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48 CFR Chapter 34

Department of Education Acquisition Regulation; Rule

DEPARTMENT OF EDUCATION

48 CFR Chapter 34

RIN 1890–AA16

[Docket ID ED–2010–OCFO–0015]

Department of Education Acquisition Regulation

AGENCY: Office of the Chief Financial Officer, Department of Education (Department).

ACTION: Final regulations.

SUMMARY: The Secretary reissues the Department of Education Acquisition Regulation (EDAR) in order to update it to accurately implement the current Federal Acquisition Regulation (FAR) and Department policies.

DATES: These regulations are effective May 9, 2011.

FOR FURTHER INFORMATION CONTACT: Nicole Evans. Telephone: (202) 245–6172 or via Internet: *Nicole.Evans@ed.gov.*

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SUPPLEMENTARY INFORMATION: On August 23, 2010, the Secretary published a notice of proposed rulemaking (NPRM) in the **Federal Register** (75 FR 51884) to reissue the Department of Education Acquisition Regulation (EDAR). In the preamble to the NPRM, on pages 51884 through 51891, the Secretary discussed how the proposed regulations would update the EDAR to accurately implement the current Federal Acquisition Regulation (FAR) and Department policies.

After the public comment period ended, the Department's contact phone number for issues relating to human subjects changed, so we have updated this phone number in the clause at 3452.224–71, Notice about research activities involving human subjects, and the clause at 3452.224–72, Research activities involving human subjects. Also, we discovered a discrepancy in the regulation in 3416.470 discussing Award Term contracting and the clause prescribed in this section, 3452.216–71 Award-term. Therefore, we removed from 3416.470, Award-term contracting, the sentence, "These decisions are not subject to the Disputes clause." We also have made some minor technical and editorial changes to the regulations.

Analysis of Comments and Changes

In response to the Secretary's invitation in the NPRM, the Department did not receive any comments on the proposed regulations.

Executive Order 12866

Under Executive Order 12866, the Secretary must determine whether a regulatory action is "significant" and therefore subject to the requirements of the Executive order and subject to review by the Office of Management and Budget (OMB). Section 3(f) of Executive Order 12866 defines a "significant regulatory action" as an action likely to result in a rule that may (1) have an annual effect on the economy of $100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or Tribal governments or communities in a material way (also referred to as an "economically significant" rule); (2) create serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impacts of entitlement grants, user fees, or local programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive order. The Secretary has determined that this regulatory action is not significant under section 3(f) of the Executive order.

Potential Costs and Benefits

This rule has been reviewed in accordance with Executive Order 12866. Under the terms of the order, we have assessed the potential costs and benefits of this regulatory action.

The potential costs associated with this regulatory action are those resulting from statutory requirements and those we have determined as necessary for administering the EDAR effectively and efficiently.

In assessing the potential costs and benefits—both quantitative and qualitative—of this regulatory action, we have determined that the benefits of this regulatory action justify the costs.

We have determined, also, that this regulatory action does not unduly interfere with State, local, and Tribal governments in the exercise of their governmental functions.

Regulatory Flexibility Act Certification

Under the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.,* as amended by the Small Business Regulatory Flexibility Act of 1996), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (*i.e.,* small businesses, small organizations, and small government jurisdictions), unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The Regulatory Flexibility Act requires Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant impact on a substantial number of small entities. Pursuant to the Regulatory Flexibility Act, the Secretary certifies that this rule will not have a significant economic impact on a substantial number of small entities.

The rule updates the EDAR; it does not directly regulate any small entities. As a result, a regulatory flexibility analysis is not required and none has been prepared.

Paperwork Reduction Act of 1995

These regulations do not contain any information collection requirements.

Intergovernmental Review

The EDAR is not subject to Executive Order 12372 and the regulations in 34 CFR part 79.

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Note: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.gpoaccess.gov/nara/index.html.*

(Catalog of Federal Domestic Assistance Number does not apply.)

List of Subjects in 48 CFR Chapter 34

Government procurement.

Dated: February 23, 2011.

Arne Duncan,

Secretary of Education.

For the reasons discussed in the preamble, the Secretary amends title 48 of the Code of Federal Regulations by revising chapter 34 to read as follows:

TITLE 48—FEDERAL ACQUISITION REGULATIONS SYSTEM

CHAPTER 34—DEPARTMENT OF EDUCATION ACQUISITION REGULATION

PARTS 3400 TO 3499

SUBCHAPTER A—GENERAL

Sec.
3401 ED acquisition regulation system
3402 Definitions of words and terms
3403 Improper business practices and personal conflicts of interest

SUBCHAPTER B—COMPETITION AND ACQUISITION PLANNING

3405 Publicizing contract actions
3406 Competition requirements
3408 Required sources of supplies and services
3409 Contractor qualifications
3412 Acquisition of commercial items

SUBCHAPTER C—CONTRACTING METHODS AND CONTRACT TYPES

3413 Simplified acquisition procedures
3414 Sealed bidding
3415 Contracting by negotiation
3416 Types of contracts
3417 Special contracting methods

SUBCHAPTER D—SOCIOECONOMIC PROGRAMS

3419 Small business programs
3422 Application of labor laws to Government acquisitions
3424 Protection of privacy and freedom of information
3425 Foreign acquisition

SUBCHAPTER E—GENERAL CONTRACTING REQUIREMENTS

3427 Patents, data, and copyrights
3428 Bonds and insurance
3432 Contract financing
3433 Protests, disputes, and appeals

SUBCHAPTER F—SPECIAL CATEGORIES OF CONTRACTING

3437 Service contracting
3439 Acquisition of information technology

SUBCHAPTER G—CONTRACT MANAGEMENT

3442 Contract administration and audit services
3443 Contract modifications
3445 Government property
3447 Transportation

SUBCHAPTER H—CLAUSES AND FORMS

3452 Solicitation provisions and contract clauses

SUBCHAPTER A—GENERAL

PART 3401—ED ACQUISITION REGULATION SYSTEM

Sec.
3401.000 Scope of part.

Subpart 3401.1—Purpose, Authority, Issuance

3401.104 Applicability.
3401.105 Issuance.
3401.105–2 Arrangement of regulations.
3401.105–3 Copies.

Subpart 3401.3—Agency Acquisition Regulations

3401.301 Policy.
3401.303 Publication and codification.
3401.304 Agency control and compliance procedures.

Subpart 3401.4—Deviations

3401.401 Definition.
3401.403 Individual deviations.
3401.404 Class deviations.

Subpart 3401.5—Agency and Public Participation

3401.501 Solicitation of agency and public views.
3401.501–2 Opportunity for public comments.

Subpart 3401.6—Career Development, Contracting Authority, and Responsibilities

3401.601 General.
3401.602–3 Ratification of unauthorized commitments.
3401.670 Nomination and appointment of contracting officer's representatives (CORs).
3401.670–1 General.
3401.670–2 Appointment.
3401.670–3 Contract clause.

Authority: 5 U.S.C. 301 and 20 U.S.C. 1018a.

3401.000 Scope of part.

The Federal Acquisition Regulation System brings together, in title 48 of the Code of Federal Regulations, the acquisition regulations applicable to all executive agencies of the Federal government. This part establishes a system of Department of Education (Department) acquisition regulations, referred to as the EDAR, for the codification and publication of policies and procedures of the Department that implement and supplement the Federal Acquisition Regulation (FAR).

Subpart 3401.1—Purpose, Authority, Issuance

3401.104 Applicability.

(a) The FAR and the EDAR apply to all Department contracts, as defined in FAR Part 2, except where expressly excluded.

(b) 20 U.S.C. 1018a provides the PBO with procurement authority and flexibility associated with sections (a)–(l) of the statute.

(c) For non-appropriated fund contracts, the FAR and EDAR will be followed to the maximum extent practicable, excluding provisions determined by the contracting officer, with the advice of counsel, not to apply to contracts funded with non-appropriated funds. Adherence to a process similar to those required by or best practices suggested by the FAR will not confer court jurisdiction concerning non-appropriated funds that does not otherwise exist.

3401.105 Issuance.

3401.105–2 Arrangement of regulations.

(c)(5) *References and citations.* The regulations in this chapter may be referred to as the Department of Education Acquisition Regulation or the EDAR. References to the EDAR are made in the same manner as references to the FAR. *See* FAR 1.105–2(c).

3401.105–3 Copies.

Copies of the EDAR in the **Federal Register** and Code of Federal Regulations (CFR) may be purchased from the Superintendent of Documents, Government Printing Office (GPO), Washington, DC 20402. An electronic version of the EDAR is available for viewing at: *http://www.ed.gov/policy/fund/reg/clibrary/edar.html.*

Subpart 3401.3—Agency Acquisition Regulations

3401.301 Policy.

(a)(1) Subject to the authorities in FAR 1.301(c) and other statutory authority, the Secretary of Education (Secretary) or delegate may issue or authorize the issuance of the EDAR. It implements or supplements the FAR and incorporates, together with the FAR, Department policies, procedures, contract clauses, solicitation provisions, and forms that govern the contracting process or otherwise control the relationship between the Agency, including its suborganizations, and contractors or prospective contractors. The Head of Contracting Activity (HCA) for FSA may issue supplementary guidelines applicable to FSA.

3401.303 Publication and codification.

(a) The EDAR is issued as chapter 34 of title 48 of the CFR.

(1) The FAR numbering illustrations at FAR 1.105–2 apply to the EDAR.

(2) The EDAR numbering system corresponds with the FAR numbering system. An EDAR citation will include the prefix "34" prior to its corresponding FAR part citation; *e.g.,* FAR 25.108–2 would have corresponding EDAR text numbered as EDAR 3425.108–2.

(3) Supplementary material for which there is no counterpart in the FAR will be codified with a suffix beginning with "70" or, in cases of successive sections

and subsections, will be numbered in the 70 series (*i.e.,* 71–79). These supplementing sections and subsections will appear to the closest corresponding FAR citation; *e.g.,* FAR 16.4 (Incentive Contracts) may be augmented in the EDAR by citing EDAR 3416.470 (Award Term) and FAR 16.403 (Fixed-price incentive contracts) may be augmented in the EDAR by citing EDAR 3416.403–70 (Award fee contracts). (*Note:* These citations are for illustrative purposes only and may not actually appear in the published EDAR). For example:

FAR	Is implemented as	Is augmented as
15	3415	3415.70
15.1	3415.1	3415.170
15.101	3415.101	3415.101–70
15.101–1	3415.101–1	3415.101–1–70
15.101–1(b)	3415.101–1(b)	3415.101–1(b)(70)
15.101–1(b)(1)	3415.101–1(b)(1)	3415.101–1(b)(1)(70)

(c) *Activity-specific authority.* Guidance that is unique to an organization with HCA authority contains that activity's acronym directly preceding the cite. The following activity acronyms apply:

FSA—Federal Student Aid.

3401.304 Agency control and compliance procedures.

(a) The EDAR is issued for Department acquisition guidance in accordance with the policies stated in FAR 1.301. The EDAR is subject to the same review procedures within the Department as other regulations of the Department.

Subpart 3401.4—Deviations

3401.401 Definition.

A deviation from the EDAR has the same meaning as a deviation from the FAR.

3401.403 Individual deviations.

An individual deviation from the FAR or the EDAR must be approved by the Senior Procurement Executive (SPE).

3401.404 Class deviations.

A class deviation from the FAR or the EDAR must be approved by the Chief Acquisition Officer (CAO).

Subpart 3401.5—Agency and Public Participation

3401.501 Solicitation of agency and public views.

3401.501–2 Opportunity for public comments.

Unless the Secretary approves an exception, the Department issues the EDAR, including any amendments to the EDAR, in accordance with the procedures for public participation in 5 U.S.C. 553. Comments on proposed Department notices of proposed rulemaking may be made at *http://www.regulations.gov.*

Subpart 3401.6—Career Development, Contracting Authority, and Responsibilities

3401.601 General.

(a) Contracting authority is vested in the Secretary. The Secretary has delegated this authority to the CAO. The Secretary has also delegated contracting authority to the SPE, giving the SPE broad authority to perform functions dealing with the management direction of the entire Department's procurement system, including implementation of its unique procurement policies, regulations, and standards. Limitations to the extent of this authority and successive delegations are set forth in the respective memorandums of delegations.

3401.602–3 Ratification of unauthorized commitments.

(a) *Definitions.* As used in this subpart, *commitment* includes issuance of letters of intent and arrangements for free vendor services or use of equipment with the promise or the appearance of commitment that a contract, modification, or order will, or may, be awarded.

(b) *Policy.*

(1) The HCA or Chief of the Contracting Office may, or may not, later ratify unauthorized commitments made by individuals without contracting authority or by contracting officers acting in excess of the limits of their delegated authority. Law and regulation requires that only individuals acting within the scope of their authority make acquisitions. Within the Department, that authority vests solely with the Contracting Officer. Acquisitions made by other than authorized personnel are matters of serious misconduct. The employee may be held legally and personally liable for the unauthorized commitment.

(2) Ratifications do not require concurrence from legal counsel.

(3) The person who made the unauthorized commitment must prepare the request for approval that must be submitted through the person's manager to the approving official.

(4) The Chief of the Contracting Office may review and sign or reject ratification requests up to $25,000.

(5) All other ratification requests must be reviewed and signed or rejected by the HCA.

3401.670 Nomination and appointment of contracting officer's representatives (CORs).

3401.670–1 General.

(a) Program offices must nominate personnel for consideration of a COR appointment in accordance with the Department's COR Policy Guide.

(b) The contracting officer must determine what, if any, duties will be delegated to a COR.

(c) The contracting officer may appoint as many CORs as is deemed necessary to support efficient contract administration.

(d) Only individuals with a written delegation of authority from a contracting officer may act in any capacity as a representative of that contracting officer, including any alternate, assistant, or back-up duties to the COR.

