Anti-Terrorism (AT) Level 1 Training course available at https://jkdirect.jten.mil (Login and Search for the course on the Course Catalog tab via the number or key word, enroll, and Launch). AT training must be completed within 12 months (1 year) prior to entry into the USSOUTHCOM AOR.

(ii) IAW the DOD Foreign Clearance Guide and USSOUTHCOM theater entry requirements, DOD sponsored contractors entering the theater on official business will have a DD Form 1833 Isolated Personnel Report (ISOPREP) on file in Personnel Recovery Mission Software (PRMS). The ISOPREP will be
reviewed within 6 months prior to theater entry and every 6 months while in the AOR.

(iii) IAW USSOUTHCOM theater entry requirements, all DOD sponsored contractors must complete the computer based SERE 100.1 Code of Conduct training course prior to theater entry. Training is available online [http://jko.jten.mil](http://jko.jten.mil) (Log into your account, go to the Course Catalog and search for SERE 100.1, enroll, and Launch) or through disk based software. Training is good for 3 years.

(iv) IAW the DOD Foreign Clearance Guide and USSOUTHCOM theater entry requirements, all DOD sponsored contractors traveling to designated high risk areas should receive a High Risk of Isolation (HRI) Briefing. The HRI Briefing is required for all DOD personnel conducting operations in, over, or around uncertain or hostile areas increasing their risk of becoming missing, isolated, detained, or captured.

(v) For more information or specific questions regarding completion of these requirements please contact the designated contracting officer’s representative (COR). The COR will contact the appropriate DOD agency or service component for additional guidance.

(e) Personnel data.

(1) The Contractor shall use the Synchronized Predeployment and Operational Tracker (SPOT) web-based system at [https://spot.dmdc.mil](https://spot.dmdc.mil) to enter and maintain the data for the following Contractor personnel:

(i) All U.S. citizen contractor personnel and TCN contractor personnel who travel to the USSOUTHCOM AOR for periods of performance anticipated to exceed 30 consecutive days.

(ii) TCN, host nation (HN), or local national (LN) personnel who reside with or work in the immediate vicinity of U.S. Armed Forces and/or DOD Civilian personnel for periods of performance anticipated to exceed 30 consecutive days.

(iii) Private security contractors and contingency contractor personnel authorized to carry weapons regardless of proximity to U.S. Armed Forces or the length of the period of performance of their contract.

(iv) Contractor personnel with a place of performance within the continental United States, including the USSOUTHCOM Headquarters and Joint Interagency Task Force-South (JIATF-S) Headquarters, that may—within the terms of
their contracts—deploy to the USSOUTHCOM AOR for periods anticipated to exceed 30 consecutive days.

(2) The Contractor shall enter into the SPOT web-based system the required information on Contractor personnel prior to travel to the USSOUTHCOM AOR and shall continue to use the SPOT web-based system to maintain accurate, up-to-date information throughout the period of travel for all Contractor personnel. Changes to the status of individual Contractor personnel relating to their in-theater arrival date and their duty location, to include closing out the trip with their proper status (e.g., mission complete, killed, wounded), shall be annotated within the SPOT database in accordance with the timelines established in the SPOT business rules.

(End of clause)
MEMORANDUM FOR COMMANDER, UNITED STATES SPECIAL OPERATIONS COMMAND (ATTN: ACQUISITION EXECUTIVE) 
COMMANDER, UNITED STATES TRANSPORTATION COMMAND (ATTN: ACQUISITION EXECUTIVE) 
DEPUTY ASSISTANT SECRETARY OF THE ARMY (PROCUREMENT) 
DEPUTY ASSISTANT SECRETARY OF THE NAVY (ACQUISITION AND PROCUREMENT) 
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE (CONTRACTING) 
DIRECTORS OF THE DEFENSE AGENCIES 
DIRECTORS OF THE DOD FIELD ACTIVITIES 

SUBJECT: Class Deviation—Determination of Fair and Reasonable Prices When Using Federal Supply Schedule Contracts

Effective immediately, contracting officers shall comply with the following policy, in lieu of FAR 8.404(d), Pricing, when using Federal Supply Schedules. This class deviation clarifies that ordering activity contracting officers are responsible for making a determination of fair and reasonable pricing when using Federal Supply Schedules.

8.404(d) Pricing. (DEVIATION)

Supplies offered on the schedule are listed at fixed prices. Services offered on the schedule are priced either at hourly rates, or at a fixed price for performance of a specific task (e.g., installation, maintenance, and repair). GSA has determined the prices of supplies and fixed-price services, and rates for services offered at hourly rates, to be fair and reasonable for the purpose of establishing the schedule contract. GSA’s determination does not relieve the ordering activity contracting officer from the responsibility of making a determination of fair and reasonable pricing for individual orders, BPAs, and orders under BPAs, using the proposal analysis techniques at 15.404-1. The complexity and circumstances of each acquisition should determine the level of detail of the analysis required.

This class deviation remains in effect until incorporated in the DFARS or otherwise rescinded. My point of contact is Mr. Mark Gomersall, who may be reached at 571-372-6099, or at Mark.R.Gomersall.civ@mail.mil.

Richard Ginman 
Director, Defense Procurement and Acquisition Policy
MEMORANDUM FOR COMMANDER, UNITED STATES SPECIAL OPERATIONS COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES TRANSPORTATION COMMAND (ATTN: ACQUISITION EXECUTIVE)
DEPUTY ASSISTANT SECRETARY OF THE ARMY (PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE NAVY (ACQUISITION AND PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE (CONTRACTING)
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Class Deviation—Prohibition on the Use of the 8(a) Business Development Program for Acquisition of Military Simulation and Military Simulation Training

Effective January 30, 2014, in accordance with the Stipulation and Agreement of Settlement in DynaLantic Corporation v. United States Department of Defense, et al., No. 95-2301 (EGS)(D.D.C.) (DynaLantic v. Department of Defense) approved by the Court on January 30, 2014 (Attachment), contracting officers are prohibited from awarding “prime contracts under the Section 8(a) program (competitive and sole source) for the purchase of military simulation and military simulation training contracts. ‘Military simulation’ and ‘military simulation training’ contracts are contracts for (i) the provision or sale of devices where the primary purpose of the device or devices is instruction for the use, operation and/or maintenance of military equipment of any nature or kind (including, but not limited to, aircraft, ships, tanks, etc.), and (ii) the training in the use, operation or maintenance with all military simulator equipment.” Accordingly, contracting officers shall not use FAR subpart 19.8, Contracting with the Small Business Administration (The 8(a) Program), in the case of such procurements.

