AMS/FAST CHANGE REQUEST (CR) COVERSHEET

Change Request Number: 20-58

Date Received: 15 July 20

Title: USMCA Guidance Implementation

Initiator Name: Tim Eckert

Initiator Organization Name / Routing Code: Procurement Policy Branch, AAP-110

Initiator Phone: 202.267.7527

ASAG Member Name*:* Monica Rheinhardt

ASAG Member Phone*:* 202.267.1441

Policy and Guidance: (check all that apply)

- ☐ Policy
- ☒ Procurement Guidance
- ☐ Real Estate Guidance
- ☐ Other Guidance
- ☐ Non-AMS Changes

Summary of Change:
References to North American Free Trade Agreement (NAFTA) replaced by United States-Mexico- Canada Agreement (USMCA). Canadian threshold references deleted as Canada is not part of the Government Procurement part of the USMCA, plus miscellaneous administrative corrections. Correct T3.5 Intellectual Property & T3.6.4 Foreign Acquisition (B) Clauses link to https://fast.faa.gov/contractclauses.cfm.

Reason for Change:
Consistency with current trade agreement and administrative update. Replace old clause link that is broken. Correct T3.5 Intellectual Property & T3.6.4 Foreign Acquisition (B) Clauses link with: https://fast.faa.gov/contractclauses.cfm.

Development, Review, and Concurrence:
Acquisition Policy, Contracts

Target Audience:
Program office and contracting personnel

Briefing Planned: No.

ASAG Responsibilities:
ASAG electronically approved on 8/10.20.

Section / Text Location:
T3.5, T3.6.4A.3, A.5, A.7, A.9, and A.15

The redline version must be a comparison with the current published FAST version.

- (•) I confirm I used the latest published version to create this change / redline

or

- ( ) This is new content

Links:
https://fast.faa.gov/docs/procurementGuidance/guidanceT3.5.pdf
https://fast.faa.gov/docs/procurementGuidance/guidanceT3.6.4.pdf

Attachments:
Redline and final documents.

Other Files:
N/A

Redline(s):

Sections Revised:

3.5 A 2 – Patents and Copyrights
3.5 A 3 – Patent Rights under Government Contracts
3.5 A 4 – Rights in Data and Copyrights

Procurement Guidance - (~~7/2020~~ 9/2020)

T3.5 Intellectual Property Revised 1/2009
- A Patents, Copyrights, and Rights in Data Revised 1/2009
  - 1 General Revised 1/2009
  - 2 Patents and Copyrights Revised ~~1/2009~~ 9/2020
  - 3 Patent Rights under Government Contracts Revised ~~7/2012~~ 9/2020
  - 4 Rights in Data and Copyrights Revised ~~1/2009~~ 9/2020
  - 5 Foreign License and Technical Assistance Agreements Revised 1/2009
- B Clauses
- C Forms Revised 1/2009

T3.5 Intellectual Property Revised 1/2009

A Patents, Copyrights, and Rights in Data Revised 1/2009

1 General Revised 1/2009

a. The policies stated in this section are applicable to all contracts entered into by the FAA. Cooperative Agreements ("Section 106 Cooperative Agreements") and "Other Transaction Agreements" entered into under the authority of 49 U.S.C. 106 do not necessarily require the use of the Intellectual Property clauses found at Section 3.5 of the AMS. Specific provisions dealing with intellectual property in Section 106 Cooperative Agreements and Other Transaction Agreements must be negotiated. Contracting Officers should follow the guidance in this section and draft appropriate clauses in consultation with legal counsel.

b. The Government encourages the maximum practical commercial use of inventions made under Government contracts.

c. Generally, the FAA will not refuse to award a contract on the grounds that the prospective contractor may infringe a patent. The FAA may authorize and consent to the use of inventions in the performance of certain contracts, even though the inventions may be covered by U.S. patents.

d. Generally, contractors providing commercial items should indemnify the Government against liability for the infringement of U.S. patents.

e. The FAA recognizes rights in data developed at private expense, and limits its demands for delivery of that data. When such data is delivered, the FAA will acquire only those rights essential to its needs.

f. Generally, the FAA requires that contractors obtain permission from copyright owners before including copyrighted works owned by others in data to be delivered to the Government.

2 Patents and Copyrights Revised ~~1/2009~~ 9/2020

a. Patent and copyright infringement liability.

(1) Pursuant to 28 U.S.C. 1498, the exclusive remedy for patent or copyright infringement by or on behalf of the Government is a suit for monetary damages against the Government in the Court of Federal Claims. There is no injunctive relief available, and there is no direct cause of action against a contractor that is infringing a patent or copyright with the authorization or consent of the Government (e.g., while performing a contract).

(2) The FAA may expressly authorize and consent to a contractor's use or manufacture of inventions covered by U.S. patents by inserting the clause at AMS 3.5-1, Authorization and Consent.

(3) Because of the exclusive remedies granted in 28 U.S.C. 1498, the FAA requires notice and assistance from its contractors regarding any claims for patent or copyright infringement by inserting the clause at AMS 3.5-2, Notice and Assistance Regarding Patent and Copyright Infringement.

(4) The FAA may require a contractor to reimburse it for liability for patent infringement arising out of a contract for commercial items by inserting the clause at AMS 3.5-3, Patent Indemnity.

b. Royalties.

(1) Reporting of royalties.

(a) To determine whether royalties anticipated or actually paid under FAA contracts are excessive, improper, or inconsistent with Government patent rights, the SIR provision at AMS 3.5-6, Royalty Information, requires prospective contractors to furnish royalty information. The contracting officer shall take appropriate action to reduce or eliminate excessive or improper royalties.

(b) If the response to a SIR includes a charge for royalties, the contracting officer shall, before award of the contract, forward the information to the office having cognizance of patent matters for the contracting activity (generally the legal office that services the contracting activity responsible for the acquisition). The cognizant office shall promptly advise the contracting officer of appropriate action.

(c) The contracting officer, when considering the approval of a subcontract, shall require royalty information if it is required under the prime contract. The contracting officer shall forward the information to the office having cognizance of patent matters. However, the contracting officer need not delay consent while awaiting advice from the cognizant office.

(d) The contracting officer shall forward any royalty reports to the office having cognizance of patent matters for the contracting activity.

(2) Notice of Government as a licensee.

(a) When the Government is obligated to pay a royalty on a patent because of an existing license agreement and the contracting officer believes that the licensed patent will be applicable to a prospective contract, the FAA should furnish the prospective offerors with

(i) Notice of the license;

(ii) The number of the patent; and

(iii) The royalty rate cited in the license.

(b) When the Government is obligated to pay such a royalty, the SIR should also require offerors to furnish information indicating whether or not each offeror is the patent owner or a licensee under the patent. This information is necessary so that the FAA may either

(c) Evaluate an offeror's price by adding an amount equal to the royalty; or

(d) Negotiate a price reduction with an offeror when the offeror is licensed under the same patent at a lower royalty rate.

(3) Adjustment of royalties.