(e) For all contracts in which an information technology system exists, the System Security Officer for that system will perform all responsibilities necessary for contractor access to the system.

3401.670–2 Appointment.

COR appointments must be in accordance with the Department's COR Program Guide.

3401.670–3 Contract clause.

Contracting officers must insert a clause substantially the same as the clause at 3452.201–70 (Contracting Officer's Representative (COR)), in all solicitations and contracts for which a COR will be (or is) appointed.

PART 3402—DEFINITIONS OF WORDS AND TERMS

Subpart 3402.1—Definitions

Sec.
3402.101 Definitions.
3402.101–70 Abbreviations and acronyms.

Subpart 3402.2—Definitions Clause

3402.201 Contract clause.

Authority: 5 U.S.C. 301 and 20 U.S.C. 1018a.

Subpart 3402.1—Definitions

3402.101 Definitions.

As used in this chapter—

Chief Acquisition Officer or *CAO* means the official responsible for monitoring the agency's acquisition activities, evaluating them based on applicable performance measurements, increasing the use of full and open competition in agency acquisitions, making acquisition decisions consistent with applicable laws, and establishing clear lines of authority, accountability, and responsibility for acquisition decision-making and developing and maintaining an acquisition career management program.

Chief of the Contracting Office means an official serving in the contracting activity (CAM or FSA Acquisitions) as the manager of a group that awards and administers contracts for a principal office of the Department. *See also* definition of *Head of the Contracting Activity* or *HCA* below.

Contracting Officer's Representative or *COR* means the person representing the Federal government for the purpose of technical monitoring of contract performance. The COR is not authorized to issue any instructions or directions that effect any increases or decreases in the scope of work or that would result in the increase or decrease of the cost or price of a contract or a change in the delivery dates or performance period of a contract.

Department or *ED* means the United States Department of Education.

Head of the Contracting Activity or *HCA* means those officials within the Department who have responsibility for and manage an acquisition organization and usually hold unlimited procurement authority. The Director, Federal Student Aid Acquisitions, is the HCA for FSA. The Director, Contracts and Acquisitions Management (CAM), is the HCA for all other Departmental program offices and all boards, commissions, and councils under the management control of the Department.

Performance-Based Organization or *PBO* is the office within the Department that is mandated by Public Law 105–244 to carry out Federal student assistance or aid programs and report to Congress on an annual basis. It may also be referred to as "Federal Student Aid."

Senior Procurement Executive or *SPE* means the single agency official appointed as such by the head of the agency and delegated broad responsibility for acquisition functions, including issuing agency acquisition policy and reporting on acquisitions agency-wide. The SPE also acts as the official one level above the contracting officer when the HCA is acting as a contracting officer.

3402.101–70 Abbreviations and acronyms.

CAO—Chief Acquisition Officer.
CO—Contracting Officer.
COR—Contracting Officer's Representative.
FSA—Federal Student Aid.
HCA—Head of the Contracting Activity.
IPv6—Internet Protocol version 6.
OMB—Office of Management and Budget.
OSDBU—Office of Small and Disadvantaged Business Utilization.
PBO—Performance-Based Organization (Federal Student Aid).
RFP—Request for Proposal.
SBA—Small Business Administration.
SPE—Senior Procurement Executive.

Subpart 3402.2—Definitions Clause

3402.201 Contract clause.

The contracting officer must insert the clause at 3452.202–1 (Definitions—Department of Education) in all solicitations and contracts in which the clause at FAR 52.202–1 is required.

PART 3403—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

Subpart 3403.1—Safeguards

Sec.
3403.101 Standards of conduct.
3403.101–3 Agency regulations.

Subpart 3403.2—Contractor Gratuities to Government Personnel

3403.203 Reporting suspected violations of the Gratuities clause.

Subpart 3403.3—Reports of Suspected Antitrust Violations

3403.301 General.

Subpart 3403.4—Contingent Fees

3403.409 Misrepresentation or violations of the covenant against contingent fees.

Subpart 3403.6—Contracts with Government Employees or Organizations Owned or Controlled by Them

3403.602 Exceptions.

Authority: 5 U.S.C. 301.

Subpart 3403.1—Safeguards

3403.101 Standards of conduct.

3403.101–3 Agency regulations.

The Department's regulations on standards of conduct and conflicts of interest are in 34 CFR part 73, Standards of Conduct.

Subpart 3403.2—Contractor Gratuities to Government Personnel

3403.203 Reporting suspected violations of the Gratuities clause.

(a) Suspected violations of the Gratuities clause at FAR 52.203–3 must be reported to the HCA in writing detailing the circumstances.

(b) The HCA evaluates the report with the assistance of the Designated Agency Ethics Officer. If the HCA determines that a violation may have occurred, the HCA refers the report to the SPE for disposition.

Subpart 3403.3—Reports of Suspected Antitrust Violations

3403.301 General.

Any Departmental personnel who have evidence of a suspected antitrust violation in an acquisition must—

(1) Report that evidence through the HCA to the Office of the General Counsel for referral to the Attorney General; and

(2) Provide a copy of that evidence to the SPE.

Subpart 3403.4—Contingent Fees

3403.409 Misrepresentation or violations of the covenant against contingent fees.

Any Departmental personnel who suspect or have evidence of attempted or actual exercise of improper influence, misrepresentation of a contingent fee arrangement, or other violation of the Covenant Against Contingent Fees, must report the matter promptly in accordance with the procedures in 3403.203.

Subpart 3403.6—Contracts with Government Employees or Organizations Owned or Controlled by Them

3403.602 Exceptions.

Exceptions under FAR 3.601 must be approved by the HCA.

SUBCHAPTER B—COMPETITION AND ACQUISITION PLANNING

PART 3405—PUBLICIZING CONTRACT ACTIONS

Subpart 3405.2—Synopses of Proposed Contract Actions

Sec.
3405.202 Exceptions.
3405.203 Publicizing and response time.
3405.205 Special situations.
3405.207 Preparation and transmittal of synopses.
3405.270 Notices to perform market surveys.

Subpart 3405.5—Paid Advertisements

3405.502 Authority.

Authority: 5 U.S.C. 301 and 20 U.S.C. 1018a.

Subpart 3405.2—Synopses of Proposed Contract Actions

3405.202 Exceptions.

(a)(15) FSA—Issuance of a synopsis is not required when the firm to be solicited has previously provided a module for the system under a contract that contained cost, schedule, and performance goals and the contractor met those goals.

3405.203 Publicizing and response time.

(c) FSA—Notwithstanding other provisions of the FAR, a bid or proposal due date of less than 30 days is permitted after issuance of a synopsis for acquisitions for noncommercial items. However, if time permits, a bid or proposal due date that affords potential offerors reasonable time to respond and fosters quality submissions should be established.

3405.205 Special situations.

(g) *FSA—Module of a previously awarded system.* Federal Student Aid must satisfy the publication requirements for sole source and competitive awards for a module of a previously awarded system by publishing a notice of intent on the governmentwide point of entry, not less than 30 days before issuing a solicitation. This notice is not required if a contractor who is to be solicited to submit an offer previously provided a module for the system under a contract that contained cost, schedule, and performance goals, and the contractor met those goals.

3405.207 Preparation and transmittal of synopses.

(c) FSA—In Phase One of a Two-Phase Source Selection as described in 3415.302–70, the contracting officer must publish a notice in accordance with FAR 5.2, except that the notice must include only the following:

(1) Notification that the procurement will be conducted using the specific procedures included in 3415.302–70.

(2) A general notice of the scope or purpose of the procurement that provides sufficient information for sources to make informed business decisions regarding whether to participate in the procurement.

(3) A description of the basis on which potential sources are to be selected to submit offers in the second phase.

(4) A description of the information that is to be required to be submitted if the request for information is made separate from the notice.

(5) Any other information that the contracting officer deems is appropriate.

(h) FSA—When modular contracting authority is being utilized, the notice must invite comments and support if it is believed that modular contracting is not suited for the requirement being procured.

3405.270 Notices to perform market surveys.

(a) If a sole source contract is anticipated, the issuance of a notice of a proposed contract action that is detailed enough to permit the submission of meaningful responses and the subsequent evaluation of the responses by the Federal government constitutes an acceptable market survey.

(b) The notice must include—

(1) A clear statement of the supplies or services to be procured;

(2) Any capabilities or experience required of a contractor and any other factor relevant to those requirements;

(3) A statement that all responsible sources submitting a proposal, bid, or quotation must be considered;

(4) Name, business address, and phone number of the Contracting Officer; and

(5) Justification for a sole source and the identity of that source.

Subpart 3405.5—Paid Advertisements

3405.502 Authority.

Authority to approve publication of paid advertisements in newspapers is delegated to the HCA.

PART 3406—COMPETITION REQUIREMENTS

Sec.
3406.001 Applicability.

Subpart 3406.3—Other Than Full and Open Competition

3406.302–5 Authorized or required by statute.

Subpart 3406.5—Competition Advocates

3406.501 Requirement.

Authority: 5 U.S.C. 301; 41 U.S.C. 418(a) and (b); and 20 U.S.C. 1018a.

3406.001 Applicability.

(b) FSA—This part does not apply to proposed contracts and contracts awarded based on other than full and open competition when the conditions for successive systems modules set forth in 3417.70 are utilized.

Subpart 3406.3—Other Than Full and Open Competition

3406.302–5 Authorized or required by statute.

(a) *Authority.*

(1) Citations: 20 U.S.C. 1018a.

(2) Noncompetitive awards of successive modules for systems are permitted when the conditions set forth in 3417.70 are met.

Subpart 3406.5—Competition Advocates

3406.501 Requirement.

The Competition Advocate for the Department is the Deputy Director, Contracts and Acquisitions Management.

PART 3408—REQUIRED SOURCES OF SUPPLIES AND SERVICES

Subpart 3408.8—Acquisition of Printing and Related Supplies

Sec.
3408.870 Printing clause.
3408.871 Paperwork reduction.

Authority: 5 U.S.C. 301, unless otherwise noted.

Subpart 3408.8—Acquisition of Printing and Related Supplies

Authority: 44 U.S.C. 501.

3408.870 Printing clause.

The contracting officer must insert the clause at 3452.208–71 (Printing) in all solicitations and contracts other than purchase orders.

3408.871 Paperwork reduction.

The contracting officer must insert the clause at 3452.208–72 (Paperwork Reduction Act) in all solicitations and contracts in which the contractor will develop forms or documents for public use.

PART 3409—CONTRACTOR QUALIFICATIONS

Subpart 3409.4—Debarment, Suspension, and Ineligibility

Sec.
3409.400 Scope of subpart.
3409.401 Applicability.
3409.403 Definitions.
3409.406 Debarment.
3409.406–3 Procedures.
3409.407 Suspension.
3409.407–3 Procedures.

Subpart 3409.5—Organizational and Consultant Conflicts of Interest

3409.502 Applicability.

3409.503 Waiver.
3409.506 Procedures.
3409.507 Solicitation provision and contract clause.
3409.507–1 Solicitation provision.
3409.507–2 Contract clause.
3409.570 Certification at or below the simplified acquisition threshold.

Authority: 5 U.S.C. 301.

Subpart 3409.4—Debarment, Suspension, and Ineligibility

3409.400 Scope of subpart.

This subpart implements FAR subpart 9.4 by detailing policies and procedures governing the debarment and suspension of organizations and individuals from participating in ED contracts and subcontracts.

3409.401 Applicability.

This subpart applies to all procurement debarment and suspension actions initiated by ED. This subpart does not apply to nonprocurement debarment and suspension.

3409.403 Definitions.

The SPE is designated as the "debarring official" and "suspending official" as defined in FAR 9.403 and is designated as the agency official authorized to make the decisions required in FAR 9.406 and FAR 9.407.

3409.406 Debarment.

3409.406–3 Procedures.

(b) *Decision making process.*

(1) Contractors proposed for debarment may submit, in person, in writing, or through a representative, information and argument in opposition to the proposed debarment. The contractor must submit additional information within 30 days of receipt of the notice of proposal to debar, as described in FAR 9.406–3(c).

(2) In actions not based upon a conviction or civil judgment, if the contractor's submission in opposition raises a genuine dispute over facts material to the proposed debarment, the contractor may request a fact-finding conference. If the Debarring Official determines that there is a genuine dispute of material fact, the Debarring Official will conduct fact-finding and base the decision in accordance with FAR 9.406–3(b)(2) and (d)–(f).

3409.407 Suspension.

3409.407–3 Procedures.

(b) *Decision making process.*

(1) Contractors suspended in accordance with FAR 9.407 may submit, in person, in writing, or through a representative, information and argument in opposition to the suspension. The contractor must submit this information and argument within 30 days of receipt of the notice of suspension, as described in FAR 9.407–3(c).

(2) In actions not based upon an indictment, if the contractor's submission in opposition raises a genuine dispute over facts material to the suspension and if no determination has been made, on the basis of Department of Justice advice, that substantial interests of the Government in pending or contemplated legal proceedings based on the same facts as the suspension would be prejudiced, the contractor may request a fact-finding conference. The Suspending Official will conduct fact-finding and base the decision in accordance with FAR 9.407–3(b)(2) and (d) through (e).

Subpart 3409.5—Organizational and Consultant Conflicts of Interest

3409.502 Applicability.

This subpart applies to all ED contracts except contracts with other Federal agencies. However, this subpart applies to contracts with the Small Business Administration (SBA) under the 8(a) program.

3409.503 Waiver.

The HCA is designated as the official who may waive any general rule or procedure of FAR subpart 9.5 or of this subpart.

3409.506 Procedures.

(a) If the effects of a potential or actual conflict of interest cannot be avoided, neutralized, or mitigated before award, the prospective contractor is not eligible for that award. If a potential or actual conflict of interest is identified after award and the effects cannot be avoided, neutralized, or mitigated, ED will terminate the contract unless the HCA deems continued performance to be in the best interest of the Federal government.

