

contains policy on the leasing of DoD equipment to defense contractors for demonstration to foreign governments or for display or demonstration at international trade shows and exhibitions. In addition to the leasing of equipment, contractors may obtain related support services from DoD. The Directive provides that the contractor leasing the equipment may not recover the DoD charges associated with the lease, directly or indirectly through any U.S. Government contract, except to the extent chargeable to contracts for foreign military sales. For consistency with the policy in DoD Directive 7230.8, this proposed rule adds DFARS text to address the limitations on the allowability of costs associated with the leasing of Government equipment.

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

B. Regulatory Flexibility Act

DoD does not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule is consistent with existing DoD policy, and applies only in those situations where a contractor chooses to lease military equipment for display or demonstration purposes. Therefore, DoD has not performed an initial regulatory flexibility analysis. DoD invites comments from small businesses and other interested parties. DoD also will consider comments from small entities concerning the affected DFARS subparts in accordance with 5 U.S.C. 610. Such comments should be submitted separately and should cite DFARS Case 2007–D004.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply, because the rule does not impose any information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 225 and 231

Government procurement.

Michele P. Peterson,

Editor, Defense Acquisition Regulations System.

Therefore, DoD proposes to amend 48 CFR parts 225 and 231 as follows:

1. The authority citation for 48 CFR parts 225 and 231 continues to read as follows:

Authority: 41 U.S.C. 421 and 48 CFR Chapter 1.

PART 225—FOREIGN ACQUISITION

2. Section 225.7303–2 is amended by revising paragraph (b) and adding paragraph (e) to read as follows:

225.7303–2 Cost of doing business with a foreign government or an international organization.

* * * * *

(b) Costs not allowable under FAR Part 31 are not allowable in pricing FMS contracts, except as noted in paragraphs (c) and (e) of this subsection.

* * * * *

(e) The limitations on allowability of costs associated with leasing Government equipment, in 231.205–1, do not apply to FMS contracts.

PART 231—CONTRACT COST PRINCIPLES AND PROCEDURES

3. Section 231.205–1 is added to read as follows:

231.205–1 Public relations and advertising costs.

(e) See 225.7303–2(e) for allowability provisions affecting foreign military sales contracts.

(f) Unallowable public relations and advertising costs also include monies paid to the Government associated with the leasing of Government equipment, including lease payments and reimbursement for support services, except for foreign military sales contracts as provided for at 225.7303–2. [FR Doc. E7–23654 Filed 12–6–07; 8:45 am]

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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 228, 231, and 252

RIN 0750–AF72

Defense Federal Acquisition Regulation Supplement; Ground and Flight Risk Clause (DFARS Case 2007–D009)

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

ACTION: Proposed rule with request for comments.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to revise and combine contract clauses addressing assumption of risk for loss under contracts involving the furnishing of aircraft to the Government. The proposed rule establishes requirements

that apply consistently to all contract types.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before February 5, 2008 to be considered in the formation of the final rule.

ADDRESSES: You may submit comments, identified by DFARS Case 2007–D009, using any of the following methods:

Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

E-mail: dfars@osd.mil. Include DFARS Case 2007–D009 in the subject line of the message.

Fax: 703–602–7887.

Mail: Defense Acquisition Regulations System, Attn: Ms. Robin Schulze, OUSD (AT&L) DPAP (CPF), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301–3062.

Hand Delivery/Courier: Defense Acquisition Regulations System, Crystal Square 4, Suite 200A, 241 18th Street, Arlington, VA 22202–3402.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Ms. Robin Schulze, 703–602–0326.

SUPPLEMENTARY INFORMATION

A. Background

The clauses at DFARS 252.228–7001, Ground and Flight Risk, and DFARS 252.228–7002, Aircraft Flight Risk, are presently used in contracts involving the furnishing of aircraft to the Government. The clause at 252.228–7001 is used in negotiated fixed-price contracts, and the clause at 252.228–7002 is used in cost-reimbursement contracts. This proposed rule revises and combines the two clauses into a single ground and flight risk clause, to establish requirements that apply consistently to all contract types. In addition, a new section is added at DFARS 231.205–19 to specifically reference the treatment of insurance costs under the new clause and the existing clause at DFARS 252.217–7012, Liability and Insurance.