(a) If at any time the contracting officer believes that any royalties paid, or to be paid, under a contract or subcontract are inconsistent with Government rights, excessive, or otherwise improper, the contracting officer shall promptly report the facts to the office having cognizance of patent matters for the contracting activity concerned.

(b) In coordination with the cognizant office, the contracting officer shall promptly act to protect the FAA against payment of royalties

(i) With respect to which the Government has a royalty-free license;

(ii) At a rate in excess of the rate at which the Government is licensed; or

(iii) When the royalties in whole or in part otherwise constitute an improper charge.

(c) In appropriate cases, the contracting officer in coordination with the cognizant office shall demand a refund pursuant to any refund of royalties clause in the contract (see ~~T3.5.A.2.b(~~T3.5.A.2.b (4)) or negotiate for a reduction of royalties.

(4) Refund of royalties. The clause at AMS 3.5-8, Refund of Royalties, establishes procedures to pay the contractor royalties under the contract and recover royalties not paid by the contractor when the royalties were included in the contractor's fixed price.

c. Security requirements for patent applications containing classified subject matter.

(1) Unauthorized disclosure of classified subject matter, whether in patent applications or resulting from the issuance of a patent, may be a violation of 18 U.S.C. 792, et seq. (Chapter 37 - Espionage and Censorship), and related statutes, and may be contrary to the interests of national security.

(2) Upon receipt of a patent application under paragraph (a) or (b) of the clause at AMS 3.5-9, Filing of Patent Applications - Classified Subject Matter, the contracting officer shall ascertain the proper security classification of the patent application. If the application contains classified subject matter, the contracting officer shall inform the contractor how to transmit the application to the United States Patent Office in accordance with procedures provided by legal counsel. If the material is classified "Secret" or higher, the contracting officer shall make every effort to notify the contractor within 30 days of the Government's determination, pursuant to paragraph (a) of the clause.

(3) Upon receipt of information furnished by the contractor under paragraph (d) of the clause at AMS 3.5-9, the contracting officer shall promptly submit that information to legal counsel in order that the steps necessary to ensure the security of the application will be taken

(4) The contracting officer shall act promptly on requests for approval of foreign filing under paragraph (c) of the clause at AMS 3.5-9 in order to avoid the loss of valuable patent rights of the Government or the contractor.

d. Patented technology under trade agreements.

(1) Use of patented technology under the ~~North American Free Trade Agreement~~United States-Mexico-Canada Agreement (USMCA).

~~(a) The requirements of this section apply to the use of technology covered by a valid patent when the patent holder is from a country that is a party to the North American Free Trade Agreement (NAFTA).~~

~~(b) Article 1709(10) of NAFTA generally requires a user of technology covered by a valid patent to make a reasonable effort to obtain authorization prior to use of the patented technology. However, NAFTA provides that this requirement for authorization may be waived in situations of national emergency or other circumstances of extreme urgency, or for public noncommercial use.~~

~~(c) Section 6 of Executive Order 12889, "Implementation of the North American Free Trade Act," of December 27, 1993, waives the requirement to obtain advance authorization for an invention used or manufactured by or for the Federal Government. However, the patent owner shall be notified in advance whenever the agency or its contractor knows or has reasonable grounds to know, without making a patent search, that an invention described in and covered by a valid U.S. patent is or will be used or manufactured without a license. In cases of national emergency or other circumstances of extreme urgency, this notification need not be made in advance, but shall be made as soon as reasonably practicable.~~

~~(d) The contracting officer, in consultation with the office having cognizance of patent matters, shall ensure compliance with the notice requirements of NAFTA~~

~~Article 1709(10) and Executive Order 12889. A contract award should not be suspended pending notification to the patent owner.~~

~~(e) Section 6(c) of Executive Order 12889 provides that the notice to the patent owner does not constitute an admission of infringement of a valid privately- owned patent.~~

~~(f) When addressing issues regarding compensation for the use of patented technology, FAA personnel should be advised that NAFTA uses the term "adequate remuneration." Executive Order 12889 equates "remuneration" to "reasonable and entire compensation" as used in 28 U.S.C. 1498, the statute that gives jurisdiction to the U.S. Court of Federal Claims to hear patent and copyright cases involving infringement by the Government.~~

~~(g)~~ When questions arise ~~regarding the notice requirements or other matters relating to this section~~with regard to use of patented technology under the USMCA, the contracting officer should consult with legal counsel.

(2) Use of patented technology under the General Agreement on Tariffs and Trade (GATT). Article 31 of Annex 1C, Agreement on Trade-Related Aspects of Intellectual Property Rights, to GATT (Uruguay Round) addresses situations where the law of a member country allows for use of a patent without authorization, including use by the Government.

3 Patent Rights under Government Contracts **Revised ~~7/2012~~ 9/2020**

This section prescribes policies, procedures, SIR provisions, and contract clauses pertaining to inventions made in the performance of work under an FAA contract or subcontract for experimental, developmental, or research work.

a. Definitions. As used in this subpart

Invention means any invention or discovery that is or may be patentable or otherwise protectable under title 35 of the U.S. Code, or any variety of plant that is or may be protectable under the Plant Variety Protection Act (7 U.S.C. 2321, et seq.)

Made means

(1) When used in relation to any invention other than a plant variety, means the conception or first actual reduction to practice of the invention;

(2) When used in relation to a plant variety, means that the contractor has at least tentatively determined that the variety has been reproduced with recognized characteristics.

Nonprofit organization means a domestic university or other institution of higher education or an organization of the type described in section 501(c~~)(~~) (3) of the Internal Revenue Code of 1954 (26

U.S.C. 501(c)) and exempt from taxation under section 501(a) of the Internal Revenue Code (26 U.S.C. 501(a)), or any nonprofit scientific or educational organization qualified under a State nonprofit organization statute.

Practical application means to manufacture, in the case of a composition or product; to practice, in the case of a process or method; or to operate, in the case of a machine or system; and, in each case, under such conditions as to establish that the invention is being utilized and that its benefits are, to the extent permitted by law or Government regulations, available to the public on reasonable terms.

Subject invention means any invention of the contractor made in the performance of work under a Government contract.

b. Policy.

(1) Introduction. In accordance with chapter 18 of title 35, U.S.C. (as implemented by 37 CFR part 401), Presidential Memorandum on Government Patent Policy to the Heads of Executive Departments and Agencies dated February 18, 1983, and Executive Order 12591, Facilitating Access to Science and Technology dated April 10, 1987, it is the policy and objective of the Government to

(a) Use the patent system to promote the use of inventions arising from federally supported research or development;

(b) Encourage maximum participation of industry in federally supported research and development efforts;

(c) Ensure that these inventions are used in a manner to promote free competition and enterprise without unduly encumbering future research and discovery;

(d) Promote the commercialization and public availability of the inventions made in the United States by United States industry and labor;

(e) Ensure that the Government obtains sufficient rights in federally supported inventions to meet the needs of the Government and protect the public against nonuse or unreasonable use of inventions; and

(f) Minimize the costs of administering patent policies.

