

commence program test operations with the new antenna at one half (50%) of the authorized ERP upon installation. If the directional antenna replacement is an EXACT duplicate of the antenna being replaced (i.e., same manufacturer, antenna model number, and measured or computer modeled composite pattern), program tests may commence with the new antenna at the full authorized power upon installation. The licensee must file a modification of license application on FCC Form 302-FM within 10 days of commencing operations with the newly installed antenna, and the license application must contain all of the exhibits required by § 73.1690(c)(2). After review of the modification-of-license application to cover the antenna change, the Commission will issue a letter notifying the applicant whether program test operation at the full authorized power has been approved for the replacement directional antenna.

* * * * *

■ 4. Amend § 73.1690 by revising paragraph (c)(2) to read as follows:

§ 73.1690 Modification of transmission systems.

* * * * *

(c) * * *
(2) Replacement of a directional FM antenna, where the measured or computer modeled composite directional antenna pattern does not exceed the licensed composite directional pattern at any azimuth, where no change in effective radiated power will result, and where compliance with the principal coverage requirements of § 73.315(a) will be maintained by the measured or computer modeled directional pattern. The antenna must be mounted not more than 2 meters above or 4 meters below the authorized values. The modification of license application on Form 302-FM to cover the antenna replacement must contain all of the data in the following sections (i) through (v). Program test operations at one half (50%) power may commence immediately upon installation pursuant to § 73.1620(a)(3). However, if the replacement directional antenna is an exact replacement (i.e., no change in manufacturer, antenna model number, AND measured or computer modeled composite antenna pattern), program test operations may commence immediately upon installation at the full authorized power.

(i) A measured or computer modeled directional antenna pattern and tabulation on the antenna manufacturer's letterhead showing both the horizontally and vertically polarized radiation components and

demonstrating that neither of the components exceeds the authorized composite antenna pattern along any azimuth.

(ii) Contour protection stations authorized pursuant to § 73.215 or 73.509 must attach a showing that the RMS (root mean square) of the composite measured or computer modeled directional antenna pattern is 85% or more of the RMS of the authorized composite antenna pattern. See § 73.316(c)(9). If this requirement cannot be met, the licensee may include new relative field values with the license application to reduce the authorized composite antenna pattern so as to bring the measured or computer modeled composite antenna pattern into compliance with the 85 percent requirement.

(iii) A description from the manufacturer as to the procedures used to measure or computer model the directional antenna pattern. The antenna measurements or computer modeling must be performed with the antenna mounted on a tower, tower section, or scale model equivalent to that on which the antenna will be permanently mounted, and the tower or tower section must include transmission lines, ladders, conduits, other antennas, and any other installations which may affect the measured or computer modeled directional pattern. See § 73.316(c)(2)(iv) for details of the showings required in connection with an application filed for a station utilizing an FM directional antenna.

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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 228, 242, and 252

[Docket DARS-2021-0024]

RIN 0750-AL13

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

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

ACTION: Proposed rule.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to revise the requirements related to the assumption of risk associated with

aircraft under DoD contracts. The current requirements are outdated and in need of revision to clarify applicability due to numerous changes in aircraft contract situations and the emergence of contracts for small, unmanned aircraft.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before January 31, 2022, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2020-D027, using any of the following methods:

○ *Federal eRulemaking Portal:* <https://www.regulations.gov>. Search for "DFARS Case 2020-D027"; select "Comment" and follow the instructions to submit a comment. Please include "DFARS Case 2020-D027" on any attached document.

○ *Email:* osd.dfars@mail.mil. Include DFARS Case 2020-D027 in the subject line of the message.

Comments received generally will be posted without change to <https://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check <https://www.regulations.gov>, approximately two to three days after submission to verify posting.

FOR FURTHER INFORMATION CONTACT: Mr. David E. Johnson, telephone 571-372-6115.

SUPPLEMENTARY INFORMATION:

I. Background

The contract clause at DFARS 252.228-7001, Ground and Flight Risk, was established to reduce DoD acquisition costs by relieving contractors from the responsibility to obtain (and bill the Government for) commercial insurance to cover the loss of aircraft or damage to Government-owned aircraft in excess of the first \$100,000 of loss or damage. The current clause requires the contractor to be responsible for the first \$100,000 of loss or damage; and, when in excess of \$100,000, the Government assumes the risk of loss of or damage to its aircraft. The clause is included (with rare exceptions) in solicitations and contracts for the acquisition, development, production, modification, maintenance, repair, flight, or overhaul of aircraft as prescribed in DFARS 228.370.

