

(b) Use the basic or the alternate of the clause at 252.235–7003, Frequency Authorization, in solicitations and contracts for developing, producing, constructing, testing, or operating a device requiring a frequency authorization.

(1) Use the basic clause if agency procedures do not authorize the use of DD Form 1494, Application for Equipment Frequency Allocation, to obtain radio frequency authorization.

(2) Use the alternate I clause if agency procedures authorize the use of DD Form 1494, Application for Equipment Frequency Allocation, to obtain frequency authorization.

\* \* \* \* \*

## PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

- 3. Amend section 252.235–7003 by—
- a. Revising the introductory text, clause title and date; and
- b. Revising Alternate I.

### 252.235–7003 Frequency authorization.

As prescribed in 235.072(b), use one of the following clauses:

*Basic.* As prescribed at 235.072(b)(1), use the following clause.

#### FREQUENCY AUTHORIZATION—BASIC (MAR 2014)

\* \* \* \* \*

*Alternate I.* As prescribed at 235.072(b)(2), use the following clause, which uses a different paragraph (c) than the basic clause.

#### FREQUENCY AUTHORIZATION—ALTERNATE I (MAR 2014)

(a) The Contractor shall obtain authorization for radio frequencies required in support of this contract.

(b) For any experimental, developmental, or operational equipment for which the appropriate frequency allocation has not been made, the Contractor shall provide the technical operating characteristics of the proposed electromagnetic radiating device to the Contracting Officer during the initial planning, experimental, or developmental phase of contract performance.

(c) The Contractor shall use DD Form 1494, Application for Equipment Frequency Allocation, to obtain radio frequency authorization.

(d) The Contractor shall include this clause, including this paragraph (d), in all subcontracts requiring the development, production, construction, testing, or operation of a device for which a radio frequency authorization is required.

(End of clause)

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## DEPARTMENT OF DEFENSE

### Defense Acquisition Regulations System

#### 48 CFR Parts 246 and 252

RIN 0750–AH95

#### Defense Federal Acquisition Regulation Supplement: Clauses With Alternates—Quality Assurance (DFARS Case 2013–D004)

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

**ACTION:** Final rule.

**SUMMARY:** DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to create an overarching prescription for a quality assurance-related clause with two alternates. The rule also includes separate prescriptions for the basic and alternate clauses and includes the full text of each alternate.

**DATES:** Effective March 28, 2014.

**FOR FURTHER INFORMATION CONTACT:** Ms. Annette Gray, telephone 571–372–6093.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

DoD published a proposed rule in the *Federal Register* at 78 FR 48407 on August 8, 2013, to revise the presentation of the DFARS part 246 clause with alternates and their prescriptions.

##### II. Discussion

This final rule addresses the single DFARS part 246 clause that has alternates. The affected clause is 252.246–7001, Warranty of Data, with two alternates. The naming convention results in new clause titles: Warranty of Data—Basic, Warranty of Data—Alternate I, and Warranty of Data—Alternate II.

No public comments were submitted in response to the proposed rule. Minor editorial changes were made in the final rule to standardize language used for the clause prescriptions and prefaces to provide uniform arrangement in the regulations.

##### III. 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. This rule is not a major rule under 5 U.S.C. 804.

#### IV. Regulatory Flexibility Act

A final regulatory flexibility analysis has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, and is summarized as follows.

This final rule amends the Defense Federal Acquisition Regulation Supplement (DFARS) to (1) create an umbrella prescription for the elements common to the basic clause and both alternates, (2) create a specific prescription for the basic clause and each alternate clause that address only the requirements for their use of the alternate so that it is clear which is appropriate in a specific procurement, and (3) include the full text of the clause alternate. The inclusion of the full text of the alternate clause makes the terms clearer to offerors, and contractors, as well as to DoD contracting officers. The prescriptions are not revised in any way to change when the clause is applicable to offerors, contractors, or subcontractors.

No comments were received from the public in response to the initial regulatory flexibility analysis. The Chief Counsel for Advocacy of the Small Business Administration did not submit any comments in response to the rule.

Potential offerors, including small businesses, may be affected by this rule by seeing an unfamiliar format for clause alternates in solicitations and contracts issued by DoD contracting activities. According to the Federal Procurement Data System, in Fiscal Year 2012, DoD made approximately 270,000 contract awards (not including modification and orders) that exceeded the micro-purchase threshold, of which approximately 180,000 (67%) were awarded to small businesses. It is unknown how many of these contracts were awarded that included an alternate to a DFARS provision or clause. Nothing substantive will change in solicitations or contracts for potential offerors, and only the appearance of how clause alternates are presented in the solicitations and contracts will be changed. This rule may result in potential offerors, including small businesses, expending more time to become familiar with and to understand the new format of the clause alternates in full text contained in contracts issued

by any DoD contracting activity. The rule also anticipates saving contractors time by making all paragraph substitutions from the basic version of the clause, and not requiring the contractors to read inapplicable paragraphs contained in the basic version of the clause where alternates are also included in the solicitations and contracts. The overall burden caused by this rule is expected to be negligible and will not be any greater on small businesses than it is on large businesses.

