

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 45 and 52**

[FAR Case 2002–015]

RIN 9000–AJ99

**Federal Acquisition Regulation;
Government Property Rental and
Special Tooling**

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

ACTION: Proposed rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are proposing to amend the Federal Acquisition Regulation (FAR) by incorporating the Class Deviations regarding use and charges and special tooling, both of which have been applicable to the Department of Defense since 1998. Both deviations are appropriate for application across the Federal Government. The change clarifies the basis for determining the rental charges for the use of Government property and is intended to promote the dual use of such property. It also revises the special tooling clause and addresses the issue of title to special tooling.

DATES: Interested parties should submit comments in writing on or before September 13, 2004 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAR case 2002–015 by any of the following methods:

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

- Agency Web Site: <http://www.acqnet.gov/far/ProposedRules/proposed.htm>. Click on the FAR case number to submit comments.

- E-mail: farcase.2002-015@gsa.gov. Include FAR case 2002–015 in the subject line of the message.

- Fax: 202–501–4067.

- Mail: General Services Administration, Regulatory Secretariat (VR), 1800 F Street, NW, Room 4035, ATTN: Laurie Duarte, Washington, DC 20405.

Instructions: Please submit comments only and cite FAR case 2002–015 in all correspondence related to this case. All comments received will be posted without change to <http://www.acqnet.gov/far/ProposedRules/proposed.htm>, including any personal information provided.

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FOR FURTHER INFORMATION CONTACT: The FAR Secretariat at (202) 501–4755 for information pertaining to status or publication schedules. For clarification of content, contact Ms. Jeritta Parnell, Procurement Analyst, at (202) 501–4082. Please cite FAR case 2002–015.

SUPPLEMENTARY INFORMATION:**A. Background**

The proposed rule incorporates two Department of Defense class deviations 98–00010, Use and Charges, and 98–00011, Special Tooling, into FAR Part 45 and makes appropriate revisions to FAR 52.245–9, Use and Charges, and FAR 52.245–17, Special Tooling. The proposed rule establishes, as the basis for rental charges, the time property is actually used for commercial purposes, rather than time available for use; permits contractors to obtain property appraisals from independent appraisers; permits appraisal-based rentals for all property; and allows contracting officers to consider alternate bases for determining rentals. These changes are intended to encourage dual use of Government property. The revised rental calculation would also be used in the procedures for eliminating competitive advantage associated with contractor possession of Government property (see FAR Subpart 45.2).

With respect to special tooling, the proposed rule substitutes a substantially revised special tooling clause for the clause at 52.245–17, Special Tooling, and waives that portion of the clause at 52.245–2, Government Property (Fixed-Price Contracts), that states that special tooling is subject to title provisions in that latter clause. The revised clause adds title provisions.

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

B. Regulatory Flexibility Act

The Councils do 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.* Adoption of the proposed changes may have a slight reduction in recordkeeping requirements for civilian agency contractors and would decrease the amount of information required under the reporting requirements. An Initial

Regulatory Flexibility Analysis has, therefore, not been performed. The Councils invite comments from small businesses and other interested parties. The Councils will consider comments from small entities concerning the affected FAR Parts 45 and 52 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (FAR case 2002–015), in correspondence.

C. Paperwork Reduction Act

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

We are publishing the current burdens associated with this case for your information. The following information for OMB Clearance 9000–0075 is provided:

Annual Reporting Burden:

FAR 52.245–9 and 45.302–6(c). The Government property is provided to contractors on a rent-free use basis. However, we estimate that 10 percent of all contractors use property that requires rental payments. We estimate that 500 contractors submit 4 quarterly reports, and that it takes 1 hour to store, retrieve, prepare and submit the report.

Respondents: 500

Responses per respondent: 4

Total annual responses: 2,000

Preparation hours per response: 1

Total response burden hours: 2000

FAR 52.245–17(f)(1) and 45.306–5.

We estimate that approximately 900 contractors have special tooling. Using the 900 as a baseline, we estimate that 75 contractors also must maintain records on special tooling that they actually produce. We estimate that each contractor maintains 200 records and it takes 30 minutes to prepare each record.