The injunction entered by the Court in its August 15, 2012, decision and order, as modified by the Stipulation and Agreement of Settlement, remains in effect. The modifications are described in this class deviation. The memorandum from the Director of Defense Procurement and Acquisition Policy, dated August 22, 2012, subject: “Immediate Cessation of Small Business Development Program (8(a) Program) Procurement Contracts for Military Simulators or Services in the Military Simulator Industry,” advised addressees of the decision, provided instructions effective August 15, 2012, based on the decision, and included as attachments the Court’s decision and order dated August 15, 2012.

This class deviation remains in effect until further notice. My point of contact is Ms. Lee Renna, who may be reached at 571-372-6905, or at marylee.renna.civ@mail.mil.

Richard Ginman
Director, Defense Procurement and Acquisition Policy

Attachment:
As stated
STIPULATION AND AGREEMENT OF SETTLEMENT

WHEREAS, by Order entered on August 15, 2012, the Court denied in part and granted in part the parties' respective motions for summary judgment, and ordered "that the Small Business Administration and the Department of Defense are hereby enjoined from awarding procurements for military simulators under the Section 8(a) program without first articulating a strong basis in evidence for doing so" [ECF Document 247]; and

WHEREAS, Plaintiff's appeal from the Court's August 15, 2012 Order is currently pending before the United States Court of Appeals for the District of Columbia Circuit in Case No. 12-5330; and

WHEREAS, the parties have agreed to settle this case on the terms and conditions set forth herein.
NOW, THEREFORE, Plaintiff and Defendants stipulate and agree as follows:

1. Subject to the Court's approval, the injunction entered by the Court in its August 15, 2012 Order shall be modified to read as follows: "Defendants shall not award prime contracts under the Section 8(a) program (competitive and sole source) for the purchase of military simulation and military simulation training contracts without first articulating a strong basis in evidence for doing so. 'Military simulation' and 'military simulation training' contracts are contracts for (i) the provision or sale of devices where the primary purpose of the device or devices is instruction for the use, operation and/or maintenance of military equipment of any nature or kind (including, but not limited to, aircraft, ships, tanks, etc.), and (ii) the training in the use, operation or maintenance with all military simulator equipment.' The injunction, as so modified, shall not apply to contracts already in effect as of the date this Stipulation and Agreement of Settlement is signed by Plaintiff and Defendants.

2. The provisions contained in this Paragraph are contingent upon the Court's approval of the modifications to its injunction set forth in Paragraph 1 above, and shall become effective only upon the Court's entry of this Stipulation and Agreement as a Court order:

A. Defendants shall pay Plaintiff the sum of One Million and 00/100 Dollars ($1,000,000.00) in full and final satisfaction of Plaintiff's claims for attorney's fees, costs, and other litigation expenses on account of (i) this action from its inception up to the date this Stipulation and Agreement of

2
Settlement is signed by Plaintiff and Defendants, (ii) Plaintiff's pending appeal in D.C. Circuit Case No. 12-5330, (iii) Defendants' appeal in D.C. Circuit Case 12-5329, (iv) Plaintiff's appeal in D.C. Circuit Case No. 96-5260, and (v) Plaintiff's petition for writ of mandamus in D.C. Circuit Case No. 12-5220, and Defendants shall have no further liability for any such fees, costs, or expenses. Payment shall be made as promptly as practicable, consistent with the normal processing procedures followed by Defendants, the Department of Justice, and the Department of the Treasury, by electronic transfer of funds as specified in instructions provided to Defendants' counsel by Plaintiff's counsel in writing.

B. Plaintiff shall promptly dismiss its pending appeal in D.C. Circuit Case No. 12-5330.

C. Defendants shall refrain from seeking to vacate the injunction entered by the Court in this case for a period of at least two years after the date on which this Stipulation and Agreement of Settlement is signed by Plaintiff and Defendants. At any time after the expiration of that two-year period, Defendants may give notice to the Court and to Plaintiff of Defendants' intent to begin re-using the Section 8(a) program for military simulation and military simulation training contracts. Such notice (i) shall be in writing, (ii) shall be given at least thirty days prior to the date on which Defendants propose to begin such contracting activities, and (iii) shall be
filed and served through the Court's electronic case filing system or as otherwise permitted by the Federal Rules of Civil Procedure and the local civil rules. The injunction shall remain in effect until further action is taken by the Court modifying or dissolving it.

3. Except as expressly set forth herein, Plaintiff reserves all of its rights (i) with respect to the injunction entered by the Court in this case, and (ii) to oppose any request to vacate the injunction.

4. If Plaintiff at any time believes that any contracting action or proposed contracting action by Defendants has violated or would violate the Court's injunction, Plaintiff shall notify Defendants of the alleged violation and Defendants shall then have ten days to cure the violation or otherwise respond to the claim. The parties shall make a good faith effort to resolve any dispute arising from or regarding the injunction's scope or applicability before bringing the dispute to the Court's attention.

5. The Court shall retain jurisdiction over this case.

6. Each signatory hereto represents and warrants that he is fully authorized to enter into this Stipulation.
IN WITNESS WHEREOF, Plaintiff and Defendants, intending to be legally
bound, have executed this Stipulation on this 28th day of January 2014.