(b) The HCA is designated as the official to conduct reviews and make final decisions under FAR 9.506(b) and (c).

3409.507 Solicitation provision and contract clause.

3409.507–1 Solicitation provision.

The contracting officer must insert the provision in 3452.209–70 (Conflict of interest certification) in all solicitations for services above the simplified acquisition threshold.

3409.507–2 Contract clause.

The contracting officer must insert the clause at 3452.209–71 (Conflict of interest) in all contracts for services above the simplified acquisition threshold. The clause is applicable to each order for services over the simplified acquisition threshold under task order contracts.

3409.570 Certification at or below the simplified acquisition threshold.

By accepting any contract, including orders against any Schedule or Government-wide Acquisition Contract (GWAC), with the Department at or below the simplified acquisition threshold:

(a) The contractor warrants that, to the best of the contractor's knowledge and belief, there are no relevant facts or circumstances that would give rise to an organizational conflict of interest, as defined in FAR subpart 2.1, or that the contractor has disclosed all such relevant information.

(b) The contractor agrees that if an actual or potential organizational conflict of interest is discovered after award, the contractor will make an immediate full disclosure in writing to the contracting officer. This disclosure must include a description of actions that the contractor has taken or proposes to take, after consultation with the contracting officer, to avoid, mitigate, or neutralize the actual or potential conflict.

(c) The contractor agrees that:

(1) The Government may terminate this contract for convenience, in whole or in part, if such termination is necessary to avoid an organizational conflict of interest.

(2) The Government may terminate this contract for default or pursue other remedies permitted by law or this contract if the contractor was aware or should have been aware of a potential organizational conflict of interest prior to award, or discovers or should have discovered an actual or potential conflict after award, and does not disclose, or misrepresents, relevant information to the contracting officer regarding the conflict.

(d) The contractor further agrees to insert provisions that substantially conform to the language of this section, including this paragraph (d), in any subcontract or consultant agreement hereunder.

PART 3412—ACQUISITION OF COMMERCIAL ITEMS

Subpart 3412.2—Special Requirements for the Acquisition of Commercial Items

Sec.
3412.203 Procedures for solicitation, evaluation, and award.

Subpart 3412.3—Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Items

3412.302 Tailoring of provisions and clauses for the acquisition of commercial items.

Authority: 5 U.S.C. 301 and 20 U.S.C. 1018a.

Subpart 3412.2—Special Requirements for the Acquisition of Commercial Items

3412.203 Procedures for solicitation, evaluation, and award.

As specified in 3413.003, simplified acquisition procedures for commercial items may be used without regard to any dollar or timeframe limitations described in FAR 13.5 when acquired by the FSA and used for its purposes.

Subpart 3412.3—Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Items

3412.302 Tailoring of provisions and clauses for the acquisition of commercial items.

The HCA is authorized to approve waivers in accordance with FAR 12.302(c). The approved waiver may be either for an individual contract or for a class of contracts for the specific item. The approved waiver and supporting documentation must be incorporated into the contract file.

SUBCHAPTER C—CONTRACTING METHODS AND CONTRACT TYPES

PART 3413—SIMPLIFIED ACQUISITION PROCEDURES

Sec.
3413.000 Scope of part.
3413.003 Policy.

Subpart 3413.3—Simplified Acquisition Methods

3413.303 Blanket purchase agreements (BPAs).
3413.303–5 Purchases under BPAs.

Authority: 5 U.S.C. 301 and 20 U.S.C. 1018a.

3413.000 Scope of part.

3413.003 Policy.

(c)(1)(iii) FSA—FSA may use simplified acquisition procedures for commercial items without regard to any dollar or timeframe limitations described in FAR 13.5.

(iv) FSA—FSA may use simplified acquisition procedures for non-commercial items up to $1,000,000 when the acquisition is set aside for small businesses, pursuant to 3419.502.

Subpart 3413.3—Simplified Acquisition Methods

3413.303 Blanket purchase agreements (BPAs).

3413.303–5 Purchases under BPAs.

(b) Individual purchases under blanket purchase agreements for commercial items may exceed the simplified acquisition threshold but shall not exceed the threshold for the test program for certain commercial items in FAR 13.500(a).

PART 3414—SEALED BIDDING

Subpart 3414.4—Opening of Bids and Award of Contract

Sec.
3414.407 Mistakes in bids.
3414.407–3 Other mistakes disclosed before award.

Authority: 5 U.S.C. 301.

Subpart 3414.4—Opening of Bids and Award of Contract

3414.407 Mistakes in bids.

3414.407–3 Other mistakes disclosed before award.

Authority is delegated to the HCA to make determinations under FAR 14.407–3(a) through (d).

PART 3415—CONTRACTING BY NEGOTIATION

Subpart 3415.2—Solicitation and Receipt of Proposals and Information

Sec.
3415.209 Solicitation provisions and contract clauses.

Subpart 3415.3—Source Selection

3415.302 Source selection objective.
3415.302–70 Two-phase source selection.

Subpart 3415.6—Unsolicited Proposals

3415.605 Content of unsolicited proposals.
3415.606 Agency procedures.

Authority: 5 U.S.C. 301 and 20 U.S.C. 1018a.

Subpart 3415.2—Solicitation and Receipt of Proposals and Information

3415.209 Solicitation provisions and contract clauses.

(a) The Freedom of Information Act (FOIA), 5 U.S.C. 552, may require ED to release data contained in an offeror's proposal even if the offeror has identified the data as restricted in accordance with the provision in FAR 52.215–1(e). The solicitation provision in 3452.215–70 (Release of restricted data) informs offerors that ED is required to consider release of restricted data under FOIA and Executive Order 12600.

(b) The contracting officer must insert the provision in 3452.215–70, in all solicitations that include a reference to FAR 52.215–1 (Instructions to Offerors—Competitive Acquisitions).

Subpart 3415.3—Source Selection

3415.302 Source selection objective.

3415.302–70 Two-phase source selection.

(a) FSA—May utilize a two-phase process to solicit offers and select a source for award. The contracting officer can choose to use this optional method of solicitation when deemed beneficial to the FSA in meeting its needs as a PBO.

(b) *Phase One.*

(1) The contracting officer must publish a notice in accordance with FAR 5.2, except that the notice must include limited information as specified in 3405.207.

(2) *Information Submitted by Offerors.* Each offeror must submit basic information such as the offeror's qualifications, the proposed conceptual approach, costs likely to be associated with the approach, and past performance data, together with any additional information requested by the contracting officer.

(3) *Selection for participating in second phase.* The contracting officer must select the offerors that are eligible to participate in the second phase of the process. The contracting officer must limit the number of the selected offerors to the number of sources that the contracting officer determines is appropriate and in the best interests of the Federal government.

(c) *Phase Two.*

(1) The contracting officer must conduct the second phase of the source selection consistent with FAR 15.2 and 15.3, except as provided by 3405.207.

(2) Only sources selected in the first phase will be eligible to participate in the second phase.

Subpart 3415.6—Unsolicited Proposals

3415.605 Content of unsolicited proposals.

(d) Each unsolicited proposal must contain the following certification:

Unsolicited Proposal Certification by Offeror

This is to certify, to the best of my knowledge and belief, that—

a. This proposal has not been prepared under Federal government supervision;

b. The methods and approaches stated in the proposal were developed by this offeror;

c. Any contact with employees of the Department of Education has been

within the limits of appropriate advance guidance set forth in FAR 15.604; and

d. No prior commitments were received from Departmental employees regarding acceptance of this proposal.

Date:

Organization:

Name:

Title:

(This certification must be signed by a responsible person authorized to enter into contracts on behalf of the organization.)

3415.606 Agency procedures.

(b)(1) The HCA or designee is the contact point to coordinate the receipt, control, and handling of unsolicited proposals.

(2) Offerors must direct unsolicited proposals to the HCA.

PART 3416—TYPES OF CONTRACTS

Subpart 3416.3—Cost-Reimbursement Contracts

Sec.
3416.303 Cost-sharing contracts.
3416.307 Contract clauses.

Subpart 3416.4—Incentive Contracts

3416.402 Application of predetermined, formula-type incentives.
3416.402–2 Performance incentives.
3416.470 Award-term contracting.

Subpart 3416.6—Time-and-Materials, Labor-Hour, and Letter Contracts

3416.603 Letter contracts.
3416.603–3 Limitations.

Authority: 5 U.S.C. 301 and 20 U.S.C. 1018a.

Subpart 3416.3—Cost-Reimbursement Contracts

3416.303 Cost-sharing contracts.

(b) *Application.* Costs that are not reimbursed under a cost-sharing contract may not be charged to the Federal government under any other grant, contract, cooperative agreement, or other arrangement.

3416.307 Contract clauses.

(a) If the clause at FAR 52.216–7 (Allowable Cost and Payment) is used in a contract with a hospital, the contracting officer must modify the clause by deleting the words "Subpart 31.2 of the Federal Acquisition Regulation (FAR)" from paragraph (a) and substituting "34 CFR part 74, Appendix E."

(b) The contracting officer must insert the clause at 3452.216–70 (Additional cost principles) in all solicitations of and resultant cost-reimbursement contracts with nonprofit organizations other than educational institutions, hospitals, or organizations listed in Attachment C to Office of Management and Budget Circular A–122.

Subpart 3416.4—Incentive Contracts

3416.402 Application of predetermined, formula-type incentives.

3416.402–2 Performance incentives.

(b) Award-term contracting may be used for performance-based contracts or task orders. *See* 3416.470 for the definition of *award-term contracting* and implementation guidelines.

3416.470 Award-term contracting.

(a) *Definition.* Award-term contracting is a method, based upon a pre-determined plan in the contract, to extend the contract term for superior performance and to reduce the contract term for substandard or poor performance.

(b) *Applicability.* A Contracting Officer may authorize use of an award-term incentive contract for acquisitions where the quality of contractor performance is of a critical or highly important nature. The basic contract term may be extended on the basis of the Federal government's determination of the excellence of the contractor's performance. Additional periods of performance, which are referred to herein as "award terms," are available for possible award to the contractor. As award term(s) are awarded, each additional period of performance will immediately follow the period of performance for which the award term was granted. The contract may end at the base period of performance if the Federal government determines that the contractor's performance does not reflect a level of performance as described in the award-term plan. Award-term periods may only be earned based on the evaluated quality of the performance of the contractor. Meeting the terms of the contract is not justification to award an award-term period. The use of an award-term plan does not exempt the contract from the requirements of FAR 17.207, with respect to performing due diligence prior to extending a contract term.

(c) *Approvals.* The Contracting Officer must justify the use of an award-term incentive contract in writing. The award-term plan approving official will be appointed by the HCA.

(d) *Disputes.* The Federal government unilaterally makes all decisions regarding award-term evaluations, points, methodology used to calculate points, and the degree of the contractor's success.

(e) *Award-term limitations.*

(1) Award periods may be earned during the base period of performance and each option period, except the last option period. Award-term periods may not be earned during the final option year of any contract.

(2) Award-term periods may not exceed twelve months.

(3) The potential award-term periods will be priced, evaluated, and considered in the initial contract selection process.

(f) *Implementation of extensions or reduced contract terms.*

(1) An award term is contingent upon a continuing need for the supplies or services and the availability of funds. Award terms may be cancelled prior to the start of the period of performance at no cost to the Federal government if there is not a continued need or available funding.

(2) The extension or reduction of the contract term is affected by a unilateral contract modification.

(3) Award-term periods occur after the period for which the award term was granted. Award-term periods effectively move option periods to later contract performance periods.

(4) Contractors have the right to decline the award of an award-term period. A contractor loses its ability to earn additional award terms if an earned Award-Term Period is declined.

(5) Changes to the contract award-term plan must be mutually agreed upon.

(g) *Clause.* Insert a clause substantially the same as the clause at 3452.216–71 (Award-term) in all solicitations and resulting contracts where an award-term incentive contract is anticipated.

Subpart 3416.6—Time-and-Materials, Labor-Hour, and Letter Contracts

3416.603 Letter contracts.

3416.603–3 Limitations.

If the HCA is to sign a letter contract as the contracting officer, the SPE signs the written determination under FAR 16.603–3.

PART 3417—SPECIAL CONTRACTING METHODS

Subpart 3417.2—Options

Sec.
3417.204 Contracts.
3417.207 Exercise of options.

Subpart 3417.5—Interagency Acquisitions Under the Economy Act

3417.502 General.

Subpart 3417.7—Modular Contracting

3417.70 Modular contracting.

Authority: 31 U.S.C. 1535 and 20 U.S.C. 1018a.

Subpart 3417.2—Options

3417.204 Contracts.

(e) Except as otherwise provided by law, contract periods that exceed the five-year limitation specified in FAR 17.204(e) must be approved by—

(1) The HCA for individual contracts; or

(2) The SPE for classes of contracts.

3417.207 Exercise of options.

If a contract provision allows an option to be exercised within a specified timeframe after funds become available, it must also specify that the date on which funds "become available" is the actual date funds become available to the contracting officer for obligation.

(f)(2) The Federal government may accept price reductions offered by contractors at any time during contract performance. Acceptance of price reductions offered by contractors will not be considered renegotiations as identified in this subpart if they were not initiated or requested by the Federal government.

Subpart 3417.5—Interagency Acquisitions Under the Economy Act

3417.502 General.

No other Federal department or agency may purchase property or services under contracts established or administered by FSA unless the purchase is approved by SPE for the requesting Federal department or agency.

Subpart 3417.7—Modular Contracting

3417.70 Modular contracting.

(a) FSA—May incrementally conduct successive procurements of modules of overall systems. Each module must be useful in its own right or useful in combination with the earlier procurement modules. Successive modules may be procured on a sole source basis under the following circumstances:

(1) Competitive procedures are used for awarding the contract for the first system module; and

(2) The solicitation for the first module included the following:

(i) A general description of the entire system that was sufficient to provide potential offerors with reasonable notice of the general scope of future modules;

(ii) Other sufficient information to enable offerors to make informed business decisions to submit offers for the first module; and

(iii) A statement that procedures, *i.e.,* the sole source awarding of follow-on modules, could be used for the subsequent awards.