(2) Contractor right to elect title.

(a) Generally, pursuant to 35 U.S.C. 202 and the Presidential memorandum and executive order cited in paragraph (a) of this section, each contractor may, after required disclosure to the Government, elect to retain title to any subject invention.

(b) A contract may require the contractor to assign to the Government title to any subject invention

(i) When the contractor is not located in the United States or does not have a place of business located in the United States or is subject to the control of a foreign government;

(ii) In exceptional circumstances, when an agency determines that restriction or elimination of the right to retain title in any subject invention will better promote the policy and objectives of chapter 18 of title 35, U.S.C. and the Presidential Memorandum;

(iii) When a Government authority, that is authorized by statute or executive order to conduct foreign intelligence or counterintelligence activities, determines that the restriction or elimination of the right to retain title to any subject invention is necessary to protect the security of such activities;

(iv) Reserved.

(v) Pursuant to statute or in accordance with agency regulations.

(c) When the Government has the right to acquire title to a subject invention, the contractor may, nevertheless, request greater rights to a subject invention.

(d) Consistent with 37 CFR part 401, when a contract with a small business concern or nonprofit organization requires assignment of title to the Government based on the exceptional circumstances enumerated in paragraph (b)(2)(ii) or (iii) of this section for reasons of national security, the contract shall still provide the contractor with the right to elect ownership to any subject invention that

(i) Is not classified by the agency; or

(ii) Is not limited from dissemination by the DOE within 6 months from the date it is reported to the agency.

(e) Contracts in support of DOE's naval nuclear propulsion program are exempted from this paragraph (b).

(f) When a contract involves a series of separate task orders, the FAA may structure the contract to apply the exceptions at paragraph (b)(2)(ii) or (iii) of this section to individual task orders.

(3) Government license. The Government shall have at least a nonexclusive, nontransferable, irrevocable, paid-up license to practice, or have practiced for or on behalf of the United States, any subject invention throughout the world. The Government may require additional rights in order to comply with treaties or other international agreements. In such case, these rights shall be made a part of the contract.

(4) Government right to receive title.

(a) In addition to the right to obtain title to subject inventions pursuant to paragraph (b)() (2)() (i) through (v) of this section, the Government has the right to receive title to an invention

(i) If the contractor has not disclosed the invention within the time specified in the clause; or

(ii) In any country where the contractor

(A) Does not elect to retain rights or fails to elect to retain rights to the invention within the time specified in the clause;

(B) Has not filed a patent or plant variety protection application within the time specified in the clause;

(C) Decides not to continue prosecution of a patent or plant variety protection application, pay maintenance fees, or defend in a reexamination or opposition proceeding on the patent; or

(D) No longer desires to retain title.

(b) For the purposes of this paragraph, filing in a European Patent Office Region or under the Patent Cooperation Treaty constitutes election in the countries selected in the application(s).

(5) Utilization reports. The FAA has the right to require periodic reporting on how any subject invention is being used by the contractor or its licensees or assignees. In accordance with 35 U.S.C. 202(c)() (5) and 37 CFR part 401, agencies shall not disclose such utilization reports to persons outside the Government without permission of the contractor. Contractors should mark as confidential/proprietary any utilization report to help prevent inadvertent release outside the Government.

(6) March-in rights.

(a) Pursuant to 35 U.S.C. 203, agencies have certain march-in rights that require the contractor, an assignee, or exclusive licensee of a subject invention to grant a nonexclusive, partially exclusive, or exclusive license in any field of use to responsible applicants, upon terms that are reasonable under the circumstances. If the contractor, assignee or exclusive licensee of a subject invention refuses to grant such a license, the agency can grant the license itself. March-in rights may be exercised only if the agency determines that this action is necessary

(i) Because the contractor or assignee has not taken, or is not expected to take within a reasonable time, effective steps to achieve practical application of the subject invention in the field(s) of use;

(ii) To alleviate health or safety needs that are not reasonably satisfied by the contractor, assignee, or their licensees;

(iii) To meet requirements for public use specified by Federal regulations and these requirements are not reasonably satisfied by the contractor, assignee, or licensees; or

(iv) Because the agreement required by paragraph (g) of this section has neither been obtained nor waived, or because a licensee of the exclusive right to use or sell any subject invention in the United States is in breach of its agreement obtained pursuant to paragraph (g) of this section.

(b) The agency shall not exercise its march-in rights unless the contractor has been provided a reasonable time to present facts and show cause why the proposed agency action should not be taken. The agency shall provide the contractor an opportunity to dispute or appeal the proposed action, in accordance with ~~T3.5.3.d(~~T3.5.3.d (1~~)(~~) (g).

(7) Preference for United States industry. In accordance with 35 U.S.C. 204, no contractor that receives title to any subject invention and no assignee of the contractor shall grant to any person the exclusive right to use or sell any subject invention in the United States unless that person agrees that any products embodying the subject invention or produced through the use of the subject invention will be manufactured substantially in the United States. However, in individual cases, the requirement for this agreement may be waived by the FAA upon a showing by the contractor or assignee that reasonable but unsuccessful efforts have been made to grant licenses on similar terms to potential licensees that would be likely to manufacture substantially in the United States or that under the circumstances domestic manufacture is not commercially feasible.

(8) Special conditions for nonprofit organizations' preference for small business concerns.

(a) Nonprofit organization contractors are expected to use reasonable efforts to attract small business licensees (see paragraph (i~~)(~~) (4) of the clause at AMS 3.5-10, Patent Rights Ownership by the Contractor). What constitutes reasonable efforts to attract small business licensees will vary with the circumstances and the nature, duration, and expense of efforts needed to bring the invention to the market.

(b) Small business concerns that believe a nonprofit organization is not meeting its obligations under the clause may report the matter to the Secretary of Commerce. To the extent deemed appropriate, the Secretary of Commerce will undertake informal investigation of the matter, and may discuss or negotiate with the nonprofit organization ways to improve its efforts to meet its obligations under the clause.

However, in no event will the Secretary of Commerce intervene in ongoing negotiations or contractor decisions concerning the licensing of a specific subject invention. These investigations, discussions, and negotiations involving the Secretary of Commerce will be in coordination with other interested agencies, including the Small Business Administration. In the case of a contract for the operation of a Government-owned, contractor-operated research or production facility, the Secretary of Commerce will coordinate with the agency responsible for the facility prior to any discussions or negotiations with the contractor.

(9) Minimum rights to contractor.

(a) When the Government acquires title to a subject invention, the contractor is normally granted a revocable, nonexclusive, paid-up license to that subject invention throughout the world. The contractor's license extends to any of its domestic subsidiaries and affiliates within the corporate structure of which the contractor is a part and includes the right to grant sublicenses to the extent the contractor was legally obligated to do so at the time of contract award. The contracting officer shall approve or disapprove, in writing, any contractor request to transfer its licenses. No approval is necessary when the transfer is to the successor of that part of the contractor's business to which the subject invention pertains.