/s/Michael E. Rosman
MICHAEL E. ROSMAN
D.C. Bar #454002
Center for Individual Rights
1233 20th St. N.W., Suite 300
Washington, D.C. 20036
(202) 833-8400
Counsel for Plaintiff

/s/Daniel F. Van Horn
DANIEL F. VAN HORN
D.C. Bar #924092
Chief, Civil Division
United States Attorney’s Office
555 Fourth St., N.W. – Room E4226
Washington, D.C. 20530
(202) 252-2506
Counsel for Defendants

JOCELYN SAMUELS
Acting Assistant Attorney General
Civil Rights Division
United States Department of Justice

RONALD C. MACHEN Jr.
United States Attorney
District of Columbia

APPROVED and SO ORDERED on this 30th day of January, 2014.

UNITED STATES DISTRICT JUDGE
MEMORANDUM FOR COMMANDER, UNITED STATES SPECIAL OPERATIONS
COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES TRANSPORTATION
COMMAND (ATTN: ACQUISITION EXECUTIVE)
DEPUTY ASSISTANT SECRETARY OF THE ARMY
(PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE NAVY
(ACQUISITION AND PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE
(CONTRACTING)
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Class Deviation—Past Performance Evaluation Thresholds and Reporting
Requirements

Effective immediately, all contracting officers shall comply with the attached language,
in lieu of FAR 15.304(c)(3)(i) and 42.1502, when collecting and using past performance
information. This class deviation updates the DoD thresholds that identify when contracting
officers must evaluate a contractor’s performance.

The Guidance for CPARS, dated September 2013, includes revisions to the
categorization of “fuels” and “health care.” These two categories previously were listed
separately in Table 1 of the Guidance. The threshold for “fuels” has been raised to $5,000,000
and is included under the “operations support” business sector. The threshold for “health care”
has been raised to $1,000,000, and is included under the “services” business sector.

This class deviation requires past performance reporting for contracts awarded under
FAR subpart 8.7, Acquisition from Nonprofit Agencies Employing People Who are Blind or
Severely Handicapped, when the thresholds in this class deviation are exceeded, and it applies
these thresholds to reporting requirements for FAR subpart 8.6, Acquisition from Federal Prison
Industries, Inc. The thresholds in this class deviation also apply to reporting requirements for
individual task or delivery orders, when past performance evaluations are required for orders by
FAR subpart 42.15.

Contracting officers are encouraged to manually register and complete assessment reports
on science and technology contracts and delivery/task orders under budget accounts 6.1 (basic
research), 6.2 (applied research), and 6.3 (advanced technology development) over $1,000,000,
consistent with the threshold for services, although the completion of past performance evaluations is not mandatory for these types of contracts.

This class deviation supersedes Class Deviations 2012-O0017 and 2012-O0018. This class deviation is effective upon signature, and remains in effect until incorporated in the FAR or DFARS or otherwise rescinded. My point of contact is Sandra Ross, who may be reached at 703-695-9774, or sandra.k.ross28.civ@mail.mil.

Attachment:
As stated
Revised past performance thresholds to be used in lieu of the thresholds at FAR 15.304(c)(3)(i) and 42.1502(b):

215.304 Evaluation factors and significant subfactors (DEVIATION).

(c)(3)(i) In lieu of the threshold specified at FAR 15.304(c)(3)(i), except as provided at FAR 15.304(c)(3)(iii), evaluate past performance in source selections for negotiated competitive acquisitions as follows:
   (A) For systems and operations support acquisitions expected to exceed $5,000,000;
   (B) For services and information technology acquisitions expected to exceed $1,000,000; and
   (C) For ship repair and overhaul acquisitions expected to exceed $500,000.

242.1502 Policy (DEVIATION).

In lieu of the threshold specified at FAR 42.1502(b), 42.1502(c), and 42.1502(d), except as provided at FAR 42.1502(e), (f), and (h), prepare an evaluation of contractor performance as follows:
   (i) For systems and operations support contracts that exceed $5,000,000;
   (ii) For services and information technology contracts that exceed $1,000,000; and
   (iii) For ship repair and overhaul contracts that exceed $500,000.

NOTE: The Governmentwide CPARS guidance lists various business sectors. DoD includes health care under the services business sector and includes fuels under the operations support business sector.
MEMORANDUM FOR COMMANDER, UNITED STATES CENTRAL COMMAND (ATTN: JOINT THEATER SUPPORT CONTRACTING COMMAND) 
COMMANDER, UNITED STATES SPECIAL OPERATIONS COMMAND (ATTN: ACQUISITION EXECUTIVE) 
COMMANDER, UNITED STATES TRANSPORTATION COMMAND (ATTN: ACQUISITION EXECUTIVE) 
DEPUTY ASSISTANT SECRETARY OF THE ARMY (PROCUREMENT) 
DEPUTY ASSISTANT SECRETARY OF THE NAVY (ACQUISITION AND PROCUREMENT) 
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE (CONTRACTING) 
DIRECTORS OF THE DEFENSE AGENCIES 
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Class Deviation—Contractor Demobilization

Effective immediately, contracting officers shall use the attached clause in all solicitations and contracts with performance in Afghanistan, except solicitations and contracts for commodities.

This class deviation remains in effect until it is incorporated in the DFARS, or is otherwise rescinded. My point of contact is Ms. Barbara J. Trujillo, who may be reached at 571-256-7010, or at barbara.j.trujillo2.civ@mail.mil.

Attachment:
As stated
252.225-7998 Contractor Demobilization. (DEVIATION 2013-00017)

Insert the following clause in all solicitations and contracts with performance in Afghanistan, except solicitations and contracts for commodities:

**CONTRACTOR DEMOBILIZATION**
**(DEVIATION 2013-00017) (AUGUST 2013)**

(a) Generally, the Contractor is responsible for demobilizing all of its personnel and equipment from the Afghanistan Combined Joint Operations Area (CJOA).