Through the clause, contractors are bound by the operating procedures contained in the combined regulation/instruction entitled "Contractor's Flight and Ground Operations" (Air Force Instruction 10-220_IP, Army Regulation

95–20, Naval Air Systems Command (NAVAIR) Instruction 3710.1 (Series), Coast Guard Instruction M13020.3 (Series), and Defense Contract Management Agency Instruction 8210.1 (Series)) in effect on the date of contract award. The combined regulation/instruction is used to mitigate the risk assumed by the Government through the clause, which was last updated in June 2010.

II. Discussion and Analysis

This proposed rule incorporates language in DFARS subpart 228.3 to update circumstances in which the contract clause at DFARS 252.228–7001 is to be used. The current text at DFARS 228.370 does not adequately address contractor-owned aircraft and exceptions to the use of the clause. The proposed text at 228.3 does not require use of the clause in solicitations and contracts for which a non-DoD customer allows the use of commercial insurance or other self-insurance, under which the aircraft are classified as certain unmanned aircraft systems, or under which the aircraft will be dismantled and removed from inventory. The proposed change at DFARS 242.302 provides guidance on the DoD policy for maintaining surveillance of aircraft flight and ground operations.

The changes proposed to DFARS clause 252.228–7001 remove confusing language and definitions and reflect changes in costs associated with evolving technology, such as relatively inexpensive drones. For example, the term “in the open” is replaced with the more common insurance term “covered aircraft.” The proposed language clarifies the difference between “workmanship errors” and “damage.” The update also clarifies the applicability of liability coverage for subcontracts, including those for commercial items.

Additionally, due to the wide range that has developed in aircraft unit prices and the range of overall contract cost based on the variety of services contractors may perform, the proposed rule adds reasonable alternatives for calculating the contractor’s cost share in the event of a mishap to a covered aircraft. Specifically, except for loss or damage caused by negligence of Government personnel, the contractor will be responsible only for the least of the following 3 alternatives: (1) \$200,000; (2) 20 percent of the price or estimated acquisition cost of affected aircraft; or (3) 20 percent of the price or estimated cost of the contract, task order, or delivery order. In other words, if 20 percent of the cost of an inexpensive aircraft (*e.g.*, a drone) or 20

percent of the price or estimated cost of a relatively inexpensive contract is less than \$200,000, the contractor will pay a lesser cost share.

The proposed rule includes a new contract clause at DFARS 252.228–70XX, Public Aircraft and State Aircraft Operations—Liability, which is to be used when contracted aircraft perform public or state aircraft operations and the contract does not include DFARS clause 252.228–7001. The new clause provides definitions for terms related to public and state aircraft operations, requires compliance with the combined regulation/instruction for flight operations, and defines contractor liability for operations for contract performance conducted as public or state aircraft operations.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

This rule proposes to revise the clause at DFARS 252.228–7001, Ground and Flight Risk, and to create one new clause at DFARS 252.228–70XX, Public Aircraft and State Aircraft Operations—Liability, for use in situations where contracted aircraft perform public aircraft operations or state aircraft operations and the clause at DFARS 252.228–7001 is not used. DoD intends to apply both clauses to contracts below the simplified acquisition threshold; doing so allows for the inclusion of lower value items in affected contracts, while preventing contractors who have contracts valued below \$200,000 from being liable for the entirety of the loss or damages. This burden on these smaller purchases is not commensurate with those of the larger dollar value contracts and, therefore, discourages the contractors with lower value contracts from working with the Government.

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

regulation/instruction, which provides the terms and conditions for the Government’s self-insurance.

IV. Expected Impact of the Rule

This rule is not expected to have a significant impact on the Government or industry. The rule updates and expands procedures and guidelines on use of DFARS clause 252.228–7001. The change in the calculation of the contractor’s share of loss is viewed as a positive incentive in reducing the magnitude of the risk of loss for contractors. Although the dollar amount for contractor liability is increased from \$100,000 to \$200,000 in this proposed rule, the addition of reasonable alternatives that recognize the low cost of aircraft, such as drones, will mean that a contractor’s share of loss may be much lower. The rule also provides a new clause 252.228–70XX, Public Aircraft and State Aircraft Operations—Liability, to use when conditions for use of 252.228–7001 are not met, but the acquisition involves public aircraft operations or state aircraft operations. It is expected that contract clause 252.228–70XX will be used very infrequently, fewer than 10 times annually.

V. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

VI. Congressional Review Act

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

VII. Regulatory Flexibility Act

DoD does not expect this proposed 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 primarily provides updates and clarifications. As noted in Section IV of this preamble, the change in the calculation of the contractor's share of loss, increased from \$100,000 to \$200,000 in this clause, is viewed as a positive incentive in reducing the magnitude of the risk of loss for contractors. However, an initial regulatory flexibility analysis has been prepared and is summarized as follows:

DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to update the ground and flight risk policy and associated contract clause at DFARS 252.228–7001, Ground and Flight Risk. The language is outdated and needs revision to clarify applicability due to numerous changes in aircraft contract situations and the emergence of contracts for small, unmanned aircraft. These updates also apply to contracts involving contractor-owned and operated aircraft. The proposed changes include the following: (1) Revising the clause prescription to clarify when use of the clause at DFARS 252.228–7001 is mandatory; (2) updating the clause to reflect the evolution of aircraft technology; (3) creating a new clause to apply to contractor-owned aircraft operated as public aircraft or in state aircraft status; and (4) clarifying how DoD will maintain surveillance of aircraft flight and ground operations during contract performance.

The objective of the rule is to update the ground and flight risk policy and associated clause. The legal basis for the rule is 41 U.S.C. 1707.

The proposed rule will apply to all small entities that will be awarded contracts for the acquisition, development, production, modification, maintenance, repair, flight, or overhaul of aircraft. According to data from the Federal Procurement Data System for fiscal years 2017 through 2019, DoD made approximately 6,287 awards per year on average for these types of acquisitions for a total of 18,861 awards. Approximately 7,757 of these awards were made to 2,185 unique small entities over the 3 fiscal years.

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

The rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no known, significant, alternative approaches to the proposed rule that would meet the objectives.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C 610 (DFARS Case 2020–D027), in correspondence.

VIII. Paperwork Reduction Act

The rule does not contain any new information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35) or impact any existing information collection requirements.

List of Subjects in 48 CFR Parts 228, 242, and 252

Government procurement.

Jennifer D. Johnson,
Editor/Publisher, Defense Acquisition Regulations System.

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

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

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

PART 228—BONDS AND INSURANCE

228.370 [Redesignated as 228.371]

■ 2. Redesignate section 228.370 as section 228.371.

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

228.370 Ground and flight risk.

228.370–1 Definitions.

As used in this section—

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

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

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

(2) An aircraft owned by the Government and operated by any person for purposes related to crew training, equipment development, or demonstration, except as provided in paragraph (7) of this definition.

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

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

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

(i) Is within the United States territorial airspace;

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

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

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

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

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

State aircraft means an aircraft operated by the Government for sovereign, noncommercial purposes such as military, customs, and police services. Military aircraft are afforded status as state aircraft. In very rare circumstances, DoD-contracted aircraft may be designated, in writing, by a responsible Government official pursuant to DoD Directive 4500.54E, DoD Foreign Clearance Program, to be operated in state aircraft status, and States may choose to treat them as

deemed state aircraft when they are operating under a Government contract.

228.370–2 General.

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

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

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

(d) *Insurance.* The clause at 252.228–7001, Ground and Flight Risk, reduces acquisition costs by eliminating the costs of insurance to incentivize the contractor to perform safe and effective operations. For this reason, 252.228–7001(f) specifies that insurance premium costs are unallowable. Additionally, 252.228–7001(d)(4) provides that the Government's assumption of risk does not apply where the loss or damage is covered by available insurance.

(e) *Damage to Government aircraft.* (1) Whenever damage to Government

aircraft is reported, particularly when the cost of repair exceeds the contractor's share of loss provisions, the contracting officer shall make a liability determination in accordance with the applicable version of the combined regulation/instruction entitled "Contractor's Flight and Ground Operations" (Air Force Instruction 10–220_IP, Army Regulation 95–20, NAVAIR Instruction 3710.1 (Series), Coast Guard Instruction M13020.3 (Series), and Defense Contract Management Agency Instruction 8210.1 (Series)). Each incident should be evaluated on its own merits. The contracting officer should seek input from the Government flight representative (see 252.228–7001) and legal counsel, as needed.

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

(3) See PGI 228.370–2(e) for an example of workmanship error or damage.

■ 4. Amend newly redesignated section 228.371 by—

- a. Revising paragraph (b);
- b. Redesignating paragraphs (c), (d), and (e) as paragraphs (d), (e), and (f); and
- c. Adding a new paragraph (c).