(b) In response to a third party's proper application for an exclusive license, the contractor's domestic license may be revoked or modified to the extent necessary to achieve expeditious practical application of the subject invention. The application shall be submitted in accordance with the applicable provisions in 37 CFR part 404 and agency licensing regulations. The contractor's license will not be revoked in that field of use or the geographical areas in which the contractor has achieved practical application and continues to make the benefits of the subject invention reasonably accessible to the public. The license in any foreign country may be revoked or modified to the extent the contractor, its licensees, or its domestic subsidiaries or affiliates have failed to achieve practical application in that country. (See the procedures at ~~T3.5.A.3.d~~(T3.5.A.3.d (1)~~(~~) (f)).

(10) Confidentiality of inventions. Publishing information concerning an invention before a patent application is filed on a subject invention may create a bar to a valid patent. To avoid this bar, the FAA may withhold information from the public that discloses any invention in which the Federal Government owns or may own a right, title, or interest (including a nonexclusive license) (see 35 U.S.C. 205 and 37 CFR part 401). Agencies may only withhold information concerning inventions for a reasonable time in order for a patent application to be filed. Once filed in any patent office, agencies are not required to release copies of any document that is a part of a patent application for those subject inventions. (See also ~~T3.5.A.3.e~~(T3.5.A.3.e (4)).

c. Reserved.

d. Procedures.

(1) General.

(a) Status as small business concern or nonprofit organization. If the FAA has reason to question the size or nonprofit status of the prospective contractor, the FAA may require the prospective contractor to furnish evidence of its nonprofit status.

(b) Exceptions.

(i) Before using any of the exceptions that would require the use of AMS 3.5-12, Patent Rights – Ownership by the Government in a contract with a small business concern or a nonprofit organization and before using an exception based on "exceptional circumstances" for any contractor, the agency shall follow the applicable procedures at 37 CFR 401.

(ii) A small business concern or nonprofit organization is entitled to an administrative review of the use of the exceptions in accordance with agency procedures and 37 CFR Part 401.

(c) Greater rights determinations. Whenever the contract contains the clause at AMS 3.5-12, Patent Rights Ownership by the Government, or a patent rights clause modified to address "exceptional circumstances" the contractor (or an employee-inventor of the contractor after consultation with the contractor) may request greater rights to an identified invention within the period specified in the clause. The contracting officer may grant requests for greater rights if the contracting officer determines that the interests of the United States and the general public will be better served. In making these determinations, the contracting officer shall consider at least the following objectives (see 37 CFR 401.3(b) and 401.15):

(i) Promoting the utilization of inventions arising from federally supported research and development.

(ii) Ensuring that inventions are used in a manner to promote competition and free enterprise without unduly encumbering future research and discovery.

(iii) Promoting public availability of inventions made in the United States by United States industry and labor.

(iv) Ensuring that the Government obtains sufficient rights in federally supported inventions to meet the needs of the Government and protect the public against nonuse or unreasonable use of inventions.

(d) Retention of rights by inventor. If the contractor elects not to retain title to a subject invention, the FAA may consider and, after consultation with the contractor, grant requests for retention of rights by the inventor. Retention of rights by the

inventor will be subject to the conditions in paragraphs (d) (except paragraph (d)(() (1)(() (i)), (e)(() (4), (f), (g), and (h) of the clause at AMS 3.5-10, Patent Rights Ownership by the Contractor.

(e) Government assignment to contractor of rights in Government employees' inventions. When a Government employee is a co-inventor of an invention made under a contract with a small business concern or nonprofit organization, the agency employing the co-inventor may license or assign whatever rights it may acquire in the subject invention from its employee to the contractor, subject at least to the conditions of 35 U.S.C. 202-204.

(f) Revocation or modification of contractor's minimum rights. Before revoking or modifying the contractor's license in accordance with T3.5.3.b(T3.5.3.b (8)(() (i)B) B, the contracting officer shall furnish the contractor a written notice of intention to revoke or modify the license. The FAA will allow the contractor at least 30 days (or another time as may be authorized for good cause by the contracting officer) after the notice to show cause why the license should not be revoked or modified. The contractor has the right to appeal, in accordance with applicable regulations in 37 CFR part 404 and agency licensing regulations, any decisions concerning the revocation or modification.

(g) Exercise of march-in rights. When exercising march-in rights, agencies shall follow the procedures set forth in 37 CFR 401.6.

(h) Licenses and assignments under contracts with nonprofit organizations. If the contractor is a nonprofit organization, paragraph (i) of the clause at AMS 3.5-10 provides that certain contractor actions require agency approval.

(2) Contracts placed by or for other Government agencies. The following procedures apply unless an interagency agreement provides otherwise:

(a) When a Government agency requests the FAA to award a contract on its behalf, the request should explain any special circumstances surrounding the contract and specify the patent rights clause to be used. The clause should be selected and modified, if necessary, in accordance with the policies and procedures of this subpart. If, however, the request states that a clause of the requesting agency is required (e.g., because of statutory requirements, a deviation, or exceptional circumstances), the FAA shall use that clause rather than those of this subpart.

(1) If the request states that an agency clause is required and the work to be performed under the contract is not severable and is funded wholly or in part by the requesting agency, then include the requesting agency clause and no other patent rights clause in the contract.

(2) If the request states that an agency clause is required, and the work to be performed under the contract is severable, then the contracting officer shall assure that the requesting

agency clause applies only to that severable portion of the work and that the work for the FAA is subject to the appropriate patent rights clause.

(3) If the request states that a requesting agency clause is not required in any resulting contract, the FAA will use the appropriate patent rights clause, if any.

(b) Any action requiring an agency determination, report, or deviation involved in the use of the requesting agency's clause is the responsibility of the requesting agency unless the agencies agree otherwise. However, the FAA may not alter the requesting agency's clause without prior approval of the requesting agency.

(c) The requesting agency may require, and provide instructions regarding, the forwarding or handling of any invention disclosures or other reporting requirements of the specified clauses. Normally, the requesting agency is responsible for the administration of any subject inventions. This responsibility shall be established in advance of awarding any contracts.

(3) Subcontracts.

(a) The policies and procedures in this subpart apply to all subcontracts at any tier.

(b) Whenever a prime contractor or a subcontractor considers including a particular clause in a subcontract to be inappropriate or a subcontractor refuses to accept the clause, the contracting officer, in consultation with counsel, shall resolve the matter.

(c) It is Government policy that contractors shall not use their ability to award subcontracts as economic leverage to acquire rights for themselves in inventions resulting from subcontracts.

(1) Appeals.

(a) The designated agency official shall provide the contractor with a written statement of the basis, including any relevant facts, for taking any of the following actions:

(1) A refusal to grant an extension to the invention disclosure period under paragraph (c)(4) of the clause at AMS 3.5-10;

(2) A demand for a conveyance of title to the Government under ~~T.3.5.A.3.2(~~T.3.5.A.3.2 (d~~)(~~) (1~~)(~~) (i) and
(ii);

(3) A refusal to grant a waiver under ~~T3.5.A.3.b(~~T3.5.A.3.b (7), Preference for United States industry; or

(4) A refusal to approve an assignment under ~~T3.5.A.3.b(~~T3.5.A.3.b (8).