(b) Demobilization plan. The Contractor shall submit a demobilization plan to the Contracting Officer for approval a minimum of 120 calendar days prior to the end of the current contract performance period or as otherwise directed by the Contracting Officer. Upon acceptance of the demobilization plan by the Contracting Officer, the demobilization plan becomes a material part of the contract and the Contractor agrees to fully perform its demobilization in accordance with that plan. The demobilization plan shall address the items specified in this clause and must demonstrate the Contractor's plans and ability to remove its personnel and equipment from the CJOA and to return Government property no later than 30 days after the expiration of the current period of performance.

(c) Demobilization plan implementation. Every 30 calendar days after incorporation of the plan into the contract, or as otherwise directed by the Contracting Officer, the Contractor shall provide written information to the Contracting Officer and Contracting Officer Representative that addresses the Contractor's progress in implementing the plan. The Contractor shall continue to provide the information in the preceding sentence until the Contractor has completely and properly demobilized. If the Contracting Officer or Contracting Officer Representative identifies deficiencies with the plan, as approved, or with the implementation of that plan, the Contractor shall submit a corrective action plan (CAP) to those officials within five calendar days to remedy those deficiencies. The Contracting Officer shall review the CAP within five calendar days to determine whether the CAP is acceptable. Upon approval by the Contracting Officer, the CAP becomes a material part of the demobilization plan.

(d) Plan contents

(1) The plan shall identify the method of transportation (air, ground) the Contractor intends to use to remove its personnel and equipment from the CJOA and whether that method of transportation is Government or Contractor-furnished. If Government-furnished transportation is authorized, the plan must identify the
contract term or condition which authorizes Government transportation of the personnel and equipment associated with this contract.

(2) The plan shall identify the number of Contractor personnel to be demobilized by category (U.S. citizens, Third Country Nationals (TCN), Local Nationals (LN)) and, for U.S. and TCN personnel, identify the point of origin or home country to which they will be transported and the timeline for accomplishing that objective. If U.S. or TCN employees have authorization to remain in the CJOA after completion of demobilization, the plan shall identify the name each individual, their nationality, their location in the CJOA, and provide a copy of the authorization. The plan shall also identify whether the Contractor needs the Contracting Officer to extend the Letters of Authorization (LOA) for any Contractor personnel to execute the demobilization plan.

(3) The plan shall identify all Contractor equipment and the timeline for accomplishing its demobilization. The Contractor shall identify all equipment, whether or not it is covered by CJTSCC Acquisition Instruction Clause “Inbound / Outbound Cargo and Contractor Equipment Census.” The plan shall also specify whether the Contractor intends to leave any equipment in the CJOA, a list of all such equipment, including its location, and the reason(s) therefor.

(4) The plan shall identify all Government property provided or made available to the Contractor under this contract or through any separate agreement or arrangement (e.g., Installation Mayors, Garrison Commanders). The plan shall also identify the timeline for vacating or returning that property to the Government, including proposed dates for conducting joint inspections.

(e) Demobilization requirements:

(1) The Contractor shall demobilize and return its personnel to their point of origin or home country according to the approved demobilization plan.

(2) The Contractor is not authorized to use Government-furnished transportation unless specifically authorized in this contract.

(3) The Contractor may request an extension of the LOAs only for those Contractor personnel whose presence is required to execute the approved demobilization plan. The Contractor shall submit its request no later than 30 calendar days prior to the expiration of the current period of performance. LOAs may only be extended for a period up to 30 calendar days after expiration of the current performance period. The request shall contain the following information:

(i) The names of each individual requiring an extension.
(ii) The required extension period.

(iii) The justification for each extension (e.g., the specific function(s) the individual will perform during the demobilization period). The Contractor is not entitled to any additional compensation if LOAs are extended.

(4) The Contractor shall close out their employees deployments with the proper status entered into the Synchronized Pre-Deployment Operational Tracker (SPOT) database (e.g. active, redeployed, no-shows, killed, injured) within 72 hours of their employee’s re-deployment and, if applicable, release their personnel in SPOT.

(5) All Contractor equipment that is lost, abandoned or unclaimed personal property that comes into the custody or control of the Government after the demobilization period has ended may be sold or otherwise disposed of in accordance with 10 U.S.C. section 2575. Notwithstanding the previous sentence and the Government’s authority under 10 U.S.C. section 2575, the Government may exercise any other contractual rights for the Contractor’s failure to perform in accordance with its demobilization plan.

(6) If the Contractor waives its interest to all lost, abandoned or unclaimed personal property, the Contractor may still be liable for all costs incurred by the Government to remove or dispose of the abandoned property.

(7) The Government may dispose of any and all lost, unclaimed, or abandoned personal property in accordance with 10 U.S.C. section 2575.

(8) The Contractor shall return all Government property provided or made available under this contract or through any separate agreement. The Contractor shall report all lost or damaged Government property in accordance with DFARS 52.245-1(h) unless other procedures are identified in the contract or separate agreement. If the Government inspects the property and finds that damages or deficiencies have not been reported by the end of the demobilization period, the Government may reduce payments under the contract by the amounts required to correct the damages or deficiencies or replace the loss.

(9) The Contractor is liable for all cleanup, clearing, and/or environmental remediation expenses incurred by the Government in returning a Government facility to its original condition. If damages or deficiencies are discovered during the inspection of said facility, the Contractor shall make the necessary repairs or corrections and then notify the Installation Mayor, Garrison Commander, or their designees to arrange for a re-inspection of the facility. If the Installation Mayor or Garrison Commander inspects the facility and finds that damages or deficiencies
have not been repaired or corrected by the end of the demobilization period, the Government may reduce payments under the contract by the amounts required to correct the damages or deficiencies.