SUBCHAPTER D—SOCIOECONOMIC PROGRAMS

PART 3419—SMALL BUSINESS PROGRAMS

Subpart 3419.2—Policies

Sec.
3419.201 General policy.
3419.201–70 Office of Small and Disadvantaged Business Utilization (OSDBU).

Subpart 3419.5—Set-Asides for Small Business

3419.502 Setting aside acquisitions.
3419.502–4 Methods of conducting set-asides.

Authority: 5 U.S.C. 301 and 20 U.S.C. 1018a.

Subpart 3419.2—Policies

3419.201 General policy.

3419.201–70 Office of Small and Disadvantaged Business Utilization (OSDBU).

The Office of Small and Disadvantaged Business Utilization (OSDBU), Office of the Deputy Secretary, is responsible for facilitating the implementation of the Small Business Act, as described in FAR 19.201. The OSDBU develops rules, policy, procedures, and guidelines for the effective administration of ED's small business program.

Subpart 3419.5—Set-Asides for Small Business

3419.502 Setting aside acquisitions.

3419.502–4 Methods of conducting set-asides.

(a) Simplified acquisition procedures as described in FAR Part 13 for the procurement of noncommercial services for FSA requirements may be used under the following circumstances:

(1) The procurement does not exceed $1,000,000;

(2) The procurement is conducted as a small business set-aside pursuant to section 15(a) of the Small Business Act;

(3) The price charged for supplies associated with the services are expected to be less than 20 percent of the total contract price;

(4) The procurement is competitive; and

(5) The procurement is not for construction.

PART 3422—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

Subpart 3422.10—Service Contract Act of 1965, as Amended

Sec.
3422.1002 Statutory requirements.
3422.1002–1 General.

Authority: 5 U.S.C. 301 Subpart 3422.10—Service Contract Act of 1965, as Amended

3422.1002 Statutory requirements.

3422.1002–1 General.

Consistent with 29 CFR 4.145, Extended term contracts, the five-year limitation set forth in the Service Contract Act of 1965, as amended (Service Contract Act), applies to each period of the contract individually, not the cumulative period of base and option periods. Accordingly, no contract subject to the Service Contract Act issued by the Department of Education will have a base period or option period that exceeds five years.

PART 3424—PROTECTION OF PRIVACY AND FREEDOM OF INFORMATION

Subpart 3424.1—Protection of Individual Privacy

Sec.
3424.103 Procedures.
3424.170 Protection of human subjects.

Subpart 3424.2—Freedom of Information Act

3424.201 Authority.
3424.203 Policy.

Authority: 5 U.S.C. 301.

Subpart 3424.1—Protection of Individual Privacy

3424.103 Procedures.

(a) If the Privacy Act of 1974 (Privacy Act) applies to a contract, the contracting officer must specify in the contract the disposition to be made of the system or systems of records upon completion of performance. For example, the contract may require the contractor to completely destroy the records, to remove personal identifiers, to turn the records over to ED, or to keep the records but take certain measures to keep the records confidential and protect the individual's privacy.

(b) If a notice of the system of records has not been published in the **Federal Register**, the contracting officer may proceed with the acquisition but must not award the contract until the notice is published, unless the contracting officer determines, in writing, that portions of the contract may proceed without maintaining information subject

to the Privacy Act. In this case, the contracting officer may—

(1) Award the contract, authorizing performance only of those portions not subject to the Privacy Act; and

(2) After the notice is published and effective, authorize performance of the remainder of the contract.

3424.170 Protection of human subjects.

In this subsection, "Research" means a systematic investigation, including research development, testing and evaluation, designed to develop or contribute to generalizable knowledge. (34 CFR 97.102(d)) Research is considered to involve human subjects when a researcher obtains information about a living individual through intervention or interaction with the individual or obtains personally identifiable private information about an individual. Some categories of research are exempt under the regulations, and the exemptions are in 34 CFR part 97.

(a) The contracting officer must insert the provision in 3452.224–71 (Notice about research activities involving human subjects) in any solicitation where a resultant contract will include, or is likely to include, research activities involving human subjects covered under 34 CFR part 97.

(b) The contracting officer must insert the clause at 3452.224–72 (Research activities involving human subjects) in any solicitation that includes the provision in 3452.224–71 (Notice about research activities involving human subjects) and in any resultant contract.

Subpart 3424.2—Freedom of Information Act

3424.201 Authority.

The Department's regulations implementing the Freedom of Information Act, 5 U.S.C. 552, are in 34 CFR part 5.

3424.203 Policy.

(a) [Reserved]

(b) The Department's policy is to release all information incorporated into a contract and documents that result from the performance of a contract to the public under the Freedom of Information Act. The release or withholding of documents requested will be made on a case-by-case basis. Contracting officers must advise offerors and prospective contractors of the possibility that their submissions may be released under the Freedom of Information Act, not withstanding any restrictions that are included at the time of proposal submission. A clause substantially the same as the clause at 3452.224–70 (Release of information under the Freedom of Information Act) must be included in all solicitations and contracts.

PART 3425—FOREIGN ACQUISITION

Subpart 3425.1—Buy American Act—Supplies

Sec.
3425.102 Exceptions.

Authority: 5 U.S.C. 301.

Subpart 3425.1—Buy American Act—Supplies

3425.102 Exceptions.

The HCA approves determinations under FAR 25.103(b)(2)(i).

SUBCHAPTER E—GENERAL CONTRACTING REQUIREMENTS

PART 3427—PATENTS, DATA, AND COPYRIGHTS

Subpart 3427.4—Rights in Data and Copyrights

Sec.
3427.409 Solicitation provisions and contract clauses.

Authority: 5 U.S.C. 301.

Subpart 3427.4—Rights in Data and Copyrights

3427.409 Solicitation provisions and contract clauses.

(a) The contracting officer must insert the clause at 3452.227–70 (Publication and publicity) in all solicitations and contracts other than purchase orders.

(b) The contracting officer must insert the clause at 3452.227–71 (Advertising of awards) in all solicitations and contracts other than purchase orders.

(c) The contracting officer must insert the clause at 3452.227–72 (Use and non-disclosure agreement) in all contracts over the simplified acquisition threshold, and in contracts under the simplified acquisition threshold, as appropriate.

(d) The contracting officer must insert the clause at 3452.227–73 (Limitations on the use or disclosure of Government-furnished information marked with restrictive legends) in all contracts of third party vendors who require access to Government-furnished information including other contractors' technical data, proprietary information, or software.

PART 3428—BONDS AND INSURANCE

Subpart 3428.3—Insurance

Sec.
3428.311 Solicitation provision and contract clause on liability insurance under cost-reimbursement contracts.
3428.311–2 Contract clause.

Authority: 5 U.S.C. 301.

Subpart 3428.3—Insurance

3428.311 Solicitation provision and contract clause on liability insurance under cost-reimbursement contracts.

3428.311–2 Contract clause.

The contracting officer must insert the clause at 3452.228–70 (Required insurance) in all solicitations and resultant cost-reimbursement contracts.

PART 3432—CONTRACT FINANCING

Subpart 3432.4—Advance Payments for Non-Commercial Items

Sec.
3432.402 General.
3432.407 Interest.

Subpart 3432.7—Contract Funding

3432.705 Contract clauses.
3432.705–2 Clauses for limitation of cost or funds.

Authority: 5 U.S.C. 301.

Subpart 3432.4—Advance Payments for Non-Commercial Items

3432.402 General.

The HCA is delegated the authority to make determinations under FAR 32.402(c)(1)(iii). This authority may not be redelegated.

3432.407 Interest.

The HCA is designated as the official who may authorize advance payments without interest under FAR 32.407(d).

Subpart 3432.7—Contract Funding

3432.705 Contract clauses.

3432.705–2 Clauses for limitation of cost or funds.

(a) The contracting officer must insert the clause at 3452.232–70 (Limitation of cost or funds) in all solicitations and contracts where a Limitation of cost or Limitation of funds clause is utilized.

(b) The contracting officer must insert the provision in 3452.232–71 (Incremental funding) in a solicitation if a cost-reimbursement contract using incremental funding is contemplated.

PART 3433—PROTESTS, DISPUTES, AND APPEALS

Subpart 3433.1—Protests

Sec.
3433.103 Protests to the agency.

Authority: 5 U.S.C. 301.

Subpart 3433.1—Protests

3433.103 Protests to the agency.

(f)(3) The contracting officer's HCA must approve the justification or determination to continue performance.

The criteria in FAR 33.103(f)(3) must be followed in making the determination to award a contract before resolution of a protest.

SUBCHAPTER F—SPECIAL CATEGORIES OF CONTRACTING

PART 3437—SERVICE CONTRACTING

Subpart 3437.1—Service Contracts—General

Sec.
3437.102 Policy.
3437.170 Observance of administrative closures

Subpart 3437.2—Advisory and Assistance Services

3437.270 Services of consultants clauses.

Subpart 3437.6—Performance-Based Acquisition

3437.670 Contract type.

Authority: 5 U.S.C. 301 and 20 U.S.C. 1018a.

Subpart 3437.1—Service Contracts—General

3437.102 Policy.

If a service contract requires one or more end items of supply, FAR Subpart 37.1 and this subpart apply only to the required services.

3437.170 Observance of administrative closures.

The contracting officer must insert the clause at 3452.237–71 (Observance of administrative closures) in all solicitations and contracts for services.

Subpart 3437.2—Advisory and Assistance Services

3437.270 Services of consultants clause.

The contracting officer must insert the clause at 3452.237–70 (Services of consultants) in all solicitations and resultant cost-reimbursement contracts that do not provide services to FSA.

Subpart 3437.6—Performance-Based Acquisition

3437.670 Contract type.

Award-term contracting may be used for performance-based contracts and task orders that provide opportunities for significant improvements and benefits to the Department. Use of award-term contracting must be approved in advance by the HCA.

PART 3439—ACQUISITION OF INFORMATION TECHNOLOGY

Subpart 3439.70—Department Requirements for Acquisition of Information Technology

Sec.
3439.701 Internet Protocol version 6.
3439.702 Department security requirements.
3439.703 Federal desktop core configuration (FDCC) compatibility.

Authority: 5 U.S.C. 301 and 20 U.S.C. 1018a.

Subpart 3439.70—Department Requirements for Acquisition of Information Technology

3439.701 Internet Protocol version 6.

The contracting officer must insert the clause at 3452.239–70 (Internet protocol version 6 (IPv6)) in all solicitations and resulting contracts for hardware and software.

3439.702 Department security requirements.

The contracting officer must include the solicitation provision in 3452.239–71 (Notice to offerors of Department security requirements) and the clause at 3452.239–72 (Department security requirements) when contractor employees will have access to Department-controlled facilities or space, or when the work (wherever located) involves the design, operation, repair, or maintenance of information systems and access to sensitive but unclassified information.

3439.703 Federal desktop core configuration (FDCC) compatibility.

The contracting officer must include the clause at 3452.239–73 (Federal desktop core configuration (FDCC) compatibility) in all solicitations and contracts where software will be developed, maintained, or operated on any system using the FDCC configuration.

SUBCHAPTER G—CONTRACT MANAGEMENT

PART 3442—CONTRACT ADMINISTRATION AND AUDIT SERVICES

Subpart 3442.70—Contract Monitoring

Sec.
3442.7001 Litigation and claims clause.
3442.7002 Delays.

Subpart 3442.71—Accessibility of Meetings, Conferences, and Seminars to Persons with Disabilities

3442.7101 Policy and clause.

Authority: 5 U.S.C. 301.

Subpart 3442.70—Contract Monitoring

3442.7001 Litigation and claims clause.

The contracting officer must insert the clause at 3452.242–70 (Litigation and claims) in all solicitations and resultant cost-reimbursement contracts.

3442.7002 Delays.

The contracting officer must insert the clause at 3452.242–71 (Notice to the Government of delays) in all solicitations and contracts other than purchase orders.

Subpart 3442.71—Accessibility of Meetings, Conferences, and Seminars to Persons with Disabilities

3442.7101 Policy and clause.

(a) It is the policy of ED that all meetings, conferences, and seminars be accessible to persons with disabilities.

(b) The contracting officer must insert the clause at 3452.242–73 (Accessibility of meetings, conferences, and seminars to persons with disabilities) in all solicitations and contracts.

PART 3443—CONTRACT MODIFICATIONS

Subpart 3443.1—General

Sec.
3443.107 Contract clause.

Authority: 5 U.S.C. 301.

Subpart 3443.1—General

3443.107 Contract clause.

The contracting officer must insert a clause substantially the same as 3452.243–70 (Key personnel) in all solicitations and resultant cost-reimbursement contracts in which it will be essential for the contracting officer to be notified that a change of designated key personnel is to take place by the contractor.

PART 3445—GOVERNMENT PROPERTY

Subpart 3445.4—Contractor Use and Rental of Government Property

Sec.
3445.405 Contracts with foreign governments or international organizations.

Authority: 5 U.S.C. 301.

Subpart 3445.4—Contractor Use and Rental of Government Property

3445.405 Contracts with foreign governments or international organizations.

Requests by, or for the benefit of, foreign governments or international organizations to use ED production and research property must be approved by the HCA. The HCA must determine the amount of cost to be recovered or rental charged, if any, based on the facts and circumstances of each case.

PART 3447—TRANSPORTATION

Subpart 3447.7—Foreign Travel

Sec.
3447.701 Foreign travel clause.

Authority: 5 U.S.C. 301.

Subpart 3447.7—Foreign Travel

3447.701 Foreign travel clause.

The contracting officer must insert the clause at 3452.247–70 (Foreign travel) in all solicitations and resultant cost-reimbursement contracts.