Respondents: 75

Responses per respondent: 200

Total annual responses: 15,000

Preparation hours per response: .5

Total response burden hours: 7,500

The FAR requires three lists. We added hours for the initial list of special tooling and the final list of special tooling. The excess list of special tooling is covered in the paragraph below. We calculated additional hours as follows:

Respondents: 900

Responses per respondent: 10

Total annual responses: 9,000

Preparation hours per response: 1.5

Total response burden hours: 13,500

FAR 52.245–17(h). Of the 75 contractors maintaining special tooling

in accordance with this clause, we estimate that 15 percent, or approximately 12 contractors submit excess listings and that it takes each contractor 2 hours to store, retrieve, prepare and submit the information.

Respondents: 12

Responses per respondent: 1

Total annual responses: 12

Preparation hours per response: 2

Total response burden hours: 24

If this rule is approved as a final rule, this coverage will be deleted and the burden hours will be slightly reduced.

FAR 52.245-17(i)(4) requires contractors to submit two copies of all special tooling lists to the ACO, PCO, and ICP unless otherwise directed. We calculate the hours as follows:

Respondents: 900

Responses per respondent: 10

Total annual responses: 9,000

Preparation hours per response: .1

Total response burden hours: 900

Requester may obtain a copy of the information collection from the General Services Administration, FAR Secretariat (VR), Room 4035, Washington, DC 20405, telephone (202) 501-4755. Please cite OMB Control Number 9000-0075, Government Property, in all correspondence.

List of Subjects in 48 CFR Parts 45 and 52

Government procurement.

Dated: July 7, 2004.

Laura Auletta,

Director, Acquisition Policy Division.

Therefore, DoD, GSA, and NASA propose amending 48 CFR parts 45 and 52 as set forth below:

1. The authority citation for 48 CFR parts 45 and 52 is revised to read as follows:

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

PART 45—GOVERNMENT PROPERTY

2. Amend section 45.106 by adding paragraph (h) to read as follows:

45.106 Government property clauses.

* * * * *

(h)(1) Insert the clause at 52.245-9, Use and Charges—

(i) In fixed-price or labor-hour solicitations and contracts under which the Government will furnish property for performance of the contract;

(ii) In all cost-reimbursement and time-and-materials solicitations and contracts; and

(iii) When a consolidated facilities contract or a facilities use contract is contemplated.

(2) The contracting officer may modify the clause if an alternative rental

methodology is used in accordance with 45.403.

45.302-6 [Amended]

3. Amend section 45.302-6 by removing paragraph (c); and redesignating paragraphs (d) and (e) as paragraphs (c) and (d), respectively.

4. Revise section 45.306-5 to read as follows:

45.306-5 Contract clause.

Insert the clause at 52.245-17, Special Tooling, in solicitations and contracts when—

(a) A fixed-price contract is contemplated;

(b) The Government desires to reserve the right to obtain title in the special tooling acquired by the contractor; and

(c) The Special Tooling is not a required deliverable.

5. Revise section 45.403 to read as follows:

45.403 Rental—Use and Charges clause.

(a) The contracting officer shall charge contractors rent for using Government production and research property, except as prescribed in 45.404 and 45.405. Rent shall be computed in accordance with the clause at 52.245-9, Use and Charges. If the agency head determines it to be in the Government's interest, an alternative method for computing rent may be used.

(b) The contracting officer shall ensure the collection of any rent due the Government from the contractor.

45.505-1 [Amended]

6. Amend section 45.505-1 in the introductory text of paragraph (a) by adding "or unless records are maintained as required by paragraph (h) of the clause at 52.245-17, Special Tooling," after the word "section,"

45.505-4 [Amended]

7. Amend section 45.505-4 in paragraph (a) by adding "or unless records are maintained as required by paragraph (h) of the clause at 52.245-17, Special Tooling," after "45.505-1(b),"

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

8. Amend section 52.245-2 by revising the date of the clause; removing the second sentence of paragraph (c)(2); and revising paragraph (c)(3) to read as follows:

52.245-2 Government Property (Fixed-Price Contracts).

* * * * *

GOVERNMENT PROPERTY (FIXED-PRICE CONTRACTS) (DATE)

* * * * *

(c) * * *

(3) Title to each item of facilities, and special test equipment and special tooling (other than that subject to the clause at 52.245-17, Special Tooling), acquired by the Contractor for the Government under this contract shall pass to and vest in the Government when its use in performing this contract commences or when the Government has paid for it, whichever is earlier, whether or not title previously vested in the Government.