The revision and addition read as follows:

228.371 Additional clauses.

* * * * *

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

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

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

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

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

(iv) For maintenance (ground operations only) of commercial derivative aircraft with an FAA certificate of airworthiness maintained to FAA standards. Performance under the exception in this paragraph (b)(1)(iv) must be at a licensed and certified FAA

repair station rated for the type of aircraft and work to be maintained;

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

(vi) Under which the aircraft are classified as Group 1 or 2 unmanned aircraft systems per DoD Instruction (DoDI) 6055.07, Mishap Notification, Investigation, Reporting, and Record Keeping, and the purchase price of the air vehicle, including installed Government-furnished equipment, is below the cost threshold for a Class C mishap per DoDI 6055.07; or

(2) Involving aircraft not owned by or to be delivered to the Government, only if the contracting officer decides that it is in the best interest of the Government. Potential factors for contracting officers to consider when deciding which course of action is in the best interest of the Government include, but are not limited to, whether—

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

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

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

(c) Use the clause at 252.228–70XX, Public Aircraft and State Aircraft Operations—Liability, in solicitations and contracts that do not include the clause at 252.228–7001 but involve public aircraft operations or state aircraft operations.

* * * * *

PART 242—CONTRACT ADMINISTRATION AND AUDIT SERVICES

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

242.302 Contract administration functions.

(a) * * *

(56) Within DoD, maintaining surveillance of aircraft flight and ground operations is accomplished by incorporating into the contract, task order, or delivery order the requirements of the applicable version of the combined regulation/instruction entitled "Contractor's Flight and Ground Operations" (Air Force Instruction 10–220_IP, Army Regulation 95–20, NAVAIR Instruction 3710.1 (Series), Coast Guard Instruction M13020.3 (Series), and Defense Contract Management Agency Instruction 8210.1 (Series)). See PGI 242.302(a)(56).

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PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

252.228–7000 [Amended]

■ 6. Amend section 252.228–7000 introductory text by removing “228.370(a)” and adding “228.371(a)” in its place.

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

252.228–7001 Ground and Flight Risk.

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

GROUND AND FLIGHT RISK (DATE)

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

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

(1) Any item, other than a rocket or missile, intended for flight (e.g., fixed-winged aircraft, blended wing/lifting bodies, helicopters, vertical take-off or landing aircraft, lighter-than-air airships, and unmanned aerial vehicles);

(2) Aircraft furnished by the Government to the Contractor under this contract while in the Contractor's possession, care, custody, or control regardless of their location, state of disassembly or reassembly; items removed from—

(i) A particular aircraft already in the Government inventory retain their status as covered aircraft, provided they are intended for reinstallation on that particular aircraft; and

(ii) An aircraft that are not intended for reinstallation on that aircraft lose their status as covered aircraft;

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

(i) New production aircraft become covered aircraft at a stage of manufacture or production (similar to the point of manufacture in a conventional aircraft) when a wing, portion of a wing, or engine is attached to a fuselage.

(ii) Blended wing/lifting bodies become covered aircraft at a stage of manufacture or production when the center portion and a lifting surface become attached; and

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

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

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

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

(3) A separate and complete major industrial operation.

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

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

Flight means any flight approved in writing by the Government flight representative, to include taxi test made in the performance of this contract, or flight for the purpose of safeguarding the aircraft.

Workmanship errors mean damage to the aircraft that is the result of a task, operation, or action that was originally planned or intended, the end result of which is a noncompliance with contract specifications.

(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_IP, Army Regulation 95–20, NAVAIR Instruction 3710.1 (Series), Coast Guard Instruction M13020.3 (Series), and Defense Contract Management Agency Instruction 8210.1 (Series)) in effect on the date of contract award. Compliance with the combined regulation/instruction is required from the time of contract award throughout the period of performance of the contract, regardless of the Government's assumption of risk under the contract.

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

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

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

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

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

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

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

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

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

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

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

(4) Is covered by insurance;

(5) Occurs after the Contracting Officer has, in writing, revoked the Government's assumption of risk in accordance with paragraph (e)(1) of this clause;

(6) Is sustained due to workmanship errors; or

(7) Is found by the Contracting Officer to be the result of exposure to unreasonable conditions. The Contracting Officer will consider factors including but not limited to the following: Lack of adequate hangar fire suppression or firefighting vehicles, failure to provide adequate procedures to the GFR, or systemic failure to comply with approved procedures.