This rule does not add any new information collection requirements. No alternatives were identified that will accomplish the objectives of the rule. This rule should not result in any significant economic impact on small entities.

#### V. Paperwork Reduction Act

The rule does not contain any 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).

#### List of Subjects in 48 CFR Parts 246 and 252

Government procurement.

#### Manuel Quinones,

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 246 and 252 are amended as follows:

■ 1. The authority citation for 48 CFR parts 246 and 252 continues to read as follows:

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

#### PART 246—QUALITY ASSURANCE

■ 2. Amend section 246.710 by—  
 ■ a. Removing paragraphs (2) and (3);  
 ■ b. Redesignating paragraphs (4) and (5) as paragraphs (2) and (3), respectively; and  
 ■ c. Revising paragraph (1) to read as follows:

##### 246.710 Contract clauses.

(1) Use a clause substantially the same as the basic or one of the alternates of the clause at 252.246–7001, Warranty of Data, in solicitations and contracts that include the clause at 252.227–7013, Rights in Technical Data and Computer Software, when there is a need for greater protection or period of liability than provided by the inspection and warranty clauses prescribed in FAR part 46.

(i) Use the basic clause in solicitations and contracts that are not firm-fixed price or fixed-price incentive.

(ii) Use alternate in fixed-price-incentive solicitations and contracts.

(iii) Use alternate II in firm-fixed-price solicitations and contracts.

\* \* \* \* \*

#### PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 3. Amend section 252.246–7001 by—

■ a. Revising the introductory text, clause title and date; and

■ b. Revising Alternate I and Alternate II.

Revised text reads as follows:

##### 252.246–7001 Warranty of data.

As prescribed in 246.710(1), use one of the following clauses:

*Basic.* As prescribed at 246.710(1)(i), use the following clause.

##### WARRANTY OF DATA—BASIC (MAR 2014)

\* \* \* \* \*

*Alternate I.* As prescribed in 246.710(1)(ii), use the following clause, which uses a different paragraph (d)(3) than the basic clause.

##### WARRANTY OF DATA—ALTERNATE I (MAR 2014)

(a) *Definition.* *Technical data* has the same meaning as given in the clause in this contract entitled “Rights in Technical Data and Computer Software.”

(b) *Warranty.* Notwithstanding inspection and acceptance by the Government of technical data furnished under this contract, and notwithstanding any provision of this contract concerning the conclusiveness of acceptance, the Contractor warrants that all technical data delivered under this contract will at the time of delivery conform with the specifications and all other requirements of this contract. The warranty period shall extend for three years after completion of the delivery of the line item of data (as identified in DD Form 1423, Contract Data Requirements List) of which the data forms a part; or any longer period specified in the contract.

(c) *Contractor Notification.* The Contractor agrees to notify the Contracting Officer in writing immediately of any breach of the above warranty which the Contractor discovers within the warranty period.

(d) *Remedies.* The following remedies shall apply to all breaches of the warranty, whether the Contractor notifies the Contracting Officer in accordance with paragraph (c) of this clause or if the Government notifies the Contractor of the breach in writing within the warranty period:

(1) Within a reasonable time after such notification, the Contracting Officer may—

(i) By written notice, direct the Contractor to correct or replace at the Contractor's expense the nonconforming technical data promptly; or

(ii) If the Contracting Officer determines that the Government no longer has a requirement for correction or replacement of

the data, or that the data can be more reasonably corrected by the Government, inform the Contractor by written notice that the Government elects a price or fee adjustment instead of correction or replacement.

(2) If the Contractor refuses or fails to comply with a direction under paragraph (d)(1)(i) of this clause, the Contracting Officer may, within a reasonable time of the refusal or failure—

(i) By contract or otherwise, correct or replace the nonconforming technical data and charge the cost to the Contractor; or

(ii) Elect a price or fee adjustment instead of correction or replacement.]

(3) In addition to the remedies under paragraphs (d)(1) and (2) of this clause, the Contractor shall be liable to the Government for all damages to the Government as a result of the breach of warranty.

(i) The additional liability under paragraph (d)(3) of this clause shall not exceed 75 percent of the target profit.

(ii) If the breach of the warranty is with respect to the data supplied by an equipment subcontractor, the limit of the Contractor's liability shall be—

(A) Ten percent of the total subcontract price in a firm-fixed-price subcontract;

(B) Seventy-five percent of the total subcontract fee in a cost-plus-fixed-fee or cost-plus-award-fee subcontract; or

(C) Seventy-five percent of the total subcontract target profit or fee in a fixed-price-incentive or cost-plus-incentive subcontract.

(iii) Damages due the Government under the provisions of this warranty are not an allowable cost.