* * * * *

9. Revise section 52.245-9 to read as follows:

52.245-9 Use and Charges.

As prescribed in 45.106(h), insert the following clause in solicitations and contracts:

USE AND CHARGES (DATE)

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

Acquisition cost means the acquisition cost recorded in the Contractor's property control system or, in the absence of such record, the value attributed by the Government to a Government property item for purposes of determining a reasonable rental charge.

Government property means all property owned by or leased to the Government or acquired by the Government under the terms of the contract. It includes both Government-furnished property and contractor-acquired property as defined in FAR 45.101.

Real property means land and rights in land, ground improvements, utility distribution systems, and buildings and other structures. It does not include foundations and other work necessary for installing special tooling, special test equipment, or equipment.

Rental period means the calendar period during which Government property is made available for nongovernmental purposes.

Rental time means the number of hours, to the nearest whole hour, rented property is actually used for non-governmental purposes. It includes time to set up the property for such purposes, perform required maintenance, and restore the property to its condition prior to rental (less normal wear and tear).

(b) *Use of Government property.* The Contractor may use the Government property without charge in the performance of—

(1) Contracts with the Government that specifically authorize such use without charge;

(2) Subcontracts of any tier under Government prime contracts if the Contracting Officer having cognizance of the prime contract—

(i) Approves a subcontract specifically authorizing such use; or

(ii) Otherwise authorizes such use in writing; and

(3) Other work, if the Contracting Officer specifically authorizes in writing use without charge for such work.

(c) *Rental.* If granted written permission by the Contracting Officer, or if it is specifically provided for in the Schedule, the Contractor may use the Government property (except material) for a rental fee for work other than that provided in paragraph (b) of this clause.

Authorizing such use of the Government property does not waive any rights of the Government to terminate the Contractor's right to use the Government property. The rental fee shall be determined in accordance with the following paragraphs.

(d) *General.* (1) Rental requests shall be submitted to the administrative Contracting Officer, identify the property for which rental is requested, propose a rental period, and compute an estimated rental charge by using the Contractor's best estimate of rental time in the formulae described in paragraph (e) of this clause.

(2) The Contractor shall not use Government property for nongovernmental purposes, including Independent Research and Development, until a rental charge for real property, or estimated rental charge for other property, is agreed upon. Rented property shall be used only on a non-interference basis.

(e) *Rental charge.* (1) *Real property and associated fixtures.* (i) The Contractor shall obtain, at its expense, a property appraisal from an independent licensed, accredited, or certified appraiser that computes a monthly, daily, or hourly rental rate for comparable commercial property. The appraisal may be used to compute rentals under this clause throughout its effective period or, if an effective period is not stated in the appraisal, for one year following the date the appraisal was performed. The Contractor shall submit the appraisal to the Administrative Contracting Officer at least 30 days prior to the date the property is needed for nongovernmental use. Except as provided in paragraph (e)(1)(iii) of this clause, the administrative Contracting Officer shall use the appraisal rental rate to determine a reasonable rental charge.

(ii) Rental charges shall be determined by multiplying the rental time by the appraisal rental rate expressed as a rate per hour. Monthly or daily appraisal rental rates shall be divided by 720 or 24, respectively, to determine an hourly rental rate.

(iii) When the administrative Contracting Officer has reason to believe the appraisal rental rate is not reasonable, he or she shall promptly notify the Contractor and provide his or her rationale. The parties may agree on an alternate means for computing a reasonable rental charge.

(iv) The Contractor shall obtain, at its expense, additional property appraisals in the same manner as provided in paragraph (e)(1)(i) if the effective period has expired and the Contractor desires the continued use of property for non-governmental use. The Contractor may obtain additional appraisals within the effective period of the current appraisal if the market prices decrease substantially.

(2) *Other Government property.* The Contractor may elect to compute the rental charge using the appraisal method described in paragraph (e)(1) of this clause subject to the constraints therein or the following formula in which rental time shall be expressed in increments of not less than one hour with portions of hours rounded to the next higher hour: The rental charge is calculated by multiplying 2 percent of the acquisition cost by the hours of rental time, and dividing by 720.

(3) *Alternative methodology.* The Contractor may request consideration of an alternative basis for computing the rental charge if it considers the monthly rental rate or a time-based rental unreasonable or impractical.