(b) Any of these actions may be appealed by filing a contract claim with the Office of Dispute Resolution for Acquisition (ODRA) under the procedures established at Parts 14 and 17 of title 49 of the Code of Federal Regulations. The ODRA shall consider both the factual and legal basis for the action and its consistency with the policy and objectives of 35 U.S.C. 200-206 and 210.

(c) The decision of the ODRA may be appealed as provided at 49 U.S.C. 46110. This is the Contractor's sole remedy for an adverse decision of the ODRA.

e. Administration of patent rights clauses.

(1) Goals.

(a) Contracts having a patent rights clause should be so administered that

(i) Inventions are identified, disclosed, and reported as required by the contract, and elections are made;

(ii) The rights of the Government in subject inventions are established;

(iii) When patent protection is appropriate, patent applications are timely filed and prosecuted by contractors or by the Government;

(iv) The rights of the Government in filed patent applications are documented by formal instruments such as licenses or assignments; and

(v) Expeditious commercial utilization of subject inventions is achieved. (b) If a subject invention is made under a contract funded by more than one agency, at the request of the contractor or on their own initiative, the agencies shall designate one agency as responsible for administration of the rights of the Government in the invention.

(2) Administration by the FAA.

(a) The FAA should establish and maintain appropriate follow-up procedures to protect the Government's interest and to check that subject inventions are identified and disclosed, and when appropriate, patent applications are filed, and that the Government's rights therein are established and protected. Standard forms are available in the AMS for reporting subject inventions and confirmatory instruments. Follow-up activities for contracts that include a clause referenced in ~~T3.5.A.3.d(~~T3.5.A.3.d (h~~)~~() (2) should be coordinated with the appropriate agency.

(b)

(i) The contracting officer administering the contract (or other representative specifically designated in the contract for this purpose) is responsible for receiving invention disclosures, reports, confirmatory instruments, notices, requests, and other documents and information submitted by the contractor pursuant to a patent rights clause.

(A) For other than confirmatory instruments, if the contractor fails to furnish documents or information as called for by the clause within the time required, the contracting officer shall promptly request the contractor to supply the required documents or information. If the failure persists, the contracting officer shall take appropriate action to secure compliance.

(B) If the contractor does not furnish confirmatory instruments within 6 months after filing each patent application, or within 6 months after submitting the invention disclosure if the application has been previously filed, the contracting officer shall request the contractor to supply the required documents.

(ii) The contracting officer shall promptly furnish all invention disclosures, reports, confirmatory instruments, notices, requests, and other documents and information relating to patent rights clauses to legal counsel.

(c) Contracting activities should establish appropriate procedures to detect and correct failures by the contractor to comply with its obligations under the patent rights clauses, such as failures to disclose and report subject inventions, both during and after contract performance. Government effort to review and correct contractor compliance with its patent rights obligations should be directed primarily toward contracts that are more likely to result in subject inventions significant in number or quality. These contracts include contracts of a research, developmental, or experimental nature; contracts of a large dollar amount; and any other contracts when there is reason to believe the contractor may not be complying with its contractual obligations. Other contracts may be reviewed using a spot-check method, as feasible. Appropriate follow-up procedures and activities may include the investigation or review of selected contracts or contractors by those qualified in patent and technical matters to detect failures to comply with contract obligations.

(d) Follow-up activities should include, where appropriate, use of Government patent personnel

(i) To interview agency technical personnel to identify novel developments made in contracts;

(ii) To review technical reports submitted by contractors with cognizant agency technical personnel;

(iii) To check the Official Gazette of the United States Patent and Trademark Office and other sources for patents issued to the contractor in fields related to its Government contracts; and

(iv) To have cognizant Government personnel interview contractor personnel regarding work under the contract involved, observe the work on site, and inspect laboratory notebooks and other records of the contractor related to work under the contract.

(e) If a contractor or subcontractor does not have a clear understanding of its obligations under the clause, or its procedures for complying with the clause are deficient, the contracting officer should explain to the contractor its obligations. The withholding of payments provision (if any) of the patent rights clause may be invoked if the contractor fails to meet the obligations required by the patents rights clause. Significant or repeated failures by a contractor to comply with the patent rights obligation in its contracts shall be documented and made a part of the general file.

(3) Securing invention rights acquired by the Government.

(a) The FAA is responsible for implementing procedures necessary to protect the Government's interest in subject inventions. When the Government acquires the entire right, title, and interest in an invention by contract, the chain of title from the inventor to the Government shall be clearly established. This is normally accomplished by an assignment either from each inventor to the contractor and from the contractor to the Government, or from the inventor to the Government with the consent of the contractor. When the Government's rights are limited to a license, there should be a confirmatory instrument to that effect.

(b) The FAA will develop suitable assignments, licenses, and other papers evidencing any rights of the Government in patents or patents applications. Standard forms are available in the AMS for reporting subject inventions and confirmatory instruments. These instruments should be recorded in the U.S. Patent and Trademark Office (see Executive Order 9424, Establishing in the United States Patent Office a Register of Government Interests in Patents and Applications for Patents, (February 18, 1944).

(4) Protection of invention disclosures.

(a) The Government will, to the extent authorized by 35 U.S.C. 205, withhold from disclosure to the public any invention disclosures reported under the patent rights clauses of AMS 3.5-10 or AMS 3.5-12 for a reasonable time in order for patent applications to be filed. The Government will follow the policy in ~~T3.5.3.b~~(T3.5.3.b (9) regarding protection of confidentiality.

(b) The Government should also use reasonable efforts to withhold from disclosure to the public for a reasonable time other information disclosing a subject invention. This information includes any data delivered pursuant to contract requirements provided that the contractor notifies the FAA as to the identity of the data and the subject invention to which it relates at the time of delivery of the data. This notification shall be provided to both the contracting officer and to any patent representative to which the invention is reported, if other than the contracting officer.

(c) For more information on protection of invention disclosures, also see 37 CFR 401.13.

f. Licensing background patent rights to third parties.

(1) A contract with a small business concern or nonprofit organization shall not contain a provision allowing the Government to require the licensing to third parties of inventions owned by the contractor that are not subject inventions unless the Administrator has approved and signed a written justification in accordance with paragraph (b) of this section. The Administrator may not delegate this authority and may exercise the authority only if it is determined that the

(a) Use of the invention by others is necessary for the practice of a subject invention or for the use of a work object of the contract; and

(b) Action is necessary to achieve the practical application of the subject invention or work object.

(2) Any determination will be on the record after an opportunity for a hearing, and the FAA will notify the contractor of the determination by certified or registered mail. The notification shall include a statement that the contractor must bring any action for review of the Administrator's determination within 90 days after the notification pursuant to 49 U.S.C. 46110.