(10) The Contractor shall ensure that all employees, including all subcontractor employees at all tiers, return installation and/or access badges to the local Access Control Badging Office for de-activation and destruction according to the approved demobilization plan. The Contractor shall submit a Badge Termination Report to ensure each record is flagged and the badge is revoked. If an employee’s badge is not returned, the Contractor shall submit a Lost, Stolen or Unrecovered Badge Report to the appropriate Access Control Badging Office. Contractor employees in possession of a Common Access Card (CAC) shall be responsible for turning in the CAC upon re-deployment through a CONUS Replacement Center in the United States. Failure to comply with these requirements may result in delay of final payment.

(f) **Subcontracts.** The Contractor shall include the substance of this clause, including this paragraph (f), in all subcontracts.

(End of Clause)
In reply refer to
DARS Tracking Number: 2012-00013

MEMORANDUM FOR COMMANDER, UNITED STATES SPECIAL OPERATIONS
COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES TRANSPORTATION
COMMAND (ATTN: ACQUISITION EXECUTIVE)
DEPUTY ASSISTANT SECRETARY OF THE ARMY
(PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE NAVY
(ACQUISITION AND PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE
(CONTRACTING)
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Class Deviation—DCAA Policy and Procedure for Sampling Low-Risk Incurred
Cost Proposals

Effective immediately, for the purposes of satisfying the audit requirements at FAR
4.804-5(a)(12), 42.705-1(b)(2), and 42.705-2(b)(2)(i), Department of Defense contracting
officers shall continue to rely on either a DCAA audit report or a DCAA memorandum
documenting that, based on a risk assessment and a proposal adequacy evaluation pursuant to
FAR 42.705-1(b)(1)(iii), DCAA deemed the incurred cost proposal to be low-risk and did not
select it for further audit in accordance with the attached DCAA Policy dated July 6, 2012.

This DCAA policy represents a continuation of a risk-based sampling process in use
since 1994. It remains a prudent use of resources and contains adequate safeguards against
unacceptable risk, while still ensuring that the contracting officer will have all the information
needed for contract closeout.

This deviation remains in effect until it is incorporated into the FAR or DFARS or is
otherwise rescinded. My point of contact is Mr. Mark Gomersall who may be reached at
571-372-6099, or mark.gomersall@osd.mil.

Attachment:
As stated

Richard Ginman
Director, Defense Procurement
and Acquisition Policy
MEMORANDUM FOR DIRECTOR, DEFENSE PROCUREMENT AND ACQUISITION POLICY

SUBJECT: Modification of DCAA Process for Sampling Low-Risk Incurred Cost Proposals

As coordinated with your office, enclosed are our policies and procedures for sampling low-risk incurred cost proposals. The policies and procedures will be implemented upon your issuance of the related Class Deviation. We believe this process will provide for a more effective oversight approach without significantly increasing risk to the Government. Should you have any questions, please contact me at (703) 767-3200.

Enclosure:
Policy and Procedures
POLICY

All incurred cost proposals should be evaluated upon receipt for adequacy, in accordance with FAR 52.216-7, using the DCAA Incurred Cost Proposal Adequacy checklist. If the incurred cost proposal is not adequate and the deficiencies cannot be remedied with minor effort, the proposal will be returned to the contractor with written instructions on required corrective actions, in accordance with CAM Chapter 6.

All adequate annual incurred cost proposals exceeding $250 million in auditable dollar value (ADV) will be audited. All other incurred cost proposals received and determined to be adequate will be assessed for risk. All adequate high-risk proposals will be audited.

To address the current significant backlog, low risk adequate annual incurred cost proposals (using criteria below) submitted by contractors with auditable dollar value (ADV) of $1 million or less and received prior to October 1, 2011, will not be selected for audit. A Memorandum for Contracting Officer will be issued as discussed in the following paragraphs.

CRITERIA FOR CLASSIFICATION OF PROPOSALS TO HIGH-RISK AND LOW-RISK POOLS

For all proposals with $250 million or less in ADV, FAOs should classify risk as high or low for all adequate incurred cost proposals on hand where an audit (field work) has not been started, using the criteria specified below:

Low Risk Proposal Criteria

- We have prior incurred cost audit experience (i.e., an incurred cost audit has been performed).
- No significant audit leads or no other significant risk has been identified (any known business system deficiencies that would have a significant impact on the final indirect rate proposal for this FY, significant risk identified by the contracting officer, etc.).
- No prior significant total exception dollar reported in the last year audited.

Significant exception dollars are defined by strata in the table below:

<table>
<thead>
<tr>
<th>Low-Risk Adequate Proposals by Auditable Dollar Value (ADV)</th>
<th>Amount of Previous Exception Dollars (including Corporate, Home Office, etc) Classified as Significant (gov. impact)</th>
</tr>
</thead>
<tbody>
<tr>
<td>$1M or less</td>
<td>$15,000</td>
</tr>
<tr>
<td>$1M to $15 Million</td>
<td>$25,000</td>
</tr>
<tr>
<td>$15M to $50 Million</td>
<td>$55,000</td>
</tr>
<tr>
<td>$50 Million to $250 Million</td>
<td>$100,000</td>
</tr>
</tbody>
</table>
DCAA Policy and Procedures for
Sampling Low-Risk Incurred Cost Proposals

LOW-RISK SAMPLING PERCENTAGES

Low-risk proposals will be selected for audit using sampling techniques based on the
guidance below. An adequacy evaluation must be performed prior to designating a proposal as
low risk. No other audit procedures will be applied to the remaining low-risk proposals not
selected for audit.

<table>
<thead>
<tr>
<th>Low-Risk Adequate Proposals by</th>
<th>Low-Risk Sampling</th>
</tr>
</thead>
<tbody>
<tr>
<td>Auditable Dollar Value (ADV)</td>
<td>Percentages</td>
</tr>
<tr>
<td>$1M or less received after 9/30/2011</td>
<td>1%</td>
</tr>
<tr>
<td>$1M to $50 Million</td>
<td>5%</td>
</tr>
<tr>
<td>$50 Million to $100 Million</td>
<td>10%</td>
</tr>
<tr>
<td>$100 Million to $250 Million*</td>
<td>20%</td>
</tr>
<tr>
<td>Greater than $250 Million</td>
<td>100%</td>
</tr>
</tbody>
</table>

* A mandatory incurred cost audit will be performed once every three years for all proposals
greater than $100 million up to $250 million. If a contractor does not have a proposal selected
for audit in the 20 percent sample in a three-year cycle, the FAO shall select a proposal for audit
the third year after the last audit. This selection is in addition to those incurred cost proposals
selected for audit in the 20 percent sample for any given Government fiscal year.