(f) *Rental payments.* (1) Rent is due at the time and place specified by the Contracting Officer. If a time is not specified, the rental is due 60 days following completion of the rental period. The Contractor shall compute the rental due, and furnish records or other supporting data in sufficient detail to permit the administrative Contracting Officer to verify the rental time and computation. Payment shall be made by check payable to the Treasurer of the United States and sent to the contract administration office identified in this contract, unless otherwise specified by the contracting officer.

(2) Interest will be charged if payment is not made by the specified payment date or, in the absence of a specified date, the 61st day following completion of the rental period. Interest will accrue at the "Renegotiation Board Interest Rate" (published in the **Federal Register** semiannually on or about January 1st and July 1st) for the period in which the rent is due.

(3) The Government's acceptance of any rental payment under this clause, in whole or in part, shall not be construed as a waiver or relinquishment of any rights it may have against the Contractor stemming from the Contractor's unauthorized use of Government property or any other failure to perform this contract according to its terms.

(g) *Use revocation.* At any time during the rental period, the Government may revoke nongovernmental use authorization and require the Contractor, at the Contractor's expense, to return the property to the Government, restore the property to its pre-rental condition (less normal wear and tear), or both.

(h) *Unauthorized use.* The unauthorized use of Government property can subject a person to fines, imprisonment, or both, under 18 U.S.C. 641.

(End of clause)

52.245-10 [Amended]

10. Amend section 52.245-10 in the introductory paragraph by removing "45.302-6(d)" and adding "45.302-6(c)" in its place.

52.245-11 [Amended]

11. Amend section 52.245-11 in the introductory paragraph by removing "45.302-6(c)(1)" and adding "45.302-6(d)(1)" in its place.

12. Revise section 52.245-17 to read as follows:

52.245-17 Special Tooling.

As prescribed in 45.306-5, insert the following clause:

SPECIAL TOOLING (DATE)

(a) *Definition.* *Special tooling* means jigs, dies, fixtures, molds, patterns, taps, gauges, other equipment and manufacturing aids, all components of these items, and replacement

of these items that are of such a specialized nature that without substantial modification or alteration their use is limited to the development or production of particular supplies or parts thereof or performing particular services. It does not include material, special test equipment, facilities (except foundations and similar improvements necessary for installing special tooling), general or special machine tools, or similar capital items.

(b) *Applicability.* This clause applies to all special tooling manufactured or acquired under this contract other than that identified as a deliverable.

(c) Special tooling, for the purpose of this clause, does not include any item acquired by the Contractor before the effective date of this contract, or replacement of such items, whether or not altered or adapted for use in performing this contract, or items specifically excluded by the Schedule of this contract.

(d) *Title.* The Government has the right to take title to all special tooling subject to this clause until such time as that right to take title is relinquished by the Contracting Officer as provided for in paragraphs (k)(3) and (4) of this clause.

(e) *Use of special tooling.* The Contractor agrees to use the special tooling only in performing this contract or as otherwise approved by the Contracting Officer.

(f) *Initial list of special tooling.* If the Contracting Officer so requests, the Contractor shall furnish the Government an initial list of all special tooling acquired or manufactured by the Contractor for performing this contract. The list shall specify the nomenclature, tool number, related product part number (or service performed), retention determination (see paragraph (e) of this clause) original acquisition date and unit acquisition cost of the special tooling. The list shall separately identify special tooling that has become obsolete due to design or specification changes. The list shall be furnished within 60 days after delivery of the first production end item under this contract unless a later date is prescribed.

(g) *Contractor's offer to retain special tooling.* The Contractor may indicate a desire to retain certain items of special tooling at the time it furnishes a list or notification pursuant to paragraph (f) or (j) of this clause. The Contractor shall furnish a written offer designating those items that it wishes to retain by specifically listing the items to include identifying the items as to the particular products, parts, or services for which the items were used or designed. The offer shall be made on one of the following bases:

(1) An amount shall be offered for retention of the items free of any Government interest. This amount should ordinarily not be less than the current fair value of the items, considering among other things, the value of the items to the Contractor for use in future work.

(2) Retention may be requested for a limited period of time and under terms as may be agreed to by the Government and the Contractor. This temporary retention is subject to final disposition pursuant to paragraph (k) of this clause.