SUBCHAPTER H—CLAUSES AND FORMS

PART 3452—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

Subpart 3452.2—Text of Provisions and Clauses

Sec.
3452.201–70 Contracting Officer's Representative (COR).
3452.202–1 Definitions—Department of Education.
3452.208–71 Printing.
3452.208–72 Paperwork Reduction Act.
3452.209–70 Conflict of interest. certification.
3452.209–71 Conflict of interest.
3452.215–70 Release of restricted data.
3452.216–70 Additional cost principles.
3452.216–71 Award-Term.
3452.224–70 Release of information under the Freedom of Information Act.
3452.224–71 Notice about research activities involving human subjects.
3452.224–72 Research activities involving human subjects.
3452.227–70 Publication and publicity.
3452.227–71 Advertising of awards.
3452.227–72 Use and non-disclosure agreement.
3452.227–73 Limitations on the use or disclosure of Government-furnished information marked with restrictive legends.
3452.228–70 Required insurance.
3452.232–70 Limitation of cost or funds.
3452.232–71 Incremental funding.
3452.237–70 Services of consultants.
3452.237–71 Observance of administrative closures.
3452.239–70 Internet protocol version 6 (IPv6).
3452.239–71 Notice to offerors of Department security requirements.
3452.239–72 Department security requirements.
3452.239–73 Federal desktop core configuration (FDCC) compatibility.
3452.242–70 Litigation and claims.
3452.242–71 Notice to the Government of delays.
3452.242–73 Accessibility of meetings, conferences, and seminars to persons with disabilities.
3452.243–70 Key personnel.
3452.247–70 Foreign travel.

Authority: 5 U.S.C. 301.

Subpart 3452.2—Text of Provisions and Clauses

3452.201–70 Contracting Officer's Representative (COR).

As prescribed in 3401.670–3, insert a clause substantially the same as:

Contracting officer's Representative (COR) (MAR 2011)

(a) The Contracting Officer's Representative (COR) is responsible for the technical aspects of the project, technical liaison with the contractor, and any other responsibilities that are specified in the contract. These responsibilities include inspecting all deliverables, including reports, and recommending acceptance or rejection to the contracting officer.

(b) The COR is not authorized to make any commitments or otherwise obligate the Government or authorize any changes that affect the contract price, terms, or conditions. Any contractor requests for changes shall be submitted in writing directly to the contracting officer or through the COR. No such changes shall be made without the written authorization of the contracting officer.

(c) The COR's name and contact information:

(d) The COR may be changed by the Government at any time, but notification of the change, including the name and address of the successor COR, will be provided to the contractor by the contracting officer in writing.

(End of Clause)

3452.202–1 Definitions—Department of Education.

As prescribed in 3402.201, insert the following clause in solicitations and contracts in which the clause at FAR 52.202–1 is required.

Definitions—Department of Education (MAR 2011)

(a) The definitions at FAR 2.101 are appended with those contained in Education Department Acquisition Regulations (EDAR) 3402.101.

(b) The EDAR is available via the Internet at *http://www.ed.gov/policy/fund/reg/clibrary/edar.html.*

(End of Clause)

3452.208–71 Printing.

As prescribed in 3408.870, insert the following clause in all solicitations and contracts other than purchase orders:

Printing (MAR 2011)

Unless otherwise specified in this contract, the contractor shall not engage in, nor subcontract for, any printing (as that term is defined in Title I of the Government Printing and Binding Regulations in effect on the effective date of this contract) in connection with the performance of work under this contract; except that performance involving the duplication of fewer than 5,000 units of any one page, or fewer than 25,000 units in the aggregate of multiple pages, shall not be deemed to be printing. A unit is defined as one side of one sheet, one color only (with black counting as a color), with a maximum image size of 10¾ by 14¼ inches on a maximum paper size of 11 by 17 inches. Examples of counting the number of units: black plus one additional color on one side of one page counts as two units. Three colors (including black) on two sides of one page count as six units.

(End of Clause)

3452.208–72 Paperwork Reduction Act.

As prescribed in 3408.871, insert the following clause in all relevant solicitations and contracts:

Paperwork Reduction Act (MAR 2011)

(a) The Paperwork Reduction Act of 1995 applies to contractors that collect information for use or disclosure by the Federal government. If the contractor will collect information requiring answers to identical questions from 10 or more people, no plan, questionnaire, interview guide, or other similar device for collecting information may be used without first obtaining clearance from the Chief Acquisition Officer (CAO) or the CAO's designee within the Department of Education (ED) and the Office of Management and Budget (OMB). Contractors and Contracting Officers' Representatives shall be guided by the provisions of 5 CFR part 1320, Controlling Paperwork Burdens on the Public, and should seek the advice of the Department's Paperwork Clearance Officer to determine the procedures for acquiring CAO and OMB clearance.

(b) The contractor shall obtain the required clearances through the Contracting Officer's Representative before expending any funds or making public contacts for the collection of information described in paragraph (a) of this clause. The authority to expend funds and proceed with the collection shall be in writing by the contracting officer. The contractor must plan at least 120 days for CAO and OMB clearance. Excessive delay caused by the Government that arises out of causes beyond the control and without the fault or negligence of the contractor will be considered in accordance with the Excusable Delays or Default clause of this contract.

(End of Clause)

3452.209–70 Conflict of interest certification.

As prescribed in 3409.507–1, insert the following provision in all solicitations anticipated to result in contract actions for services above the simplified acquisition threshold:

Conflict of Interest Certification (MAR 2011)

(a)(1) The contractor, subcontractor, employee, or consultant, by signing the form in this clause, certifies that, to the best of its knowledge and belief, there are no relevant facts or circumstances that could give rise to an organizational or personal conflict of interest, (*see* FAR Subpart 9.5 for

organizational conflicts of interest) (or apparent conflict of interest), for the organization or any of its staff, and that the contractor, subcontractor, employee, or consultant has disclosed all such relevant information if such a conflict of interest appears to exist to a reasonable person with knowledge of the relevant facts (or if such a person would question the impartiality of the contractor, subcontractor, employee, or consultant). Conflicts may arise in the following situations:

(i) *Unequal access to information.* A potential contractor, subcontractor, employee, or consultant has access to non-public information through its performance on a government contract.

(ii) *Biased ground rules.* A potential contractor, subcontractor, employee, or consultant has worked, in one government contract, or program, on the basic structure or ground rules of another government contract.

(iii) *Impaired objectivity.* A potential contractor, subcontractor, employee, or consultant, or member of their immediate family (spouse, parent, or child) has financial or other interests that would impair, or give the appearance of impairing, impartial judgment in the evaluation of government programs, in offering advice or recommendations to the government, or in providing technical assistance or other services to recipients of Federal funds as part of its contractual responsibility. "Impaired objectivity" includes but is not limited to the following situations that would cause a reasonable person with knowledge of the relevant facts to question a person's objectivity:

(A) Financial interests or reasonably foreseeable financial interests in or in connection with products, property, or services that may be purchased by an educational agency, a person, organization, or institution in the course of implementing any program administered by the Department;

(B) Significant connections to teaching methodologies or approaches that might require or encourage the use of specific products, property, or services; or

(C) Significant identification with pedagogical or philosophical viewpoints that might require or encourage the use of a specific curriculum, specific products, property, or services.

(2) Offerors must provide the disclosure described above on any actual or potential conflict of interest (or apparent conflict of interest) regardless of their opinion that such a conflict or potential conflict (or apparent conflict of interest) would not impair their objectivity.

(3) In a case in which an actual or potential conflict (or apparent conflict of interest) is disclosed, the Department will take appropriate actions to eliminate or address the actual or potential conflict, including but not limited to mitigating or neutralizing the conflict, when appropriate, through such means as ensuring a balance of views, disclosure with the appropriate disclaimers, or by restricting or modifying the work to be performed to avoid or reduce the conflict. In this clause, the term "potential conflict" means reasonably foreseeable conflict of interest.

(b) The contractor, subcontractor, employee, or consultant agrees that if "impaired objectivity", or an actual or potential conflict of interest (or apparent conflict of interest) is discovered after the award is made, it will make a full disclosure in writing to the contracting officer. This disclosure shall include a description of actions that the contractor has taken or proposes to take to avoid, mitigate, or neutralize the actual or potential conflict (or apparent conflict of interest).

(c) *Remedies.* The Government may terminate this contract for convenience, in whole or in part, if it deems such termination necessary to avoid the appearance of a conflict of interest. If the contractor was aware of a potential conflict of interest prior to award or discovered an actual or potential conflict after award and did not disclose or misrepresented relevant information to the contracting officer, the Government may terminate the contract for default, or pursue such other remedies as may be permitted by law or this contract. These remedies include imprisonment for up to five years for violation of 18 U.S.C. 1001 and fines of up to $5000 for violation of 31 U.S.C. 3802. Further remedies include suspension or debarment from contracting with the Federal government. The contractor may also be required to reimburse the Department for costs the Department incurs arising from activities related to conflicts of interest. An example of such costs would be those incurred in processing Freedom of Information Act requests related to a conflict of interest.

(d) In cases where remedies short of termination have been applied, the contractor, subcontractor, employee, or consultant agrees to eliminate the organizational conflict of interest, or mitigate it to the satisfaction of the contracting officer.

(e) The contractor further agrees to insert in any subcontract or consultant agreement hereunder, provisions that conform substantially to the language of this clause, including specific mention of potential remedies and this paragraph (e).

(f) *Conflict of Interest Certification.*

The offeror, [insert name of offeror], hereby certifies that, to the best of its knowledge and belief, there are no present or currently planned interests (financial, contractual, organizational, or otherwise) relating to the work to be performed under the contract or task order resulting from Request for Proposal No. [insert number] that would create any actual or potential conflict of interest (or apparent conflicts of interest) (including conflicts of interest for immediate family members: spouses, parents, children) that would impinge on its ability to render impartial, technically sound, and objective assistance or advice or result in it being given an unfair competitive advantage. In this clause, the term "potential conflict" means reasonably foreseeable conflict of interest. The offeror further certifies that it has and will continue to exercise due diligence in identifying and removing or mitigating, to the Government's satisfaction, such conflict of interest (or apparent conflict of interest).

Offeror's Name _____

RFP/Contract No. _____

Signature _____

Title _____

Date _____

(End of Clause)

3452.209–71 Conflict of interest.

As prescribed in 3409.507–2, insert the following clause in all contracts for services above the simplified acquisition threshold:

Conflict of Interest (MAR 2011)

(a)(1) The contractor, subcontractor, employee, or consultant, has certified that, to the best of its knowledge and belief, there are no relevant facts or circumstances that could give rise to an organizational or personal conflict of interest (*see* FAR Subpart 9.5 for organizational conflicts of interest) (or apparent conflict of interest) for the organization or any of its staff, and that the contractor, subcontractor, employee, or consultant has disclosed all such relevant information if such a conflict of interest appears to exist to a reasonable person with knowledge of the relevant facts (or if such a person would question the impartiality of the contractor, subcontractor, employee, or consultant). Conflicts may arise in the following situations:

(i) *Unequal access to information*—A potential contractor, subcontractor, employee, or consultant has access to non-public information through its performance on a government contract.

(ii) *Biased ground rules*—A potential contractor, subcontractor, employee, or consultant has worked, in one government contract, or program, on the basic structure or ground rules of another government contract.

(iii) *Impaired objectivity*—A potential contractor, subcontractor, employee, or consultant, or member of their immediate family (spouse, parent, or child) has financial or other interests that would impair, or give the appearance of impairing, impartial judgment in the evaluation of government programs, in offering advice or recommendations to the government, or in providing technical assistance or other services to recipients of Federal funds as part of its contractual responsibility. "Impaired objectivity" includes but is not limited to the following situations that would cause a reasonable person with knowledge of the relevant facts to question a person's objectivity:

(A) Financial interests or reasonably foreseeable financial interests in or in connection with products, property, or services that may be purchased by an educational agency, a person, organization, or institution in the course of implementing any program administered by the Department;

(B) Significant connections to teaching methodologies that might require or encourage the use of specific products, property, or services; or

(C) Significant identification with pedagogical or philosophical viewpoints that

might require or encourage the use of a specific curriculum, specific products, property, or services.

(2) Offerors must provide the disclosure described above on any actual or potential conflict (or apparent conflict of interest) of interest regardless of their opinion that such a conflict or potential conflict (or apparent conflict of interest) would not impair their objectivity.

(3) In a case in which an actual or potential conflict (or apparent conflict of interest) is disclosed, the Department will take appropriate actions to eliminate or address the actual or potential conflict (or apparent conflict of interest), including but not limited to mitigating or neutralizing the conflict, when appropriate, through such means as ensuring a balance of views, disclosure with the appropriate disclaimers, or by restricting or modifying the work to be performed to avoid or reduce the conflict. In this clause, the term "potential conflict" means reasonably foreseeable conflict of interest.

(b) The contractor, subcontractor, employee, or consultant agrees that if "impaired objectivity", or an actual or potential conflict of interest (or apparent conflict of interest) is discovered after the award is made, it will make a full disclosure in writing to the contracting officer. This disclosure shall include a description of actions that the contractor has taken or proposes to take, after consultation with the contracting officer, to avoid, mitigate, or neutralize the actual or potential conflict (or apparent conflict of interest).

(c) *Remedies.* The Government may terminate this contract for convenience, in whole or in part, if it deems such termination necessary to avoid the appearance of a conflict of interest. If the contractor was aware of a potential conflict of interest prior to award or discovered an actual or potential conflict (or apparent conflict of interest) after award and did not disclose or misrepresented relevant information to the contracting officer, the Government may terminate the contract for default, or pursue such other remedies as may be permitted by law or this contract. These remedies include imprisonment for up to five years for violation of 18 U.S.C. 1001 and fines of up to $5,000 for violation of 31 U.S.C. 3802. Further remedies include suspension or debarment from contracting with the Federal government. The contractor may also be required to reimburse the Department for costs the Department incurs arising from activities related to conflicts of interest. An example of such costs would be those incurred in processing Freedom of Information Act requests related to a conflict of interest.