CLOSURE METHODS TO BE USED FOR PROPOSAL CONSIDERED LOW-RISK
NOT SELECTED FOR AUDIT

The following procedures will be performed on the proposals in the low-risk pool that
were not selected in the sample for audit:

- Issue a Memorandum for Contracting Officer, including the key steps performed from
  the adequacy checklist (see enclosed proforma adequacy determination letter).

- Low-risk proposals not selected in the sample for audit should be closed with
disposition code “N – Assignment completed but no formal report issued” as of the
date of the memorandum to the contracting officer. The proposal ADV should be
reported in the dollars examined field so that the Agency can determine the value of
incurred cost proposals that were not audited. Costs questioned and total exception
dollars will be reported as zero. The Audit, Desk Review, or No Audit field entry
will be “N = No Audit” and the Audit Determined/Negotiated field entry will be “N
= Negotiated.”

PROCEDURES

- Upon receipt of this guidance, the FAO should identify all incurred cost proposals on
  hand for which the audit has not started.
DCAA Policy and Procedures for
Sampling Low-Risk Incurred Cost Proposals

- Perform an adequacy determination, if not already completed.
- All adequate incurred cost proposals exceeding $250 million in ADV will be audited.
- Proposals less than or equal to $250 million received and determined adequate will be assessed for risk. The auditor will determine whether the remaining incurred cost proposals should be included in the high-risk pool or low-risk pool using the attached risk assessment worksheet.
- All adequate low-risk incurred cost proposals less than or equal to $1 million received prior to October 1, 2011 will not be audited or sampled. Draft memorandum to the contracting officer.
- All adequate incurred cost proposals included in the high-risk pool will be audited.
- All other adequate low-risk incurred cost proposals will be randomly selected for audit based on the following initial sampling percentages. Regional offices in coordination with OWD will determine and document sampling plan.
  - One percent (1%) of the incurred cost proposals up to $1 million received after September 30, 2011, and included in the low-risk pool, will be randomly selected for audit.
  - Five percent (5%) of the incurred cost proposals of $1 million to $50 million included in the low-risk pool will be randomly selected for audit.
  - Ten percent (10%) of the incurred cost proposals of $50 million to $100 million included in the low-risk pool will be randomly selected for audit.
  - Twenty percent (20%) of the incurred cost proposals of $100 million to $250 million included in the low-risk pool will be randomly selected for audit. A mandatory incurred cost audit will be performed once every three years.
- Draft a memorandum to the contracting officer for those low-risk proposals not selected for audit unless the FAO has multiple proposals from the same contractor, then follow the procedures below.
- If a contractor has more than one incurred cost proposal in the initial low-risk pool, the following procedures will be used:
  - If no proposals for the contractor are selected in the sample for audit, close out all adequate incurred cost proposals that were in the sampling pool for that contractor using the procedures discussed above.
  - If one or more proposals are selected in the sample for audit, do not disposition any of the other proposals for the contractor until the audit is completed.
    - If significant questioned costs are found, audit all other incurred cost proposals that were in the sampling pool for the contractor using multi-year audit techniques.
    - If no significant questioned costs are found, close out all other proposals that were in the sampling pool using the procedures discussed above.
MEMORANDUM FOR COMMANDER, UNITED STATES SPECIAL OPERATIONS COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES TRANSPORTATION COMMAND (ATTN: ACQUISITION EXECUTIVE)
DEPUTY ASSISTANT SECRETARY OF THE ARMY (PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE NAVY (ACQUISITION AND PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE (CONTRACTING)
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Class Deviation—Prohibition on Collection of Political Information

Effective immediately, contracting officers may not require any entity to submit political information as part of a solicitation or any contract action nor may they use fiscal year 2012 funds to require or recommend the submission of political information.

“Political information” means information relating to political spending, including any payment consisting of a contribution, expenditure, independent expenditure, or disbursement for an electioneering communication that is made by the contractor, any of its partners, officers, directors or employees, or any of its affiliates or subsidiaries to a candidate or on behalf of a candidate for election for Federal office, to a political committee, to a political party, to a third party entity with the intention or reasonable expectation that it would use the payment to make independent expenditures or electioneering communications, or that is otherwise made with respect to any election for Federal office, party affiliation, and voting history. Each of the terms ‘contribution’, ‘expenditure’, ‘independent expenditure’, ‘candidate’, ‘election’, ‘electioneering communication’, and ‘Federal office’ has the meaning given the term in the Federal Campaign Act of 1971 (2 U.S.C. 431 et seq.).

This deviation implements 10 U.S.C 2335, as added by section 823 of the National Defense Authorization Act of 2012 (Pub. L. 112-81), and it also implements section 743 of the Consolidated Appropriations Act of 2012 (Pub. L. 112-74).

This class deviation is effective upon signature, and remains in effect until it is incorporated in the FAR or DFARS or is otherwise rescinded. My point of contact is Dustin Pitsch, who may be reached at 571-372-6090, or dustin.pitsch@osd.mil.