4 Rights in Data and Copyrights **Revised ~~1/2009~~ 9/2020**

This section sets forth policies and procedures regarding rights in data and copyrights, and acquisition of data by and for the FAA.

a. Definitions. As used in this subpart

Data means recorded information, regardless of form or the media on which it may be recorded. The term includes technical data and computer software. The term does not include information incidental to contract administration, such as financial, administrative, cost or pricing, or management information.

Form, fit, and function data means data relating to items, components, or processes that are sufficient to enable physical and functional interchangeability, and data identifying source, size, configuration,

mating and attachment characteristics, functional characteristics, and performance requirements. For computer software it means data identifying source, functional characteristics, and performance requirements, but specifically excludes the source code, algorithms, processes, formulas, and flow charts of the software.

Limited rights means the rights of the Government in limited rights data as set forth in a Limited Rights Notice.

Limited rights data means data, other than computer software, that embody trade secrets or are commercial or financial and confidential or privileged, to the extent that such data pertain to items, components, or processes developed at private expense, including minor modifications. (Agencies may, however, adopt the following alternate definition:

Limited rights data means data (other than computer software) developed at private expense that embody trade secrets or are commercial or financial and confidential or privileged.

Restricted computer software means computer software developed at private expense and that is a trade secret, is commercial or financial and confidential or privileged, or is copyrighted computer software, including minor modifications of the computer software.

Restricted rights means the rights of the Government in restricted computer software as set forth in a Restricted Rights Notice.

Unlimited rights means the rights of the Government to use, disclose, reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, in any manner and for any purpose, and to have or permit others to do so.

b. Policy.

(1) To carry out its missions and programs, the FAA acquires or obtains access to many kinds of data produced during or used in the performance of its contracts. The FAA requires data to

(a) Obtain competition among suppliers;

(b) Fulfill certain responsibilities for disseminating and publishing the results of its activities;

(c) Ensure appropriate utilization of the results of research, development, and demonstration activities including the dissemination of technical information to foster subsequent technological developments;

(d) Meet other programmatic and statutory requirements; and

(e) Meet specialized acquisition needs and ensure logistics support.

(2) Contractors may have proprietary interests in data. In order to prevent the compromise of these interests, the FAA will protect proprietary data from unauthorized use and disclosure. The protection of such data is also necessary to encourage qualified contractors to participate in and apply innovative concepts to Government programs. In light of these considerations, the FAA will balance the Government's needs and the contractor's legitimate proprietary interests.

c. Data rights - General.

All contracts that require data to be produced, furnished, acquired, or used in meeting contract performance requirements, must contain terms that delineate the respective rights and obligations of the Government and the contractor regarding the use, reproduction, and disclosure of that data. Data rights clauses do not specify the type, quantity or quality of data that is to be delivered, but only the respective rights of the Government and the contractor regarding the use, disclosure, or reproduction of the data. Accordingly, the contract shall specify the data to be delivered.

d. Basic rights in data clause.

This section describes the operation of the clause at AMS 3.5-13, Rights in Data - General, and also the use of the provision at AMS 3.5-14, Representation of Limited Rights Data and Restricted Computer Software.

(1) Unlimited rights data. The Government acquires unlimited rights in the following data except for copyrighted works as provided in ~~T3.5.A.4.d(~~T3.5.A.4.d (3).

(a) Data first produced in the performance of a contract (except to the extent the data constitute minor modifications to data that are limited rights data or restricted computer software).

(b) Form, fit, and function data delivered under contract.

(c) Data (except as may be included with restricted computer software) that constitute manuals or instructional and training material for installation, operation, or routine maintenance and repair of items, components, or processes delivered or furnished for use under a contract.

(d) All other data delivered under the contract other than limited rights data or restricted computer software ~~T3.5.A.4(~~T3.5.A.4 (d~~)(~~() (2).

(2) Limited rights data and restricted computer software.

(a) General. The basic clause at AMS 3.5-13, Rights in Data - General, enables the contractor to protect qualifying limited rights data and restricted computer software

by withholding the data from the Government and instead delivering form, fit, and function data.

(b) Alternate definition of limited rights data. For contracts that do not require the development, use, or delivery of items, components, or processes that are intended to be acquired by or for the Government, the FAA may adopt the alternate definition of limited rights data set forth in Alternate I to the clause at AMS 3.5-13. The alternate definition does not require that the data pertain to items, components, or processes developed at private expense; but rather that the data were developed at private expense and embody a trade secret or are commercial or financial and confidential or privileged.

(c) Protection of limited rights data specified for delivery.

(i) The clause at AMS 3.5-13 with its Alternate II enables the FAA to require delivery of limited rights data rather than allow the contractor to withhold the data. To obtain delivery, the contract may identify and specify data to be delivered, or the contracting officer may require, by written request during contract performance, the delivery of data that has been withheld or identified to be withheld under paragraph (g)(1) of the clause. In addition, the contract may specifically identify data that are not to be delivered under Alternate II or which, if delivered, will be delivered with limited rights. The limited rights obtained by the Government are set forth in the Limited Rights Notice contained in paragraph (g~~)~~() (3) of Alternate II. The FAA will not, without permission of the contractor, use limited rights data for purposes of manufacture or disclose the data outside the Government except as set forth in the Notice. Any disclosure by the Government shall be subject to prohibition against further use and disclosure by the recipient. The following are examples of specific purposes that may be adopted by an agency in its supplement and added to the Limited Rights Notice of paragraph (g~~)~~() (3) of Alternate II of the clause:

(A) Use (except for manufacture) by support service contractors.

(B) Evaluation by nongovernment evaluators.

(C) Use (except for manufacture) by other contractors participating in the Government's program of which the specific contract is a part.

(D) Emergency repair or overhaul work.

(E) Release to a foreign government, or its instrumentalities, if required to serve the interests of the U.S. Government, for information or evaluation, or for emergency repair or overhaul work by the foreign government.

(ii) The provision at AMS 3.5-14, Representation of Limited Rights Data and Restricted Computer Software, helps the contracting officer to determine whether the clause at AMS 3.5-13 should be used with its Alternate II. This provision requests that an offeror state whether limited rights data are likely to be delivered. Where limited rights data are expected to be delivered, use Alternate II. Where negotiations are based on an unsolicited proposal, the need for Alternate II of the clause at AMS 3.5-13 should be addressed during negotiations or discussions, and if Alternate II was not included initially it may be added by modification, if needed, during contract performance.

(iii) If data that would otherwise qualify as limited rights data is delivered as a computer database, the data shall be treated as limited rights data, rather than restricted computer software, for the purposes of paragraph (g) of the AMS 3.5-13.

(d) Protection of restricted computer software specified for delivery.

(i) Alternate III of the clause at AMS 3.5-13, enables the Government to require delivery of restricted computer software rather than allow the contractor to withhold such restricted computer software. To obtain delivery of restricted computer software the contracting officer shall

(A) Identify and specify the deliverable computer software in the contract; or

(B) Require by written request during contract performance, the delivery of computer software that has been withheld or identified to be withheld under paragraph (g~~)~~() (1) of the clause.