(d) In cases where remedies short of termination have been applied, the contractor, subcontractor, employee, or consultant agrees to eliminate the organizational conflict of interest, or mitigate it to the satisfaction of the contracting officer.

(e) The contractor further agrees to insert in any subcontract or consultant agreement hereunder, provisions that conform substantially to the language of this clause, including specific mention of potential remedies and this paragraph (e).

(End of Clause)

3452.215–70 Release of restricted data.

As prescribed in 3415.209, insert the following provision in solicitations:

Release of Restricted Data (MAR 2011)

(a) Offerors are hereby put on notice that regardless of their use of the legend set forth in FAR 52.215–1(e), Restriction on Disclosure and Use of Data, the Government may be required to release certain data contained in the proposal in response to a request for the data under the Freedom of Information Act (FOIA). The Government's determination to withhold or disclose a record will be based upon the particular circumstance involving the data in question and whether the data may be exempted from disclosure under FOIA. In accordance with Executive Order 12600 and to the extent permitted by law, the Government will notify the offeror before it releases restricted data.

(b) By submitting a proposal or quotation in response to this solicitation:

(1) The offeror acknowledges that the Department may not be able to withhold or deny access to data requested pursuant to FOIA and that the Government's FOIA officials shall make that determination;

(2) The offeror agrees that the Government is not liable for disclosure if the Department has determined that disclosure is required by FOIA;

(3) The offeror acknowledges that proposals not resulting in a contract remain subject to FOIA; and

(4) The offeror agrees that the Government is not liable for disclosure or use of unmarked data and may use or disclose the data for any purpose, including the release of the information pursuant to requests under FOIA.

(c) Offerors are cautioned that the Government reserves the right to reject any proposal submitted with:

(1) A restrictive legend or statement differing in substance from the one required by the solicitation provision in FAR 52.215–1(e), Restriction on Disclosure and Use of Data, or

(2) A statement taking exceptions to the terms of paragraphs (a) or (b) of this provision.

(End of Provision)

3452.216–70 Additional cost principles.

Insert the following clause in solicitations and contracts as prescribed in 3416.307(b):

Additional Cost Principles (MAR 2011)

(a) *Bid and Proposal Costs.* Bid and proposal costs are the immediate costs of preparing bids, proposals, and applications for potential Federal and non-Federal grants, contracts, and other agreements, including the development of scientific, cost, and other data needed to support the bids, proposals, and applications. Bid and proposal costs of the current accounting period are allowable as indirect costs; bid and proposal costs of past accounting periods are unallowable as costs of the current period. However, if the organization's established practice is to treat these costs by some other method, they may be accepted if they are found to be reasonable and equitable. Bid and proposal costs do not include independent research and development costs or pre-award costs.

(b) *Independent research and development costs.* Independent research and development is research and development that is not sponsored by Federal and non-Federal grants, contracts, or other agreements. Independent research and development shall be allocated its proportionate share of indirect costs on the same basis as the allocations of indirect costs of sponsored research and development. The costs of independent research and development, including its proportionate share of indirect costs, are unallowable.

(End of Clause)

3452.216–71 Award-Term.

As prescribed in 3416.470, insert a clause substantially the same as the following in all solicitations and contracts where an award-term arrangement is anticipated:

Award–Term (MAR 2011)

(a) The initial [insert initial contract term] contract term or ordering period may be extended or reduced on the basis of contractor performance, resulting in a contract term or an ordering period lasting at least [insert minimum contract term] years from the date of contract award, to a maximum of [insert maximum contract term] years after the date of contract award.

(b) The contractor's performance will be measured against stated standards by the performance monitors, who will report their findings to the Award Term Determining Official (or Board).

(c) Bilateral changes may be made to the award-term plan at any time. If agreement cannot be made within 60 days, the Government reserves the right to make unilateral changes prior to the start of an award-term period.

(d) The contractor will submit a brief written self-evaluation of its performance within X days after the end of the evaluation period. The self-evaluation report shall not exceed seven pages, and it may be considered in the Award Term Review Board's (ATRB's) (or Term Determining Official's) evaluation of the contractor's performance during this period.

(e) The contract term or ordering period may be unilaterally modified to reflect the ATRB's decision. If the contract term or ordering period has one year remaining, the operation of the contract award-term feature will cease and the contract term or ordering period will not extend beyond the maximum term stated in the contract.

(f) Award terms that have not begun may be cancelled (rather than terminated), should the need for the items or services no longer exists. No equitable adjustments to the contract price are applicable, as this is not the same procedure as a termination for convenience.

(g) The decisions made by the ATRB or Term Determining Official may be made

unilaterally. Alternate Dispute Resolution procedures shall be utilized when appropriate.

(End of Clause)

3452.224–70 Release of information under the Freedom of Information Act.

As prescribed in 3424.203, insert the following clause in solicitations and contracts.

Release of Information Under the Freedom of Information Act (MAR 2011)

By entering into a contract with the Department of Education, the contractor, without regard to proprietary markings, approves the release of the entire contract and all related modifications and task orders including, but not limited to:

(1) Unit prices, including labor rates;

(2) Statements of Work/Performance Work Statements generated by the contractor;

(3) Performance requirements, including incentives, performance standards, quality levels, and service level agreements;

(4) Reports, deliverables, and work products delivered in performance of the contract (including quality of service, performance against requirements/standards/service level agreements);

(5) Any and all information, data, software, and related documentation first provided under the contract;

(6) Proposals or portions of proposals incorporated by reference; and

(7) Other terms and conditions.

(End of Clause)

3452.224–71 Notice about research activities involving human subjects.

As prescribed in 3424.170, insert the following provision in any solicitation where a resultant contract will include, or is likely to include, research activities involving human subjects covered under 34 CFR part 97:

Notice About Research Activities Involving Human Subjects (MAR 2011)

(a) *Applicable Regulations.* In accordance with Department of Education regulations on the protection of human subjects, title 34, Code of Federal Regulations, part 97 ("the regulations"), the contractor, any subcontractors, and any other entities engaged in covered (nonexempt) research activities are required to establish and maintain procedures for the protection of human subjects.

(b) *Definitions.* (1) The regulations define *research* as "a systematic investigation, including research development, testing and evaluation, designed to develop or contribute to generalizable knowledge." (34 CFR 97.102(d)). If an activity follows a deliberate plan designed to develop or contribute to generalizable knowledge, it is research. Research includes activities that meet this definition, whether or not they are conducted under a program considered research for other purposes. For example, some demonstration and service programs may include research activities.

(2) The regulations define a *human subject* as a living individual about whom an investigator (whether professional or student) conducting research obtains data through intervention or interaction with the individual, or obtains identifiable private information. (34 CFR 97.102(f)). The definition of a human subject is met if an activity involves obtaining—

(i) Information about a living person by—

(A) Manipulating that person's environment, as might occur when a new instructional technique is tested; or

(B) Communicating or interacting with the individual, as occurs with surveys and interviews; or

(ii) Private information about a living person in such a way that the information can be linked to that individual (the identity of the subject is or may be readily determined by the investigator or associated with the information). Private information includes information about behavior that occurs in a context in which an individual can reasonably expect that no observation or recording is taking place, and information that has been provided for specific purposes by an individual and that an individual can reasonably expect will not be made public (for example, a school health record).

(c) *Exemptions.* The regulations provide exemptions from coverage for activities in which the only involvement of human subjects will be in one or more of the categories set forth in 34 CFR 97.101(b)(1)–(6). However, if the research subjects are children, the exemption at 34 CFR 97.101(b)(2) (*i.e.,* research involving the use of educational tests, survey procedures, interview procedures or observation of public behavior) is modified by 34 CFR 97.401(b), as explained in paragraph (d) of this provision. Research studies that are conducted under a Federal statute that requires without exception that the confidentiality of the personally identifiable information will be maintained throughout the research and thereafter, *e.g.,* the Institute of Education Sciences confidentiality statute, 20 U.S.C. 9573, are exempt under 34 CFR 97.101(b)(3)(ii).

(d) *Children as research subjects.* Paragraph (a) of 34 CFR 97.402 of the regulations defines *children* as "persons who have not attained the legal age for consent to treatments or procedures involved in the research, under the applicable law of the jurisdiction in which the research will be conducted." Paragraph (b) of 34 CFR 97.401 of the regulations provides that, if the research involves children as subjects—

(1) The exemption in 34 CFR 97.101(b)(2) does not apply to activities involving—

(i) Survey or interview procedures involving children as subjects; or

(ii) Observations of public behavior of children in which the investigator or investigators will participate in the activities being observed.

(2) The exemption in 34 CFR 97.101(b)(2) continues to apply, unmodified by 34 CFR 97.401(b), to—

(i) Educational tests; and

(ii) Observations of public behavior in which the investigator or investigators will not participate in the activities being observed.

(e) *Proposal Instructions.* An offeror proposing to do research that involves human subjects must provide information to the Department on the proposed exempt and nonexempt research activities. The offeror should submit this information as an attachment to its technical proposal. No specific page limitation applies to this requirement, but the offeror should be brief and to the point.

(1) For exempt research activities involving human subjects, the offeror should identify the exemption(s) that applies and provide sufficient information to allow the Department to determine that the designated exemption(s) is appropriate. Normally, the narrative on the exemption(s) can be provided in one paragraph.

(2) For nonexempt research activities involving human subjects, the offeror must cover the following seven points in the information it provides to the Department:

(i) *Human subjects' involvement and characteristics:* Describe the characteristics of the subject population, including their anticipated number, age range, and health status. Identify the criteria for inclusion or exclusion of any subpopulation. Explain the rationale for the involvement of special classes of subjects, such as children, children with disabilities, adults with disabilities, persons with mental disabilities, pregnant women, institutionalized individuals, or others who are likely to be vulnerable.

(ii) *Sources of materials:* Identify the sources of research material obtained from or about individually identifiable living human subjects in the form of specimens, records, or data.

(iii) *Recruitment and informed consent:* Describe plans for the recruitment of subjects and the consent procedures to be followed.

(iv) *Potential risks:* Describe potential risks (physical, psychological, social, financial, legal, or other) and assess their likelihood and seriousness. Where appropriate, discuss alternative treatments and procedures that might be advantageous to the subjects.

(v) *Protection against risk:* Describe the procedures for protecting against or minimizing potential risks, including risks to confidentiality, and assess their likely effectiveness. Where appropriate, discuss provisions for ensuring necessary medical or professional intervention in the event of adverse effects to the subjects. Also, where appropriate, describe the provisions for monitoring the data collected to ensure the safety of the subjects.

(vi) *Importance of knowledge to be gained:* Discuss why the risks to the subjects are reasonable in relation to the importance of the knowledge that may reasonably be expected to result.

(vii) *Collaborating sites:* If research involving human subjects will take place at collaborating site(s), name the sites and briefly describe their involvement or role in the research. Normally, the seven-point narrative can be provided in two pages or less.

(3) If a reasonable potential exists that a need to conduct research involving human subjects may be identified after award of the

contract and the offeror's proposal contains no definite plans for such research, the offeror should briefly describe the circumstances and nature of the potential research involving human subjects.

(f) *Assurances and Certifications.* (1) In accordance with the regulations and the terms of this provision, all contractors and subcontractors that will be engaged in covered human subjects research activities shall be required to comply with the requirements for Assurances and Institutional Review Board approvals, as set forth in the contract clause 3452.224–72 (Research activities involving human subjects).

(2) The contracting officer reserves the right to require that the offeror have or apply for the assurance and provide documentation of Institutional Review Board (IRB) approval of the research prior to award.

(g)(1) The regulations, and related information on the protection of human research subjects, can be found on the Department's protection of human subjects in research Web site: *http://ed.gov/about/offices/list/ocfo/humansub.html.*

(2) Offerors may also contact the following office to obtain information about the regulations for the protection of human subjects and related policies and guidelines: Protection of Human Subjects Coordinator, U.S. Department of Education, Office of the Chief Financial Officer, Financial Management Operations, 400 Maryland Avenue, SW., Washington, DC 20202–4331, Telephone: (202) 245 8090.

(End of Provision)

3452.224–72 Research activities involving human subjects.

As prescribed in 3424.170, insert the following clause in any contract that includes research activities involving human subjects covered under 34 CFR part 97:

Research Activities Involving Human Subjects (MAR 2011)

(a) In accordance with Department of Education regulations on the protection of human subjects in research, title 34, Code of Federal Regulations, part 97 ("the regulations"), the contractor, any subcontractors, and any other entities engaged in covered (nonexempt) research activities are required to establish and maintain procedures for the protection of human subjects. The definitions in 34 CFR 97.102 apply to this clause. As used in this clause, *covered research* means research involving human subjects that is not exempt under 34 CFR 97.101(b) and 97.401(b).

(b) If ED determines that proposed research activities involving human subjects are covered (*i.e.,* not exempt under the regulations), the contracting officer or contacting officer's designee will require the contractor to apply for the Federal Wide Assurance from the Office for Human Research Protections, U.S. Department of Health and Human Services, if the contractor does not already have one on file. The contracting officer will also require that the contractor obtain and send to the Department documentation of Institutional Review Board (IRB) review and approval of the research.

(c) In accordance with 34 CFR part 97, all subcontractors and any legally separate entity (neither owned nor operated by the contractor) that will be engaged in covered research activities under or related to this contract shall be required to comply with the requirements for assurances and IRB approvals. The contractor must include the substance of this clause, including paragraph (c) of this clause, in all subcontracts, and must notify any other entities engaged in the covered research activities of their responsibility to comply with the regulations.