The proposed changes include—

- Addition of a requirement for inclusion of the clause in all subcontracts;
- Addition of a statement that the Government property clause is not applicable if the Government withdraws its self-insurance coverage;
- Addition of a statement that commercial insurance costs or self-insurance charges that duplicate the Government's self-insurance are unallowable; and

○ Establishment of a share of loss for the contractor that is the lesser of \$100,000 or 20 percent of the estimated contract cost or price. This is consistent with the contractor share of loss presently specified in the clause at 252.228–7002. The clause at 252.228–7001 presently prescribes a share of loss of \$25,000 for the contractor.

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

B. Regulatory Flexibility Act

DoD has prepared an initial regulatory flexibility analysis consistent with 5 U.S.C. 603. A copy of the analysis may be obtained from the point of contact specified herein. The analysis is summarized as follows:

The objective of the proposed rule is to clearly and consistently address the responsibilities of the Government and the contractor with regard to incidents that may occur under contracts involving the furnishing of aircraft to the Government. The proposed rule will apply to DoD contractors, and their subcontractors, under contracts for the acquisition, development, production, or servicing of aircraft. Excluded are contracts for activities strictly incidental to the normal operations of an aircraft; contracts awarded under FAR Part 12, Acquisition of Commercial Items; and contracts where a non-DoD customer does not assume risk for loss of or damage to the aircraft. The impact on small entities is unknown at this time. However, historically, most contractors engaged in this type of contract have been large business concerns.

DoD invites comments from small businesses and other interested parties. DoD also will consider comments from small entities concerning the affected DFARS subparts in accordance with 5 U.S.C. 610. Such comments should be submitted separately and should cite DFARS Case 2007–D009.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply, because the rule does not impose any information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 228, 231, and 252

Government procurement.

Michele P. Peterson,
Editor, Defense Acquisition Regulations System.

Therefore, DoD proposes to amend 48 CFR parts 228, 231, and 252 as follows:

1. The authority citation for 48 CFR parts 228, 231, and 252 continues to read as follows:

Authority: 41 U.S.C. 421 and 48 CFR Chapter 1.

PART 228—BONDS AND INSURANCE

2. Section 228.370 is amended as follows:

- a. By revising paragraph (b);
- b. By removing paragraph (c); and
- c. By redesignating paragraphs (d) through (f) as paragraphs (c) through (e) respectively. The revised text reads as follows:

228.370 Additional clauses.

* * * * *

(b)(1) Use the clause at 252.228–7001, Ground and Flight Risk, in solicitations and contracts for the acquisition, development, production, modification, maintenance, repair, or overhaul of aircraft, except those solicitations and contracts—

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

(ii) That use FAR Part 12 procedures and are for the development or production of aircraft; or

(iii) For which a non-DoD customer (including a foreign military sales customer) has not agreed to assume the risk for loss or destruction of, or damages to, the aircraft.

(2) The clause at 252.228–7001 may be modified only as follows:

(i) Include a modified definition of “aircraft” if the contract covers other than conventional types of winged aircraft, i.e., helicopters, vertical take-off or landing aircraft, lighter-than-air airships, unmanned aerial vehicles, or other nonconventional aircraft. The modified definition should describe a stage of manufacture comparable to the standard definition.

(ii) Modify “in the open” to include “hush houses,” test hangars and comparable structures, and other designated areas.

(iii) Expressly define the “contractor’s premises” where the aircraft will be located during and for contract performance. These locations may include contract premises which are owned or leased by the contractor or subcontractor, or premises where the contractor or subcontractor is a permittee or licensee or has a right to use, including Government airfields.

(iv) Revise paragraph (e)(3) of the clause to provide Government assumption of risk for transportation by

conveyance on streets or highways when transportation is—

- (A) Limited to the vicinity of contractor premises; and
- (B) Incidental to work performed under the contract.