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

(1) The Contracting Officer, when finding that Contractor managerial personnel have failed to comply with paragraph (b) of this clause, or finding the covered aircraft are exposed to unreasonable conditions, will notify the Contractor in writing and will require the Contractor to comply with contract requirements. This notice will state the timeframe to correct the noncompliance or conditions. If the Contracting Officer finds that the Contractor failed to correct the cited noncompliance or conditions within the specified timeframe, the Contracting Officer will issue a Notice of Revocation of the Government's assumption of risk for any covered aircraft.

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

(3) If the Contracting Officer issues a Notice of Revocation pursuant to the terms of this clause—

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

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

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

(4) The Contractor shall promptly notify the Contracting Officer when the

noncompliance or cited conditions have been corrected. Within 3 days of receipt of the Contractor's Notice of Correction, the Contracting Officer will notify the Contractor whether the Government will resume risk of loss. The Contracting Officer will determine that the noncompliance or cited conditions have been corrected prior to resuming assumption of risk.

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

(6) Any disputes regarding the Contracting Officer's Notice of Revocation shall be subject to FAR clause 52.233-1, Disputes.

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

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

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

- (i) The damaged, lost, or destroyed aircraft;
- (ii) The time and origin of the damage, loss, or destruction;
- (iii) All known interests in commingled property of which aircraft are a part; and
- (iv) The insurance, if any, covering the interest in commingled property.

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

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

- (i) Replaced;
 - (ii) Repaired to the condition immediately prior to the damage; or
 - (iii) Considered beyond economic repair.
- The Contracting Officer will decide whether further actions are required under the contract.

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

- (i) Repaired; or
 - (ii) Considered beyond economic repair.
- The Contracting Officer will decide further actions required under the contract.

(5) The Contractor may submit a request for equitable adjustment for expenditures made

in performing the obligations under this paragraph (g).

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

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

- (i) \$200,000;
- (ii) 20 percent of the price or estimated acquisition cost of affected aircraft; or
- (iii) 20 percent of the price or estimated cost of the contract, task order, or delivery order.

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

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

- (i) \$200,000;
- (ii) 20 percent of the price or estimated acquisition cost of affected aircraft; or
- (iii) 20 percent of the price or estimated cost of the contract, task order, or delivery order.

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

- (i) The Contractor's share of loss under the Government's self-insurance;
- (ii) The costs of the Contractor's self-insurance;
- (iii) The deductible for any Contractor-purchased insurance;
- (iv) Insurance premiums paid for Contractor-purchased insurance; and
- (v) Costs associated with determining, litigating, and defending against the Contractor's liability.

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

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

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

(1) The Contractor shall not include paragraph (f) in subcontracts for commercial items; and

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

(End of clause)

252.228-7003 [Amended]

■ 7. Amend section 252.228-7003 introductory text by removing "228.370(c)" and adding "228.371(d)" in its place.

252.228-7005 [Amended]

■ 8. Amend section 252.228-7005 introductory text by removing "228.370(d)" and adding "228.371(e)" in its place.

252.228-7006 [Amended]

■ 9. Amend section 252.228-7006 introductory text by removing "228.370(e)" and adding "228.371(f)" in its place.

■ 10. Add section 252.228-70XX to read as follows:

252.228-70XX Public Aircraft and State Aircraft Operations—Liability.

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

Public Aircraft and State Aircraft Operations—Liability (Date)

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

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

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

(2) An aircraft owned by the Government and operated by any person for purposes related to crew training, equipment development, or demonstration, except as provided in paragraph (7) of this definition.

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

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

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

(i) Is within the United States territorial airspace;

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

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

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

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

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

State aircraft means an aircraft operated by the Government for sovereign,

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

(b) *Combined regulation/instruction*. Upon award, for contract performance to be conducted as a public aircraft operation, the Contractor shall be bound by the operating procedures contained in the combined regulation/instruction entitled "Contractor's Flight and Ground Operations" (Air Force Instruction 10-220_IP, Army Regulation 95-20, NAVAIR Instruction 3710.1 (Series), Coast Guard Instruction M13020.3 (Series), and Defense Contract Management Agency Instruction 8210.1 (Series)) in effect on the date of contract award.

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

(1) The Contractor assumes responsibility for all damage or injury to persons or property, including the Contractor's employees and property and Government

personnel and property, occasioned through the use, maintenance, and operation of the Contractor's aircraft or other equipment by, or the action of, the Contractor or the Contractor's employees and agents.

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

(3) The Contractor shall maintain workers' compensation and other legally required insurance with respect to the Contractor's own employees and agents.

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

(End of clause)

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