(ii) In considering whether to use Alternate III, contracting officers should note that, unlike other data, computer software is also an end item in itself. Thus, the contracting officer shall use Alternate III if delivery of restricted computer software is required to meet agency needs.

(iii) Unless otherwise agreed (see paragraph (d~~)~~() (4) of this subsection), the restricted rights obtained by the Government are set forth in the Restricted Rights Notice contained in paragraph (g~~)~~() (4) (Alternate III). Such restricted computer software will not be used or reproduced by the Government, or disclosed outside the Government, except that the computer software may be

(A) Used or copied for use with the computers for which it was acquired, including use at any Government installation to which the computers may be transferred;

(B) Used or copied for use with a backup computer if any computer for which it was acquired is inoperative;

(C) Reproduced for safekeeping (archives) or backup purposes;

(D) Modified, adapted, or combined with other computer software, provided that the modified, adapted, or combined portions of the derivative software incorporating any of the delivered, restricted computer software shall be subject to the same restricted rights;

(E) Disclosed to and reproduced for use by support service contractors or their subcontractors, in accordance with paragraphs (3)(() (i) through (iv) of this section; and

(F) Used or copied for use with a replacement computer.

(iv) The restricted rights set forth in paragraph (d)(3) of this subsection are the minimum rights the Government normally obtains with restricted computer software and will automatically apply when such software is acquired under the Restricted Rights Notice of paragraph (g)(4) of Alternate III of the clause at AMS 3.5-13. However, the contracting officer may specify different rights in the contract, consistent with the purposes and needs for which the software is to be acquired. For example, the contracting officer should consider any networking needs or any requirements for use of the computer software from remote terminals. Also, in addressing such needs, the scope of the restricted rights may be different for the documentation accompanying the computer software than for the programs and databases. Any additions to, or limitations on, the restricted rights set forth in the Restricted Rights Notice of paragraph (g)(4) of Alternate III of the clause at AMS 3.5-13 shall be expressly stated in the contract or in a collateral agreement incorporated in and made part of the contract, and the notice modified accordingly.

(v) The provision at AMS 3.5-14, Representation of Limited Rights Data and Restricted Computer Software, helps the contracting officer determine whether to use the clause at AMS 3.5-13 with its Alternate III. This provision requests that an offeror state whether restricted computer software is likely to be delivered under the contract. In addition, the need for Alternate III should be addressed during negotiations or discussions with an offeror, particularly where negotiations are based on an unsolicited proposal. However, if Alternate III is not used initially, it may be added by modification, if needed, during contract performance.

(3) Copyrighted works.

(a) Data first produced in the performance of a contract.

(i) Generally, the contractor must obtain permission of the contracting officer prior to asserting rights in any copyrighted work containing data first produced in the performance of a contract. However, contractors are normally authorized, without prior approval of the contracting officer, to assert copyright in technical or scientific articles based on or containing such data that is published in academic, technical or professional journals, symposia proceedings and similar works.

(ii) The contractor must make a written request for permission to assert its copyright in works containing data first produced under the contract. In its request, the contractor should identify the data involved or furnish copies of the data for which permission is requested, as well as a statement as to the intended publication or dissemination media or other purpose for which the permission is requested. Generally, a contracting officer should grant the contractor's request when copyright protection will enhance the appropriate dissemination or use of the data unless the

(A) Data consist of a report that represents the official views of the agency or that the agency is required by statute to prepare;

(B) Data are intended primarily for internal use by the Government;

(C) Data are of the type that the agency itself distributes to the public under an agency program;

(D) Government determines that limitation on distribution of the data is in the national interest; or

(E) Government determines that the data should be disseminated without restriction.

(iii) Alternate IV of the clause at AMS 3.5-13 provides a substitute paragraph (c~~)~~( ) (1) granting permission for contractors to assert copyright in any data first produced in the performance of the contract without the need for any further requests. Except for contracts for management or operation of Government facilities and contracts and subcontracts in support of programs being conducted at those facilities or where international agreements require otherwise, Alternate IV shall be used in all contracts for basic or applied research to be performed solely by colleges and universities. Alternate IV shall not be used in contracts with colleges and universities if a purpose of the contract is for development of computer software for distribution to the public (including use in solicitations) by or on behalf of the Government. In addition, Alternate IV may be used in other contracts if an agency determines

that it is not necessary for a contractor to request further permission to assert copyright in data first produced in performance of the contract. The contracting officer may exclude any data, or items or categories of data, from the provisions of Alternate IV by expressly so providing in the contract or by adding a paragraph (d)(4) to the clause, consistent with T3.5.A.4.d.(4)(b).

(iv) Pursuant to paragraph (c)(1) of the clause at AMS 3.5-13, the contractor grants the Government a paid-up nonexclusive, irrevocable, worldwide license to reproduce, prepare derivative works, distribute to the public, perform publicly and display publicly by or on behalf of the Government, for all data(other than computer software) first produced in the performance of a contract. For computer software, the scope of the Government's license includes all of the above rights except the right to distribute to the public. The FAA may also obtain a license of different scope if the contracting officer determines, after consulting with legal counsel, such a license will substantially enhance the dissemination of any data first produced under the contract or if such a license is required to comply with international agreements. If the FAA obtains a different license, the contractor shall clearly state the scope of that license in a conspicuous place on the medium on which the data is recorded. For example, if the data is delivered as a report, the terms of the license shall be stated on the cover, or first page, of the report.

(v) The clause requires the contractor to affix the applicable copyright notices of 17 U.S.C. 401 or 402, and acknowledgment of Government sponsorship, (including the contract number) to data when it asserts copyright in data. Failure to do so could result in such data being treated as unlimited rights data (see ~~T3.5.A.4.d~~(T3.5.A.4.d (1)).

(b) Data not first produced in the performance of a contract.

(i) Contractors shall not deliver any data that is not first produced under the contract without either

(A) Acquiring for or granting to the Government a copyright license for the data; or

(B) Obtaining permission from the contracting officer to do otherwise.

(ii) The copyright license the Government acquires for such data will normally be of the same scope as discussed in paragraph (a)(4) of this subsection, and is set forth in paragraph (c)(2) of the clause at AMS 3.5-13. However, agencies may obtain a license of different scope if the agency determines, after consultation with its legal counsel, that such different license will not be inconsistent with the purpose of acquiring the data. If a

license of a different scope is acquired, it must be so stated in the contract and clearly set forth in a conspicuous place on the data when delivered to the Government. If the contractor delivers computer software not first produced under the contract, the contractor shall grant the Government the license set forth in paragraph (g)(4) of Alternate III if included in the clause at AMS 3.4-13, or a license agreed to in a collateral agreement made part of the contract.

(4) Contractor's release, publication, and use of data.