(3) Follow the procedures at PGI 228.370(b) when using the clause at 252.228–7001.

* * * * *

PART 231—CONTRACT COST PRINCIPLES AND PROCEDURES

3. Section 231.205–19 is added to read as follows:

231.205–19 Insurance and indemnification.

(e) In addition to the cost limitations in FAR 31.205–19(e), self-insurance and purchased insurance costs are subject to the requirements of the clauses at 252.217–7012, Liability and Insurance, and 252.228–7001, Ground and Flight Risk.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

4. Section 252.228–7001 is revised to read as follows:

252.228–7001 Ground and Flight Risk.

As prescribed in 228.370(b), use the following clause:

GROUND AND FLIGHT RISK (XXX 2007)

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

(1) *Aircraft*, unless otherwise provided in the contract Schedule, means—

(i) Aircraft to be delivered to the Government under this contract (either before or after Government acceptance), including complete aircraft and aircraft in the process of being manufactured, disassembled, or reassembled; provided that an engine, portion of a wing or a wing is attached to a fuselage of the aircraft;

(ii) Aircraft, whether in a state of disassembly or reassembly, furnished by the Government to the Contractor under this contract, including all Government property installed, in the process of installation, or temporarily removed; provided that the aircraft and property are not covered by a separate bailment agreement;

(iii) Aircraft furnished by the Contractor under this contract (either before or after Government acceptance); or

(iv) Conventional winged aircraft, as well as helicopters, vertical take-off or landing aircraft, lighter-than-air airships, unmanned aerial vehicles, or other nonconventional aircraft specified in this contract.

(2) *Contractor’s managerial personnel* means the Contractor’s directors, officers, and any of the Contractor’s managers, superintendents, or other equivalent representatives who supervise or direct all or substantially all of the Contractor’s—

- (i) Business;

(ii) Operations at any one plant or separate location at which this contract is performed; or

(iii) Operations at a separate and complete major industrial operation in connection with the performance of this contract.

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

(4) *Flight* means any flight demonstration, flight test, taxi test, or other flight made in the performance of this contract, or for the purpose of safeguarding the aircraft, or previously approved in writing by the Contracting Officer.

(i) For land-based aircraft, "flight" begins with the taxi roll from a flight line on the Contractor's premises and continues until the aircraft has completed the taxi roll in returning to a flight line on the Contractor's premises.

(ii) For seaplanes, "flight" begins with the launching from a ramp on the Contractor's premises and continues until the aircraft has completed its landing run and is beached at a ramp on the Contractor's premises.

(iii) For helicopters, "flight" begins upon engagement of the rotors for the purpose of take-off from the Contractor's premises and continues until the aircraft has returned to the ground on the Contractor's premises and the rotors are disengaged.

(iv) For vertical take-off or landing aircraft, "flight" begins upon disengagement from any launching platform or device on the Contractor's premises and continues until the aircraft has been engaged to any launching platform or device on the Contractor's premises.

(v) All aircraft off the Contractor's premises shall be considered to be in flight when on the ground or water for reasonable periods of time following emergency landings, landings made in performance of this contract, or landings approved in writing by the Contracting Officer.

(5) *Flight crew member* means the pilot, the co-pilot, and, unless otherwise provided in the Schedule, the flight engineer, navigator, and bombardier-navigator when assigned to their respective crew positions for the purpose of conducting any flight on behalf of the Contractor. It also includes any pilot or operator of an unmanned aerial vehicle. If required, a defense systems operator may also be assigned as a flight crew member.

(6) *In the open* means located wholly outside of buildings on the Contractor's premises or other places described in the Schedule as being "in the open." Government-furnished aircraft shall be considered to be located "in the open" at all times while in the Contractor's possession, care, custody, or control.

(7) *Operation* means operations and tests of the aircraft and its installed equipment, accessories, and power plants, while the aircraft is in the open or in motion. The term does not apply to aircraft on any production line or in flight.