Richard Ginman
Director, Defense/Procurement
and Acquisition Policy
MEMORANDUM FOR COMMANDER, UNITED STATES SPECIAL OPERATIONS COMMAND (ATTN: ACQUISITION EXECUTIVE) 
COMMANDER, UNITED STATES TRANSPORTATION COMMAND (ATTN: ACQUISITION EXECUTIVE) 
DEPUTY ASSISTANT SECRETARY OF THE ARMY (PROCUREMENT) 
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DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE (CONTRACTING) 
DIRECTORS OF THE DEFENSE AGENCIES 
DIRECTORS OF THE DOD FIELD ACTIVITIES 

SUBJECT: Utilities Privatization – Class Deviation from FAR Part 31

Contracting officers may use this class deviation when awarding qualified contracts in conjunction with the conveyance of a utility system under 10 U.S.C. § 2688, “Utility Systems: Conveyance Authority.” To qualify for the deviation, a contract must meet the conditions detailed in Attachment A and the Cost Accounting Standards (CAS) Board waiver at Attachment B. The applicability of this deviation extends to all qualified contracts awarded as of August 31, 2010.

This deviation replaces and updates the deviation granted under CPF Tracking Number 2007-O00007. The updates include: a statement of which elements of the waiver contractors must meet for each type of situation; a requirement for contractors to meet all the conditions in the waiver; and expansion of the permissible contract types.

The Head of the Contracting Agency shall report to this office (Attention: DPAP/CPF) on a quarterly basis any contracts awarded that use this class deviation. The report, submitted within 30 days of the end of the quarter, shall include, at a minimum, the following information:

1. Contract number
2. Contractor name
3. Date of contract award
4. Amount of contract award
5. Indication of use of CAS waiver as required in Attachment A, Section 1.b.(ii).

This class deviation remains in effect until it is incorporated into the DFARS or is otherwise rescinded. My point of contact for this issue is Mr. Mark Gomersall, 703-602-0302 or mark.gomersall@osd.mil.

Shay D. Assad
Director, Defense Procurement and Acquisition Policy

Attachments:
As stated
Deviation from FAR Part 31 - Contract Cost Principles and Procedures

Section 1. General Deviation from FAR Part 31. This deviation applies to Government contracts awarded in conjunction with the conveyance of a utility system under 10 U.S.C. § 2688 provided all of the conditions listed in this section are met. This deviation permits, but does not require, the Head of the Contracting Activity (HCA) to waive the requirements of FAR Part 31.

The HCA may exclude from the contract some or all of the requirements of FAR Part 31 provided all of the following conditions are met:

a. The contract is one of the following types:
   (i) Firm fixed price contracts (FFP);
   (ii) Fixed price contracts with economic price adjustment (where the price adjustment is based on an index or established prices, not based on actual costs incurred) (FPEPA); or
   (iii) Fixed price contracts with prospective price redetermination (where the price adjustment is based on actual costs incurred) (FPPR).

b. The contract either:
   (i) Is exempt from the application of the Cost Accounting Standards (CAS); or
   (ii) Meets all the requirements of the CAS Board waiver of September 2, 2004, related to contracts entered into under the authority of 10 U.S.C. § 2688 (erroneously referred to as section 2686).

c. The contract requires that the actual costs used for purposes of establishing the initial fixed price and any subsequent price submittals:
   (i) Meet the limitations specified in Section 2 for any deviation granted from FAR 31.205-20, Interest and other financial costs;
   (ii) Meet the limitations specified in Section 3 for any deviation granted from FAR 31.205-41, Taxes;
   (iii) Exclude the types of costs listed at 10 U.S.C. § 2324(e) (as it exists on the date of contract award). Any reasonable method of estimating such costs is sufficient to meet this requirement; and
   (iv) Exclude the types of costs that are not normally considered as reimbursable by the applicable regulatory body that oversees the utility rate determinations of the business segment performing the contract.
d. The contract provides the Government with access to all records related to the accounting practices used to determine the costs and the supporting data for any estimates of unallowable costs.

Section 2. **FAR 31.205-20 — Interest and Other Financial Costs.** If a deviation under section 1 includes a deviation from the requirements at FAR 31.205-20, the following conditions, in addition to those under section 1, must also be met. This deviation permits, but does not require, the Contracting Officer to waive the requirements of FAR 31.205-20.

This deviation applies only when all of the following conditions, as well as the conditions of section 1, are met:

a. The contracting officer determines, in writing, that:

(i) Allowing the costs will significantly reduce the costs of the United States for the utility services provided under the subject contract;

(ii) The interest costs and directly related financial costs incurred to obtain loans or borrow capital from third-party financial institutions are reasonable based on the particular facts and circumstances involved; and

(iii) The interest and directly related financial costs are associated with capital expenditures to acquire, renovate, upgrade, and expand utility systems under the subject utility services contract.

b. The contract states that cost of money is an unallowable contract cost under FAR 31.205-10, Cost of money, either during or after the period of the loan for all assets to which the loan relates; and

c. Interest rates used to calculate allowable costs are limited to 600 basis points above the Contract Disputes Act interest rate (41 U.S.C. § 611) in effect at the time the contractor makes the capital expenditure.

d. The deviation does not apply to any imputed interest on the contractor's own funds.

Section 3. **FAR 31.205-41 — Taxes.** If a deviation under section 1 includes a deviation from the requirements of FAR 31.205-41(b)(1), the following conditions, in addition to those under section 1, must also be met. This deviation permits, but does not require, the HCA to waive the requirements of FAR 31.205-41(b)(1).

To the maximum extent practical, contracts should be structured in a manner that will not result in a Contribution in Aid of Construction (CIAC) tax. Nevertheless, the HCA may determine that the CIAC tax is an allowable cost provided all of the following conditions, as well as the conditions of section 1, are met:

a. Based on the particular facts and circumstances involved, the HCA determines that incurrence of the CIAC tax is necessary to achieve the most beneficial business case for the Government and allowing the CIAC tax will result in significant benefits to the Government that outweigh the cost of allowing the tax.
b. The HCA has adequately documented, in writing:

(i) The basis for the DoD determination of fair market value using a generally accepted valuation methodology.