(iv) The additional liability in paragraph (d)(3) of this clause shall not apply—

(A) With respect to the requirements for product drawings and associated lists, special inspection equipment (SIE) drawings and associated lists, special tooling drawings and associated lists, SIE operating instructions, SIE descriptive documentation, and SIE calibration procedures under MIL–T–31000, General Specification for Technical Data Packages, Amendment 1, or MIL–T–47500, General Specification for Technical Data Packages, Supp 1, or drawings and associated lists under level 2 or level 3 of MIL–D–1000A, Engineering and Associated Data Drawings, or DoD–D–1000B, Engineering and Associated Lists Drawings (Inactive for New Design) Amendment 4, Notice 1; or drawings and associated lists under category E or I of MIL–D–1000, Engineering and Associated Lists Drawings, provided that the data furnished by the Contractor was current, accurate at time of submission, and did not involve a significant omission of data necessary to comply with the requirements; or

(B) To defects the Contractor discovers and gives written notice to the Government before the Government discovers the error.

(e) The provisions of this clause apply anew to that portion of any corrected or replaced technical data furnished to the Government under paragraph (d)(1)(i) of this clause.

(End of clause)

*Alternate II.* As prescribed at 246.710(1)(iii), use the following clause, which uses a different paragraph (d)(3) than the basic clause.

**WARRANTY OF DATA—ALTERNATE II (MAR 2014)**

(a) *Definition.* *Technical data* has the same meaning as given in the clause in this contract entitled “Rights in Technical Data and Computer Software.”

(b) *Warranty.* Notwithstanding inspection and acceptance by the Government of technical data furnished under this contract, and notwithstanding any provision of this contract concerning the conclusiveness of acceptance, the Contractor warrants that all technical data delivered under this contract will at the time of delivery conform with the specifications and all other requirements of this contract. The warranty period shall extend for three years after completion of the delivery of the line item of data (as identified in DD Form 1423, Contract Data Requirements List) of which the data forms a part; or any longer period specified in the contract.

(c) *Contractor Notification.* The Contractor agrees to notify the Contracting Officer in writing immediately of any breach of the above warranty which the Contractor discovers within the warranty period.

(d) *Remedies.* The following remedies shall apply to all breaches of the warranty, whether the Contractor notifies the Contracting Officer in accordance with paragraph (c) of this clause or if the Government notifies the Contractor of the breach in writing within the warranty period:

(1) Within a reasonable time after such notification, the Contracting Officer may—

(i) By written notice, direct the Contractor to correct or replace at the Contractor’s expense the nonconforming technical data promptly; or

(ii) If the Contracting Officer determines that the Government no longer has a requirement for correction or replacement of

the data, or that the data can be more reasonably corrected by the Government, inform the Contractor by written notice that the Government elects a price or fee adjustment instead of correction or replacement.

(2) If the Contractor refuses or fails to comply with a direction under paragraph (d)(1)(i) of this clause, the Contracting Officer may, within a reasonable time of the refusal or failure—

(i) By contract or otherwise, correct or replace the nonconforming technical data and charge the cost to the Contractor; or

(ii) Elect a price or fee adjustment instead of correction or replacement.

(3) In addition to the remedies under paragraphs (d)(1) and (2) of this clause, the Contractor shall be liable to the Government for all damages to the Government as a result of the breach of the warranty.

(i) The additional liability under paragraph (d)(3) of this clause shall not exceed ten percent of the total contract price.

(ii) If the breach of the warranty is with respect to the data supplied by an equipment subcontractor, the limit of the Contractor’s liability shall be—

(A) Ten percent of the total subcontract price in a firm[-]fixed[-]price subcontract;

(B) Seventy-five percent of the total subcontract fee in a cost-plus-fixed-fee or cost-plus-award-fee subcontract; or

(C) Seventy-five percent of the total subcontract target profit or fee in a fixed-price-incentive or cost-plus-incentive subcontract.

(iii) The additional liability specified in paragraph (d)(3) of this clause shall not apply—

(A) With respect to the requirements for product drawings and associated lists, special inspection equipment (SIE) drawings and associated lists, special tooling drawings and associated lists, SIE operating instructions, SIE descriptive documentation, and SIE calibration procedures under MIL-T-31000, General Specification for Technical Data Packages, Amendment 1, or MIL-T-

47500, General Specification for Technical Data Packages, Supp 1, or drawings and associated lists under level 2 or level 3 of MIL-D-1000A, Engineering and Associated Data Drawings, or DoD-D-1000B, Engineering and Associated Lists Drawings (Inactive for New Design) Amendment 4, Notice 1; or drawings and associated lists under category E or I of MIL-D-1000, Engineering and Associated Lists Drawings, provided that the data furnished by the Contractor was current, accurate at time of submission, and did not involve a significant omission of data necessary to comply with the requirements; or

(B) To defects the Contractor discovers and gives written notice to the Government before the Government discovers the error.

(e) The provisions of this clause apply anew to that portion of any corrected or replaced technical data furnished to the Government under paragraph (d)(1)(i) of this clause.

(End of clause)

**252.246-7002 [Amended]**

■ 4. Amend section 252.246-7002 introductory text by removing “246.710(4)” and adding “246.710(2)” in its place.

**252.246-7005 [Amended]**

■ 5. Amend section 252.246-7005 introductory text by removing “246.710(5)(i)(A)” and adding “246.710(3)(i)(A)” in its place.

**252.246-7006 [Amended]**

■ 6. Amend section 252.246-7006 introductory text by removing “246.710(5)(i)(B)” and adding “246.710(3)(i)(B)” in its place.

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