(b) *Combined regulation/instruction*. The Contractor shall be bound by the operating procedures contained in the combined

regulation/instruction entitled "Contractor's Flight and Ground Operations" (Air Force Instruction 10-220, Army Regulation 95-20, NAVAIR Instruction 3710.1 (Series), Coast Guard Instruction M13020.3, and Defense Contract Management Agency Instruction 8210.1) in effect on the date of contract award.

(c) *Government as self-insurer*. Subject to the conditions in paragraph (d) of this clause, the Government self-insures and assumes the risk of damage to, or loss or destruction of aircraft "in the open," during "operation," and in "flight," except as may be specifically provided in the Schedule as an exception to this clause. The Contractor shall not be liable to the Government for such damage, loss, or destruction beyond the Contractor's share of loss amount under the Government's self-insurance.

(d) *Conditions for Government's self-insurance*. The Government's assumption of risk for aircraft in the open shall continue unless the Contracting Officer finds that the Contractor has failed to comply with paragraph (b) of this clause, or that the aircraft is in the open under unreasonable conditions, and the Contractor fails to take prompt corrective action.

(1) The Contracting Officer, when finding that the Contractor has failed to comply with paragraph (b) of this clause or that the aircraft is in the open under unreasonable conditions, shall notify the Contractor in writing and shall require the Contractor to make corrections within a reasonable time.

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

(i) If the Contracting Officer later determines that the cited conditions were not unreasonable, an equitable adjustment shall be made in the contract price for any additional costs incurred in correcting the conditions.

(ii) Any dispute as to the unreasonableness of the conditions or the equitable adjustment shall be considered a dispute under the Disputes clause of this contract.

(3) If the Contracting Officer finds that the Contractor failed to act promptly to correct the cited conditions or failed to correct the conditions within a reasonable time, the Contracting Officer may terminate the Government's assumption of risk for any aircraft in the open under the cited conditions. The termination will be effective at 12:01 a.m. on the fifteenth day following the day the written notice is received by the Contractor.

(i) If the Contracting Officer later determines that the Contractor acted promptly to correct the cited conditions or that the time taken by the Contractor was not unreasonable, an equitable adjustment shall be made in the contract price for any additional costs incurred as a result of termination of the Government's assumption of risk.

(ii) Any dispute as to the timeliness of the Contractor's action or the equitable adjustment shall be considered a dispute under the Disputes clause of this contract.

(4) If the Government terminates its assumption of risk pursuant to the terms of this clause—

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

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

(iii) The Government Property clause of this contract is not applicable to the affected aircraft.

(5) The Contractor shall promptly notify the Contracting Officer when unreasonable conditions have been corrected.

(i) If, upon receipt of the Contractor's notice of the correction of the unreasonable conditions, the Government elects to again assume the risk of loss and relieve the Contractor of its liability for damage, loss, or destruction of the aircraft, the Contracting Officer will notify the Contractor of the Contracting Officer's decision to resume the Government's risk of loss. The Contractor shall be entitled to an equitable adjustment in the contract price for any insurance costs extending from the end of the third working day after the Government's receipt of the Contractor's notice of correction until the Contractor is notified that the Government will resume the risk of loss.

(ii) If the Government does not again assume the risk of loss and the unreasonable conditions have been corrected, the Contractor shall be entitled to an equitable adjustment for insurance costs, if any, extending after the third working day after the Government's receipt of the Contractor's notice of correction.

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

(e) *Exclusions from the Government's assumption of risk*. The Government's assumption of risk shall not extend to damage, loss, or destruction of aircraft which—

(1) Results from failure of the Contractor, due to willful misconduct or lack of good faith of any of the Contractor's managerial personnel, to maintain and administer a program for the protection and preservation of aircraft in the open and during operation in accordance with sound industrial practice, including oversight of such a program of a subcontractor;

(2) Is sustained during flight if either the flight or the flight crew members have not been approved in advance of any flight in writing by the Government Flight Representative, who has been authorized in accordance with the combined regulation/instruction entitled "Contractor's Flight and Ground Operations";

(3) Occurs in the course of transportation by rail, or by conveyance on public streets, highways, or waterways, except for Government-furnished property;

(4) Is covered by insurance;
 (5) Consists of wear and tear; deterioration (including rust and corrosion); freezing; or mechanical, structural, or electrical breakdown or failure, unless these are the result of other loss, damage or destruction covered by this clause. (This exclusion does not apply to Government-furnished property if damage consists of reasonable wear and tear or deterioration, or results from inherent vice, e.g., a known condition or design defect in the property); or

(6) Is sustained while the aircraft is being worked on and is a direct result of the work unless such damage, loss, or destruction would be covered by insurance which would have been maintained by the Contractor, but for the Government's assumption of risk.