(d) Under no condition shall the contractor conduct, or allow to be conducted, any covered research activity involving human subjects prior to the Department's receipt of the certification that the research has been reviewed and approved by the IRB. (34 CFR 97.103(f).) No covered research involving human subjects shall be initiated under this contract until the contractor has provided the contracting officer (or the contracting officer's designee) a properly completed certification form certifying IRB review and approval of the research activity, and the contracting officer or designee has received the certification. This restriction applies to the activities of each participating entity.

(e) In accordance with 34 CFR 97.109(e), an IRB must conduct continuing reviews of covered research activities at intervals appropriate to the degree of risk, but not less than once a year. Covered research activities that are expected to last one year or more are therefore subject to review by an IRB at least once a year.

(1) For each covered activity under this contract that requires continuing review, the contractor shall submit an annual written representation to the contracting officer (or the contracting officer's designee) stating whether covered research activities have been reviewed and approved by an IRB within the previous 12 months. The contractor may use the form titled "Protection of Human Subjects: Assurance Identification/Certification/Declaration of Exemption" for this representation. For multi-institutional projects, the contractor shall provide this information on its behalf and on behalf of any other entity engaged in covered research activities for which continuing IRB reviews are required.

(2) If the IRB disapproves, suspends, terminates, or requires modification of any covered research activities under this contract, the contractor shall immediately notify the contracting officer in writing of the IRB's action.

(f) The contractor shall bear full responsibility for performing as safely as is feasible all activities under this contract involving the use of human subjects and for complying with all applicable regulations and requirements concerning human subjects. No one (neither the contractor, nor any subcontractor, agent, or employee of the contractor, nor any other person or organization, institution, or group of any kind whatsoever) involved in the performance of such activities shall be deemed to constitute an agent or employee of the Department of Education or of the Federal government with respect to such activities. The contractor agrees to discharge its obligations, duties, and undertakings and the work pursuant thereto, whether requiring professional judgment or otherwise, as an independent contractor without imputing liability on the part of the Government for the acts of the contractor and its employees.

(g) Upon discovery of any noncompliance with any of the requirements or standards stated in paragraphs (b) and (c) of this clause, the contractor shall immediately correct the deficiency. If at any time during performance of this contract, the contracting officer determines, in consultation with the Protection of Human Subjects Coordinator, Office of the Chief Financial Officer, or the sponsoring office, that the contractor is not in compliance with any of the requirements or standards stated in paragraphs (b) and (c) of this clause, the contracting officer may immediately suspend, in whole or in part, work and further payments under this contract until the contractor corrects such noncompliance. Notice of the suspension may be communicated by telephone and confirmed in writing.

(h) The Government may terminate this contract, in full or in part, for failure to fully comply with any regulation or requirement related to human subjects involved in research. Such termination may be in lieu of or in addition to suspension of work or payment. Nothing herein shall be construed to limit the Government's right to terminate the contract for failure to fully comply with such requirements.

(i) The regulations, and related information on the protection of human research subjects, can be found on the Department's protection of human subjects in research Web site: *http://ed.gov/about/offices/list/ocfo/humansub.html.*

Contractors may also contact the following office to obtain information about the regulations for the protection of human subjects and related policies and guidelines: Protection of Human Subjects Coordinator, U.S. Department of Education, Office of the Chief Financial Officer, Financial Management Operations, 400 Maryland Avenue, SW., Washington, DC 20202–4331, Telephone: (202) 245–8090.

(End of Clause)

3452.227–70 Publication and publicity.

As prescribed in 3427.409, insert the following clause in all solicitations and contracts other than purchase orders:

Publication and Publicity (MAR 2011)

(a) Unless otherwise specified in this contract, the contractor is encouraged to publish and otherwise promote the results of its work under this contract. A copy of each article or work submitted by the contractor for publication shall be promptly sent to the contracting officer's representative. The contractor shall also inform the representative when the article or work is published and furnish a copy in the published form.

(b) The contractor shall acknowledge the support of the Department of Education in publicizing the work under this contract in

any medium. This acknowledgement shall read substantially as follows:

"This project has been funded at least in part with Federal funds from the U.S. Department of Education under contract number [Insert number]. The content of this publication does not necessarily reflect the views or policies of the U.S. Department of Education nor does mention of trade names, commercial products, or organizations imply endorsement by the U.S. Government."

(End of Clause)

3452.227–71 Advertising of awards.

As prescribed in 3427.409, insert the following clause in all solicitations and contracts other than purchase orders:

Advertising of Awards (MAR 2011)

The contractor agrees not to refer to awards issued by, or products or services delivered to, the Department of Education in commercial advertising in such a manner as to state or imply that the product or service provided is endorsed by the Federal government or is considered by the Federal government to be superior to other products or services.

(End of Clause)

3452.227–72 Use and Non-Disclosure Agreement.

As prescribed in 3427.409, insert the following clause in all contracts over the simplified acquisition threshold, and in contracts under the simplified acquisition threshold as appropriate:

Use and Non-Disclosure Agreement (MAR 2011)

(a) Except as provided in paragraph (b) of this clause, proprietary data, technical data, or computer software delivered to the Government with restrictions on use, modification, reproduction, release, performance, display, or disclosure may not be provided to third parties unless the intended recipient completes and signs the use and non-disclosure agreement in paragraph (c) of this clause prior to release or disclosure of the data.

(1) The specific conditions under which an intended recipient will be authorized to use, modify, reproduce, release, perform, display, or disclose proprietary data or technical data subject to limited rights, or computer software subject to restricted rights must be stipulated in an attachment to the use and non-disclosure agreement.

(2) For an intended release, disclosure, or authorized use of proprietary data, technical data, or computer software subject to special license rights, modify paragraph (c)(1)(iv) of this clause to enter the conditions, consistent with the license requirements, governing the recipient's obligations regarding use, modification, reproduction, release, performance, display, or disclosure of the data or software.

(b) The requirement for use and non-disclosure agreements does not apply to Government contractors that require access to a third party's data or software for the performance of a Government contract that contains the 3452.227–73 clause, Limitations on the use or disclosure of Government-furnished information marked with restrictive legends.

(c) The prescribed use and non-disclosure agreement is:

Use and Non-Disclosure Agreement

The undersigned, *[Insert Name],* an authorized representative of the *[Insert Company Name],* (which is hereinafter referred to as the "recipient") requests the Government to provide the recipient with proprietary data, technical data, or computer software (hereinafter referred to as "data") in which the Government's use, modification, reproduction, release, performance, display, or disclosure rights are restricted. Those data are identified in an attachment to this agreement. In consideration for receiving such data, the recipient agrees to use the data strictly in accordance with this agreement.

(1) The recipient shall—

(i) Use, modify, reproduce, release, perform, display, or disclose data marked with Small Business Innovative Research (SBIR) data rights legends only for government purposes and shall not do so for any commercial purpose. The recipient shall not release, perform, display, or disclose these data, without the express written permission of the contractor whose name appears in the restrictive legend (the contractor), to any person other than its subcontractors or suppliers, or prospective subcontractors or suppliers, who require these data to submit offers for, or perform, contracts with the recipient. The recipient shall require its subcontractors or suppliers, or prospective subcontractors or suppliers, to sign a use and non-disclosure agreement prior to disclosing or releasing these data to such persons. Such an agreement must be consistent with the terms of this agreement.

(ii) Use, modify, reproduce, release, perform, display, or disclose proprietary data or technical data marked with limited rights legends only as specified in the attachment to this agreement. Release, performance, display, or disclosure to other persons is not authorized unless specified in the attachment to this agreement or expressly permitted in writing by the contractor.

(iii) Use computer software marked with restricted rights legends only in performance of contract number *[insert contract number(s)].* The recipient shall not, for example, enhance, decompile, disassemble, or reverse engineer the software; time share; or use a computer program with more than one computer at a time. The recipient may not release, perform, display, or disclose such software to others unless expressly permitted in writing by the licensor whose name appears in the restrictive legend.

(iv) Use, modify, reproduce, release, perform, display, or disclose data marked with special license rights legends [To be completed by the contracting officer. *See* paragraph (a)(2) of this clause. Omit if none of the data requested is marked with special license rights legends].

(2) The recipient agrees to adopt or establish operating procedures and physical security measures designed to protect these data from inadvertent release or disclosure to unauthorized third parties.

(3) The recipient agrees to accept these data "as is" without any Government representation as to suitability for intended use or warranty whatsoever. This disclaimer does not affect any obligation the Government may have regarding data specified in a contract for the performance of that contract.

(4) The recipient may enter into any agreement directly with the contractor with respect to the use, modification, reproduction, release, performance, display, or disclosure of these data.

(5) The recipient agrees to indemnify and hold harmless the Government, its agents, and employees from every claim or liability, including attorneys fees, court costs, and expenses arising out of, or in any way related to, the misuse or unauthorized modification, reproduction, release, performance, display, or disclosure of data received from the Government with restrictive legends by the recipient or any person to whom the recipient has released or disclosed the data.

(6) The recipient is executing this agreement for the benefit of the contractor. The contractor is a third party beneficiary of this agreement who, in addition to any other rights it may have, is intended to have the rights of direct action against the recipient or any other person to whom the recipient has released or disclosed the data, to seek damages from any breach of this agreement, or to otherwise enforce this agreement.

(7) The recipient agrees to destroy these data, and all copies of the data in its possession, no later than 30 days after the date shown in paragraph (8) of this agreement, to have all persons to whom it released the data do so by that date, and to notify the contractor that the data have been destroyed.

(8) This agreement shall be effective for the period commencing with the recipient's execution of this agreement and ending upon *[Insert Date].* The obligations imposed by this agreement shall survive the expiration or termination of the agreement.

[Insert business name.]
Recipient's Business Name
[Have representative sign.]
Authorized Representative
[Insert date.]
Date
[Insert name and title.]
Representative's Typed Name and Title

(End of Clause)

3452.227–73 Limitations on the use or disclosure of Government-furnished information marked with restrictive legends.

As prescribed in 3427.409, insert the following clause in all contracts of third party vendors who require access to Government-furnished information including other contractors' technical data, proprietary information, or software:

Limitations on The Use Or Disclosure of Government-Furnished Information Marked With Restrictive Legends (MAR 2011)

(a) For contracts under which data are to be produced, furnished, or acquired, the terms *limited rights* and *restricted rights* are defined in the rights in data—general clause (FAR 52.227–14).

(b) Proprietary data, technical data, or computer software provided to the contractor as Government-furnished information (GFI) under this contract may be subject to restrictions on use, modification, reproduction, release, performance, display, or further disclosure.

(1) *Proprietary data with legends that serve to restrict disclosure or use of data.* The contractor shall use, modify, reproduce, perform, or display proprietary data received from the Government with proprietary or restrictive legends only in the performance of this contract. The contractor shall not, without the express written permission of the party who owns the data, release, or disclose such data or software to any person.

(2) *GFI marked with limited or restricted rights legends.* The contractor shall use, modify, reproduce, perform, or display technical data received from the Government with limited rights legends or computer software received with restricted rights legends only in the performance of this contract. The contractor shall not, without the express written permission of the party whose name appears in the legend, release or disclose such data or software to any person.

(3) *GFI marked with specially negotiated license rights legends.* The contractor shall use, modify, reproduce, release, perform, or display proprietary data, technical data, or computer software received from the Government with specially negotiated license legends only as permitted in the license. Such data or software may not be released or disclosed to other persons unless permitted by the license and, prior to release or disclosure, the intended recipient has completed the use and non-disclosure agreement. The contractor shall modify paragraph (c)(1)(iii) of the use and non-disclosure agreement (3452.227–72) to reflect the recipient's obligations regarding use, modification, reproduction, release, performance, display, and disclosure of the data or software.

(c) Indemnification and creation of third party beneficiary rights.

(1) The contractor agrees to indemnify and hold harmless the Government, its agents, and employees from every claim or liability, including attorneys fees, court costs, and expenses, arising out of, or in any way related to, the misuse or unauthorized modification, reproduction, release, performance, display, or disclosure of proprietary data, technical data, or computer software received from the Government with restrictive legends by the contractor or any person to whom the contractor has released or disclosed such data or software.

(2) The contractor agrees that the party whose name appears on the restrictive legend, in addition to any other rights it may have, is a third party beneficiary who has the right of direct action against the contractor, or any person to whom the contractor has released or disclosed such data or software, for the unauthorized duplication, release, or disclosure of proprietary data, technical data, or computer software subject to restrictive legends.

(End of Clause)

3452.228–70 Required insurance.

As prescribed in 3428.311–2, insert the following clause in all solicitations and resultant cost-reimbursement contracts:

Required Insurance (MAR 2011)

(a) The contractor shall procure and maintain such insurance as required by law or regulation, including but not limited to the requirements of FAR Subpart 28.3. Prior written approval of the contracting officer shall be required with respect to any insurance policy, the premiums for which the contractor proposes to treat as a direct cost under this contract, and with respect to any proposed qualified program of self-insurance. The terms of any other insurance policy shall be submitted to the contracting officer for approval upon request.

(b) Unless otherwise authorized in writing by the contracting officer, the contractor shall not procure or maintain for its own protection any insurance covering loss or destruction of, or damage to, Government property.

(End of Clause)

3452.232–70 Limitation of cost or funds.

The following clause shall be inserted in all contracts that include a Limitation of cost or Limitation of funds clause in accordance with 3432.705–2:

Limitation of Cost or Funds (MAR 2011)

(a) Under the circumstances in FAR 32.704(a)(1), the contractor shall submit the following information in writing to the contracting officer:

(1) Name and address of the contractor.

(2) Contract number and expiration date.

(3) Contract items and amounts that will exceed the estimated cost of the contract or the limit of the funds allotted.

(4) The elements of cost that changed from the original estimate (for example: labor, material, travel, overhead), furnished in the following order:

(i) Original estimate.

(ii) Costs incurred to date.

(iii) Estimated cost to completion.

(iv) Revised estimate.

(v) Amount of adjustment.

(5) The factors responsible for the increase.