(h) *Property control records.* The Contractor shall maintain adequate property control records of all special tooling in accordance with its normal industrial practice. The records shall be made available for Government inspection at all reasonable times. To the extent practicable, the Contractor shall identify all special tooling subject to this clause with an appropriate stamp, serial number, tag, or other mark.

(i) *Maintenance.* The Contractor shall take all reasonable steps necessary to maintain the identity and existing condition of usable items of special tooling from the date such items are no longer needed by the Contractor until final disposition under paragraph (k) of this clause. These maintenance requirements do not apply to those items designated by the Contracting Officer for disposal as scrap or identified as of no further interest to the Government under paragraph (k)(4) of this clause. The Contractor is not required to keep unneeded items of special tooling in place.

(j) *Final list of special tooling.* No later than 60 days prior to the last scheduled delivery on this contract, the Contractor shall furnish the Contracting Officer a final list of special tooling with the same information as required for the initial list under paragraph (f) of this clause. The final list shall include all items, with an identification of the items not previously reported under paragraph (f) of this clause. Special Tooling that has become obsolete as a result of changes in design or specification that was not previously reported under paragraph (f) of this clause shall be separately identified. The Contracting Officer may extend this requirement until the completion of this contract.

(k) *Disposition instructions.* The Contracting Officer shall provide the Contractor with disposition instructions for special tooling identified in a list submitted under paragraph (f) or (j) of this clause. The instructions shall be provided within 90 days of receipt of the list or notice, unless the period is extended by mutual agreement. The Contracting Officer may direct disposition by

any of the methods listed in paragraphs (k)(1) through (4) of this clause, or a combination of such methods. Any failure of the Contracting Officer to provide specific instructions within the 90-day period shall be construed as direction under paragraph (k)(3) of this clause.

(1) The Contracting Officer shall give the Contractor a list specifying the products, parts, or services for which the Government may require special tooling and request the Contractor to transfer title (to the extent not previously transferred under any other clause of this contract) and deliver to the Government all usable items of special tooling that were designed for or used in the production or performance of such products, parts, or services and that were on hand when such production or performance ceased.

(2) The Contracting Officer may accept or reject any offer made by the Contractor under paragraph (g) of this clause to retain items of special tooling or may request further negotiation of the offer. The Contractor agrees to enter into the negotiations in good faith. The net proceeds from the Contracting Officer's acceptance of the Contractor's retention offer shall either be deducted from amounts due the Contractor under this contract or shall be otherwise paid to the Government as directed by the Contracting Officer.

(3) The Contracting Officer may direct the Contractor to sell, or dispose of as scrap, for the account of the Government, any special tooling reported by the Contractor under this clause. The net proceeds of all sales shall either be deducted from amounts due the Contractor under this contract or shall be otherwise paid to the Government as directed by the Contracting Officer. To the extent that the Contractor incurs any costs occasioned by compliance with such directions for which it is not otherwise compensated, the contract price shall be equitably adjusted in accordance with the Changes clause of this contract.

(4) The Contracting Officer may furnish the Contractor with a statement disclaiming further Government interest or rights in any of the special tooling listed.

(l) *Storage or shipment.* The Contractor shall promptly transfer to the Government title to the special tooling specified by the Contracting Officer and arrange for either the shipment or the storage of such tooling in accordance with the final disposition instructions in paragraph (k)(1) of this clause. Tooling to be shipped shall be properly packaged, packed, and marked in accordance with the directions of the Contracting Officer. Tooling to be stored shall be stored pursuant to a storage agreement between the Government and the Contractor, and as directed by the Contracting Officer. Tooling shipped or stored shall be accompanied by operation sheets or other appropriate data necessary to show the manufacturing operations or processes for which the items were used or designed. To the extent that the Contractor incurs costs for authorized storage or shipment under this paragraph and not otherwise compensated for, the contract price shall be equitably adjusted in accordance with the Changes clause of this contract.

(m) *Subcontract provisions.* In order to perform this contract, the Contractor may place subcontracts (including purchase orders) involving the use of special tooling. If the full cost of the tooling is charged to those subcontracts, the Contractor agrees to include in the subcontracts appropriate provisions to obtain Government rights comparable to the rights of the Government under this clause (unless the Contractor and the Contracting Officer agree that such rights are not of substantial interest to the Government). The Contractor agrees to exercise such rights for the benefit of the Government as directed by the Contracting Officer.

(End of clause)

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