(f) *Contractor's share of loss and Contractor's deductible under the Government's self-insurance.*

(1) The Contractor assumes the risk of loss and shall be responsible for the Contractor's share of loss under the Government's self-insurance. That share is the lesser of—

(i) The first \$100,000 of loss or damage to aircraft in the open, during operation, or in flight resulting from each separate event, except for reasonable wear and tear and to the extent the loss or damage is caused by negligence of Government personnel; or

(ii) Twenty percent of the estimated price or cost of this contract.

(2) If the Government elects to require that the aircraft be replaced or restored by the Contractor to its condition immediately prior to the damage, the equitable adjustment in the price authorized by paragraph (j) of this clause shall not include the dollar amount of the risk assumed by the Contractor.

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

(i) \$100,000;

(ii) Twenty percent of the estimated price or cost of this contract; or

(iii) The amount of the loss.

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

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

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

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

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

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

(g) *Subcontractor possession or control.*

The Contractor shall not be relieved from liability for damage, loss, or destruction of

aircraft while such aircraft is in the possession or control of its subcontractors, except to the extent that the subcontract, with the written approval of the Contracting Officer, provides for relief from each liability. In the absence of approval, the subcontract shall contain provisions requiring the return of aircraft in as good condition as when received, except for reasonable wear and tear or for the utilization of the property in accordance with the provisions of this contract.

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

(i) *Procedures in the event of loss.*

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

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

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

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

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

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

(j) *Loss prior to delivery.*

(1) If prior to delivery and acceptance by the Government, aircraft is damaged, lost, or destroyed and the Government assumed the risk, the Government shall either—

(i) Require that the aircraft be replaced or restored by the Contractor to the condition immediately prior to the damage, in which event the Contracting Officer will make an equitable adjustment in the contract price and the time for contract performance; or

(ii) Terminate this contract with respect to the aircraft. Notwithstanding the provisions in any other termination clause under this contract, in the event of termination, the Contractor shall be paid the contract price for the aircraft (or, if applicable, any work to be performed on the aircraft) less any amount the Contracting Officer determines—

(A) It would have cost the Contractor to complete the aircraft (or any work to be

performed on the aircraft) together with anticipated profit on uncompleted work; and
 (B) Would be the value of the damaged aircraft or any salvage retained by the Contractor.

(2) The Contracting Officer shall prescribe the manner of disposition of the damaged, lost, or destroyed aircraft, or any parts of the aircraft. If any additional costs of such disposition are incurred by the Contractor, a further equitable adjustment will be made in the amount due the Contractor. Failure of the parties to agree upon termination costs or an equitable adjustment with respect to any aircraft shall be considered a dispute under the Disputes clause of this contract.

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

(l) *Subcontracts.* The Contractor shall incorporate the requirements of this clause, including this paragraph (l), in all subcontracts.

(End of clause)

252.228-7002 [Removed]

5. Section 252.228-7002 is removed and reserved.

252.228-7003 [Amended]

6. Section 252.228-7003 is amended in the introductory text by removing "228.370(d)" and adding in its place "228.370(c)".

252.228-7005 [Amended]

7. Section 252.228-7005 is amended in the introductory text by removing "228.370(e)" and adding in its place "228.370(d)".

252.228-7006 [Amended]

8. Section 252.228-7006 is amended in the introductory text by removing "228.370(f)" and adding in its place "228.370(e)".

[FR Doc. E7-23657 Filed 12-6-07; 8:45 am]

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