(6) The latest date by which funds must be available to the contractor to avoid delays in performance, work stoppage, or other impairments.

(b) A fixed fee provided in a contract may not be changed if a cost overrun is funded. Changes in a fixed fee may be made only to reflect changes in the scope of work that justify an increase or decrease in the fee.

(End of Clause)

3452.232–71 Incremental funding.

As prescribed in 3432.705–2, insert the following provision in solicitations if a cost-reimbursement contract using incremental funding is contemplated:

Incremental Funding (MAR 2011)

Sufficient funds are not presently available to cover the total cost of the complete project described in this solicitation. However, it is the Government's intention to negotiate and award a contract using the incremental funding concepts described in the clause titled "Limitation of Funds" in FAR 52.232–22. Under that clause, which will be included in the resultant contract, initial funds will be obligated under the contract to cover an estimated base performance period. Additional funds are intended to be allotted to the contract by contract modification, up to and including the full estimated cost of the entire period of performance. This intent notwithstanding, the Government will not be obligated to reimburse the contractor for costs incurred in excess of the periodic allotments, nor will the contractor be obligated to perform in excess of the amount allotted.

(End of Provision)

3452.237–70 Services of consultants.

As prescribed in 3437.270, insert the following clause in all solicitations and resultant cost-reimbursement contracts that do not provide services to FSA:

Services of Consultants (MAR 2011)

Except as otherwise expressly provided elsewhere in this contract, and notwithstanding the provisions of the clause of the contract entitled "Subcontracts" (FAR 52.244–2), the prior written approval of the contracting officer shall be required—

(a) If any employee of the contractor is to be paid as a "consultant" under this contract; and

(b)(1) For the utilization of the services of any consultant under this contract exceeding the daily rate set forth elsewhere in this contract or, if no amount is set forth, $800, exclusive of travel costs, or if the services of any consultant under this contract will exceed 10 days in any calendar year.

(2) If that contracting officer's approval is required, the contractor shall obtain and furnish to the contracting officer information concerning the need for the consultant services and the reasonableness of the fee to be paid, including, but not limited to, whether fees to be paid to any consultant exceed the lowest fee charged by the consultant to others for performing consultant services of a similar nature.

(End of Clause)

3452.237–71 Observance of administrative closures.

As prescribed in 3437.170, insert the following clause in all solicitations and service contracts:

Observance of Administrative Closures (MAR 2011)

(a) The contract schedule identifies all Federal holidays that are observed under this contract. Contractor performance is required under this contract at all other times, and compensated absences are not extended due to administrative closures of Government facilities and operations due to inclement weather, Presidential decree, or other administrative issuances where Government personnel receive early dismissal instructions.

(b) In cases of contract performance at a Government facility when the facility is closed, the vendor may arrange for performance to continue during the closure at the contractor's site, if appropriate.

(End of Clause)

3452.239–70 Internet protocol version 6 (IPv6).

As prescribed in 3439.701, insert the following clause in all solicitations and resulting contracts for hardware and software:

Internet Protocol Version 6 (MAR 2011)

(a) Any system hardware, software, firmware, or networked component (voice, video, or data) developed, procured, or acquired in support or performance of this contract shall be capable of transmitting, receiving, processing, forwarding, and storing digital information across system boundaries utilizing system packets that are formatted in accordance with commercial standards of Internet protocol (IP) version 6 (IPv6) as set forth in Internet Engineering Task Force (IETF) Request for Comments (RFC) 2460 and associated IPv6-related IETF RFC standards. In addition, this system shall maintain interoperability with IPv4 systems and provide at least the same level of performance and reliability capabilities of IPv4 products.

(b) Specifically, any new IP product or system developed, acquired, or produced must—

(1) Interoperate with both IPv6 and IPv4 systems and products; and

(2) Have available contractor/vendor IPv6 technical support for development and implementation and fielded product management.

(c) Any exceptions to the use of IPv6 require the agency's CIO to give advance, written approval.

(End of Clause)

3452.239–71 Notice to offerors of Department security requirements.

As prescribed in 3439.702, include the following provision in solicitations when the offeror's employees would have access to Department-controlled facilities or space, or when the work (wherever located) would involve the design, operation, repair, or maintenance of information systems and access to sensitive but unclassified information:

Notice to Offerors of Department Security Requirements (MAR 2011)

(a) The offeror and any of its future subcontractors will have to comply with Department security policy requirements as set forth in the "Bidder's Security Package: Security Requirements for Contractors Doing Business with the Department of Education" at: *http://www.ed.gov/fund/contract/about/bsp.html.*

(b) All contractor employees must undergo personnel security screening if they will be employed for 30 days or more, in accordance with Departmental Directive OM:5–101, "Contractor Employee Personnel Security Screenings," available at: *http://www.ed.gov/fund/contract/about/acs/acsom5101.doc.*

(c) The offeror shall indicate the following employee positions it anticipates to employ in performance of this contract and their proposed risk levels based on the guidance provided in Appendix I of Departmental Directive OM:5–101:

High Risk (HR): [Specify HR positions.].

Moderate Risk (MR): [Specify MR positions.].

Low Risk (LR): [Specify LR positions.].

(d) In the event the Department disagrees with a proposed risk level assignment, the issue shall be subject to negotiation. However, if no agreement is reached, the Department's risk level assignment shall be used. The type of screening and the timing of the screening will depend upon the nature of the contractor position, the type of data to be accessed, and the type of information technology (IT) system access required. Personnel security screenings will be commensurate with the risk and magnitude of harm the individual could cause.

(End of Provision)

3452.239–72 Department security requirements.

As prescribed in 3439.702, include the following clause in contracts when the contractor's employees will have access to Department-controlled facilities or space, or when the work (wherever located) would involve the design, operation, repair, or maintenance of information systems and access to sensitive but unclassified information:

Department Security Requirements (MAR 2011)

(a) The contractor and its subcontractors shall comply with Department security policy requirements as set forth in the "Bidder's Security Package: Security Requirements for Contractors Doing Business with the Department of Education" at *http://www.ed.gov/fund/contract/about/bsp.html.*

(b) The following are the contractor employee positions required under this contract and their designated risk levels:

High Risk (HR): [Specify HR positions.]

Moderate Risk (MR): [Specify MR positions.]

Low Risk (LR): [Specify LR positions.]

(c) All contractor employees must undergo personnel security screening if they will be employed for 30 days or more, in accordance with Departmental Directive OM:5–101, "Contractor Employee Personnel Security Screenings." The type of screening and the timing of the screening will depend upon the nature of the contractor position, the type of data to be accessed, and the type of information technology (IT) system access required. Personnel security screenings will be commensurate with the risk and magnitude of harm the individual could cause.

(d) The contractor shall—

(1) Ensure that all non-U.S. citizen contractor employees are lawful permanent residents of the United States or have appropriate work authorization documents as required by the Department of Homeland Security, Bureau of Immigration and Appeals, to work in the United States.

(2) Ensure that no employees are assigned to high risk designated positions prior to a completed preliminary screening.

(3) Submit all required personnel security forms to the contracting officer's representative (COR) within 24 hours of an assignment to a Department contract and ensure that the forms are complete.

(4) Ensure that no contractor employee is placed in a higher risk position than that for which he or she was previously approved, without the approval of the contracting officer or the COR, the Department personnel security officer, and the Department computer security officer.

(5) Ensure that all contractor employees occupying high-risk designated positions submit forms for reinvestigation every five years for the duration of the contract or if there is a break in service to a Department contract of 365 days or more.

(6) Report to the COR all instances of individuals seeking to obtain unauthorized access to any departmental IT system, or sensitive but unclassified and/or Privacy Act protected information.

(7) Report to the COR any information that raises an issue as to whether a contractor employee's eligibility for continued employment or access to Department IT systems, or sensitive but unclassified and/or Privacy Act protected information, promotes the efficiency of the service or violates the public trust.

(8) Withdraw from consideration under the contract any employee receiving an unfavorable adjudication determination.

(9) Officially notify each contractor employee if he or she will no longer work on a Department contract.

(10) Abide by the requirements in Departmental Directive OM:5–101, "Contractor Employee Personnel Security Screenings."

(e) Further information including definitions of terms used in this clause and a list of required investigative forms for each risk designation are contained in Departmental Directive OM:5–101, "Contractor Employee Personnel Security Screenings" available at the Web site listed in the first paragraph of this clause.

(f) Failure to comply with the contractor personnel security requirements may result in a termination of the contract for default.

(End of Clause)

3452.239–73 Federal desktop core configuration (FDCC) compatibility.

As prescribed in 3439.703, insert the following clause in all solicitations and contracts where software will be developed, maintained, or operated on any system using the FDCC configuration:

Federal Desktop Core Configuration (FDCC) Compatibility (MAR 2011)

(a) (1) The provider of information technology shall certify applications are fully functional and operate correctly as intended on systems using the Federal desktop core configuration (FDCC). This includes Internet Explorer 7 configured to operate on Windows XP and Windows Vista (in Protected Mode on Vista).

(2) For the Windows XP settings, *see: http://csrc.nist.gov/itsec/guidance_WinXP.html,* and for the Windows Vista settings, *see: http://csrc.nist.gov/itsec/guidance_vista.html.*

(b) The standard installation, operation, maintenance, update, or patching of software shall not alter the configuration settings from the approved FDCC configuration. The information technology should also use the Windows Installer Service for installation to the default "program files" directory and should be able to silently install and uninstall.

(c) Applications designed for normal end users shall run in the standard user context without elevated system administration privileges.

(End of Clause)

3452.242–70 Litigation and claims.

As prescribed in 3442.7001, insert the following clause in all solicitations and resultant cost-reimbursement contracts:

Litigation and Claims (MAR 2011)

(a) The contractor shall give the contracting officer immediate notice in writing of—

(1) Any legal action, filed against the contractor arising out of the performance of this contract, including any proceeding before any administrative agency or court of law, and also including, but not limited to, the performance of any subcontract hereunder; and

(2) Any claim against the contractor for cost that is allowable under the "allowable cost and payment" clause.

(b) Except as otherwise directed by the contracting officer, the contractor shall immediately furnish the contracting officer copies of all pertinent papers received under that action or claim.

(c) If required by the contracting officer, the contractor shall—

(1) Effect an assignment and subrogation in favor of the Government of all the contractor's rights and claims (except those against the Government) arising out of the action or claim against the contractor; and

(2) Authorize the Government to settle or defend the action or claim and to represent the contractor in, or to take charge of, the action.

(d) If the settlement or defense of an action or claim is undertaken by the Government, the contractor shall furnish all reasonable required assistance. However, if an action against the contractor is not covered by a policy of insurance, the contractor shall notify the contracting officer and proceed with the defense of the action in good faith.

(e) To the extent not in conflict with any applicable policy of insurance, the contractor may, with the contracting officer's approval, settle any such action or claim.

(f)(1) The Government shall not be liable for the expense of defending any action or for any costs resulting from the loss thereof to the extent that the contractor would have been compensated by insurance that was required by law, regulation, contract clause, or other written direction of the contracting officer, but that the contractor failed to secure through its own fault or negligence.

(2) In any event, unless otherwise expressly provided in this contract, the contractor shall not be reimbursed or indemnified by the Government for any cost or expense of liability that the contractor may incur or be subject to by reason of any loss, injury, or damage, to the person or to real or personal property of any third parties as may arise from the performance of this contract.

(End of Clause)

3452.242–71 Notice to the Government of delays.

As prescribed in 3442.7002, insert the following clause in all solicitations and contracts other than purchase orders:

Notice to The Government Of Delays (MAR 2011)

The contractor shall notify the contracting officer of any actual or potential situation, including but not limited to labor disputes, that delays or threatens to delay the timely performance of work under this contract. The contractor shall immediately give written notice thereof, including all relevant information.

(End of Clause)

3452.242–73 Accessibility of meetings, conferences, and seminars to persons with disabilities.

As prescribed in 3442.7101(b), insert the following clause in all solicitations and contracts:

Accessibility of Meetings, Conferences, and Seminars to Persons With Disabilities (MAR 2011)

The contractor shall assure that any meeting, conference, or seminar held pursuant to the contract will meet all applicable standards for accessibility to persons with disabilities pursuant to section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794) and any implementing regulations of the Department.

(End of Clause)

3452.243–70 Key personnel.

As prescribed in 3443.107, insert a clause substantially the same as the following in all solicitations and resultant cost-reimbursement contracts in which it will be essential for the contracting officer to be notified that a change of designated key personnel is to take place by the contractor:

Key Personnel (MAR 2011)

(a) The personnel designated as key personnel in this contract are considered to be essential to the work being performed hereunder. Prior to diverting any of the specified individuals to other programs, or otherwise substituting any other personnel for specified personnel, the contractor shall notify the contracting officer reasonably in advance and shall submit justification (including proposed substitutions) in sufficient detail to permit evaluation of the impact on the contract effort. No diversion or substitution shall be made by the contractor without written consent of the contracting officer; provided, that the contracting officer may ratify a diversion or substitution in writing and that ratification shall constitute the consent of the contracting officer required by this clause. The contract shall be modified to reflect the addition or deletion of key personnel.

(b) The following personnel have been identified as Key Personnel in the performance of this contract:

Labor category	Name
[Insert category.]	[Insert name.]

(End of Clause)

3452.247–70 Foreign travel.

As prescribed in 3447.701, insert the following clause in all solicitations and resultant cost-reimbursement contracts:

Foreign Travel (MAR 2011)

Foreign travel shall not be undertaken without the prior written approval of the contracting officer. As used in this clause, *foreign travel* means travel outside the Continental United States, as defined in the Federal Travel Regulation. Travel to non-foreign areas (including the States of Alaska and Hawaii, the Commonwealths of Puerto Rico, Guam and the Northern Mariana Islands and the territories and possessions of the United States) is considered "foreign travel" for the purposes of this clause.

(End of Clause)

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