(ii) The basis for the determination that the benefits to the Government outweigh the estimated cost of the tax (this requires an estimate of the expected corporate tax rate of the contractor, the marginal tax liability caused by the CIAC, and the anticipated difference in fair market value between the DoD and Internal Revenue Service (IRS) valuations).

c. The contract limits the allowable cost to the portion of the actual CIAC tax attributable to the difference between:

(i) The fair market value determinations of DoD using a generally accepted valuation methodology; and

(ii) The fair market value determination of the IRS in assessing the tax.
Ms. Deidre A. Lee  
Director, Defense Procurement and Acquisition Policy  
Department of Defense  
Washington, DC 20301  

Dear Ms. Lee:

This responds to your December 19, 2003 letter, and the additional information you provided on April 5, 2004, to the Cost Accounting Standards (CAS) Board, requesting a CAS waiver for contracts entered into under the authority of 10 U.S.C. 2686, “Utility Systems, Conveyance Authority.”

On September 2, 2004, the CAS Board approved the requested waiver subject to the conditions set forth in the attached “Enclosure.”

In granting this waiver, the CAS Board recognizes that the utilities industry has a set of established accounting practices that are used by regulatory authorities to set rates for utility customers (e.g., FERC, NARUC, RUS, or AWWA). The Board believes that the enclosed waiver conditions, which include requirements for contractors to consistently follow these established industry accounting practices, and to disclose in writing the accounting practices used for allocation of indirect costs, provides adequate protection for the Government. If any contractor selected for a contract under the above described authority does not agree to the conditions in this waiver, the contractor will be subject to CAS requirements, provided it otherwise satisfies the appropriate CAS applicability criteria.

Please inform this Office, within ninety days after the close of each fiscal year, of the extent and use of this waiver.

Sincerely,

James P. Bedingfield  
Member  
Anthony M. DiPasquale  
Member  
William F. Reed  
Member  
Eugene L. Wassyly  
Member  

Attachment B, Page 1 of 3
The Cost Accounting Standards are hereby waived for contracts entered into under the authority of 10 U.S.C. 2686, "Utility Systems, Conveyance Authority" that meet all of the following conditions:

1. The contract is one of the following types:
   a. Firm fixed price contracts (FFP);
   b. Fixed price contracts with economic price adjustment (where the price adjustment is based on an index or established prices, not based on actual costs incurred) (FPEPA);
   c. Fixed price contracts with prospective price redetermination (where the price adjustment is based on actual costs incurred) (FPPPR).

2. The business segment performing the contract is not, at the time of contract award, currently performing on any other contract that is subject to the Cost Accounting Standards.

3. The contract is awarded without the submission of cost or pricing data.

4. For contracts that are awarded without adequate price competition (regardless of contract type) and for all FPPPR contracts, the contract must include a clause that:
   a. Requires the contractor to prepare the proposal for the initial contract or for the price redetermination using accounting practices that (i) comply with pronouncements of the Federal Energy Regulatory Commission (FERC), the National Association of Regulatory Utility Commissioners (NARUC), the Rural Utility Service (RUS), or the American Water Works Association (AWWA) and (ii) are consistent with the contractor's written and established practices for measuring, assigning, and allocating costs;
   b. Requires the contractor to disclose, in writing, its established accounting practices for allocating indirect costs to contracts for which CAS has been waived, and to consistently use those disclosed practices to prepare proposal(s); and
   c. Provides for an adjustment to the contract price if it is later found that the price was increased because the contractor used accounting practices that were in noncompliance with FERC, NARUC, RUS, or AWWA, or were inconsistent with the contractor's written and established practices. The amount of the adjustment shall be the difference between the contract price that was negotiated and the price that would have been negotiated had the business unit used compliant accounting practices that were in accordance with FERC, NARUC, RUS, or AWWA, and were consistent with the contractor's written and established practices. The Government shall be entitled to a
credit or cash recovery (at the Government's option) for the amount of the increased price plus interest. The interest shall be computed from the date the payment by the Government until the date of repayment by the contractor. The interest rate shall be the rate specified at 26 U.S.C. 6621(a)(2).

5. For FPPPR contracts, the contract includes the clause at FAR 52.215-2, Audit and Records-Negotiation.

6. For FPPPR contracts, the contract includes the following clause

The actual costs used for purposes of establishing any price predetermination under the contract must exclude all statutory and contractually unallowable costs. The actual costs must also exclude the types of costs that are not normally reimbursed by the applicable regulatory body that oversees the utility rate determinations of the business segment performing the contract. Any reasonable method of estimating such costs, including a statistical sample of contractor costs projected to the total cost universe, is sufficient to meet this requirement. Should any unallowable costs be included in the negotiated price predetermination, the Government shall be entitled to recover the amount of those unallowable costs plus interest from the date of the predetermination until the date of repayment, in accordance with 26 U.S.C. 6621(a)(2).

7. For FFP and FPEPA contracts (where the price adjustment is not based on actual costs incurred), the contract includes a clause that provides the Contracting Officer and his authorized representative access to all relevant contractor records, including but not limited to the accounting practices and cost records in use at the time of the contract award and at the time of the price redetermination.
MEMORANDUM FOR COMMANDER, UNITED SPECIAL OPERATIONS COMMAND (ATTN: ACQUISITION EXECUTIVE)
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DEPUTY ASSISTANT SECRETARY OF THE ARMY (PROCUREMENT)
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DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE (CONTRACTING)
DIRECTORS, DEFENSE AGENCIES
DIRECTORS, DOD FIELD ACTIVITIES

SUBJECT: Class Deviation – Congressional Notification on Significant Contract Terminations

Effective immediately, contracting officers are authorized to deviate from the requirements at DFARS 249.7001 to provide congressional notification prior to executing any contract termination involving a reduction in employment of 100 or more contractor employees for contracts with entities that are other than United States firms, which are performed in Iraq and Afghanistan. For purposes of this deviation, a United States firm is one that is incorporated or legally organized in the United States.

This class deviation remains in effect until incorporated into the DFARS or until rescinded. My point of contact, Mary Overstreet, may be reached at 703-602-0311, or mary.overstreet@osd.mil.

Shay D. Assad
Director, Defense Procurement and Acquisition Policy