(a) In contracts for basic or applied research with universities or colleges, the FAA will not place any restrictions on the conduct of or reporting on the results of unclassified basic or applied research, except as provided in applicable U.S. Statutes. However, the FAA may restrict the release or disclosure of computer software that is or is intended to be developed to the point of practical application (including for agency distribution under established programs). This is not considered a restriction on the reporting of the results of basic or applied research. The FAA may also preclude a contractor from asserting copyright in any computer software for purposes of established agency distribution programs, or where required to accomplish the purpose for which the software is acquired.

(b) Except for the results of basic or applied research under contracts with universities or colleges, the FAA may place limitations or restrictions on the contractor's exercise of its rights in data first produced in the performance of the contract, including a requirement to assign copyright to the Government or another party. Any of these restrictions shall be expressly included in the contract.

(5) Unauthorized, omitted, or incorrect markings.

(a) Unauthorized marking of data.

(i) The FAA has, in accordance with paragraph (e) of the clause at AMS 3.5-13, the right to either return data containing unauthorized markings or to cancel or ignore the markings.

(ii) The FAA will not cancel or ignore markings without making written inquiry of the contractor and affording the contractor at least 60 days to provide a written justification substantiating the propriety of the markings.

(A) If the contractor fails to respond or fails to provide a written justification substantiating the propriety of the markings within the time afforded, the FAA may cancel or ignore the markings.

(B) If the contractor provides a written justification substantiating the propriety of the markings, the contracting officer shall consider the justification.

(C) If the contracting officer determines that the markings are authorized, the contractor will be so notified in writing.

(D) If the contracting officer determines, with concurrence of the Chief of the Contracting Office [COCO], that the markings are not authorized, the Contracting Officer shall provide a written determination to the Contractor. If the Contractor disagrees with the Contracting Officer determination, the Contractor may seek adjudication of that determination under AMS 3.9.1-1 "Contract Dispute." The decision of the Office of Dispute Resolution for Acquisition [ODRA] shall be final regarding the appropriateness of the markings unless the Contractor files an appeal pursuant to 49 U.S.C. 46110 in a court of competent jurisdiction within 90 days of receipt of the ODRA decision. This is the Contractor's sole remedy to an adverse decision of the ODRA. The markings will not be cancelled or ignored until final resolution of the matter, either by the contracting officer's determination, a decision pursuant to 14 CFR Parts 14 and 17, or by final disposition of the matter by court pursuant to 49 U.S.C. 46110.

(iii) The foregoing procedures may be modified in accordance with agency regulations implementing the Freedom of Information Act (5 U.S.C. 552) if necessary to respond to a request.

(b) Omitted or incorrect notices.

(i) Data delivered under a contract containing the clause without a limited rights notice or restricted rights notice, and without a copyright notice, will be presumed to have been delivered with unlimited rights, and the Government assumes no liability for the disclosure, use, or reproduction of the data. However, to the extent the data has not been disclosed without restriction outside the Government, the contractor may, within 6 months (or a longer period approved by the contracting officer for good cause shown), request permission of the contracting officer to have omitted limited rights or restricted rights notices, as applicable, placed on qualifying data at the contractor's expense. The contracting officer may permit adding appropriate notices if the contractor

(A) Identifies the data for which a notice is to be added;

(B) Demonstrates that the omission of the proposed notice was inadvertent;

(C) Establishes that use of the proposed notice is authorized; and

(D) Acknowledges that the Government has no liability with respect to any disclosure or use of any such data made prior to the addition of the notice or resulting from the omission of the notice.

(ii) The contracting officer may also

(A) Permit correction, at the contractor's expense, of incorrect notices if the contractor identifies the data on which correction of the notice is to be made, and demonstrates that the correct notice is authorized; or

(B) Correct any incorrect notices.

(6) Inspection of data at the contractor's facility. Contracting officers may obtain the right to inspect data at the contractor's facility by use of the clause at AMS 3.5-13 with its Alternate V, which adds paragraph (j) to provide that right. The FAA may also adopt Alternate V for general use. The data subject to inspection may be data withheld or withholdable under paragraph (g~~)~~~~(~~) (1) of the clause. Inspection may be made by the contracting officer or designee (including nongovernmental personnel under the same conditions as the contracting officer) for the purpose of verifying a contractor's assertion regarding the limited rights or restricted rights status of the data, or for evaluating work performance under the contract. This right may be exercised up to 3 years after acceptance of all items to be delivered under the contract. The contract may specify data items that are not subject to inspection under paragraph (j) of the Alternate. If the contractor demonstrates to the contracting officer that there would be a possible conflict of interest if inspection were made by a particular representative, the contracting officer shall designate an alternate representative.

e. Other data rights provisions.

(1) Special works.

(a) The clause at AMS 3.5-16, Rights in Data - Special Works, is for use in contracts (or may be made applicable to portions thereof) that are primarily for the production or compilation of data (other than limited rights data or restricted computer software) for the Government's own use, or when there is a specific need to limit distribution and use of the data or to obtain indemnity for liabilities that may arise out of the content, performance, or disclosure of the data. Examples are contracts for

(i) The production of audiovisual works, including motion pictures or television recordings with or without accompanying sound, or for the preparation of motion picture scripts, musical compositions, sound tracks, translation, adaptation, and the like;

(ii) Histories of the respective agencies, departments, services, or units thereof;

(iii) Surveys of Government establishments;

(iv) Works pertaining to the instruction or guidance of Government officers and employees in the discharge of their official duties;

(v) The compilation of reports, books, studies, surveys, or similar documents that do not involve research, development, or experimental work;

(vi) The collection of data containing personally identifiable information such that the disclosure thereof would violate the right of privacy or publicity of the individual to whom the information relates;

(vii) Investigatory reports;

(viii) The development, accumulation, or compilation of data (other than that resulting from research, development, or experimental work performed by the contractor), the early release of which could prejudice follow-on acquisition activities or agency regulatory or enforcement activities; or

(ix) The development of computer software programs, where the program

(A) May give a commercial advantage; or

(B) Is agency mission sensitive, and release could prejudice agency mission, programs, or follow-on acquisitions.

(b) The contract may specify the purposes and conditions (including time limitations) under which the data may be used, released, or reproduced other than for contract performance. Contracts for the production of audiovisual works, sound recordings, etc., may include limitations in connection with talent releases, music licenses, and the like that are consistent with the purposes for which the works are acquired.

(c) Paragraph (c)(1)() (ii) of the clause, which enables the Government to obtain assignment of copyright in any data first produced in the performance of the contract, may be deleted if the contracting officer determines that such assignment is not needed to further the objectives of the contract.

(d) Paragraph (e) of the clause, which requires the contractor to indemnify the Government against any liability incurred as the result of any violation of trade secrets, copyrights, right of privacy or publicity, or any libelous or other unlawful matter arising out of or contained in any production or compilation of data that are subject to the clause, may be deleted or limited in scope where the contracting officer determines that, because of the nature of the particular data involved, such liability will not arise.

(e) When the audiovisual or other special works are produced to accomplish a public purpose other than acquisition for the Government's own use (such as for production

and distribution to the public of the works by other than a Federal agency) agencies are authorized to modify the clause for use in contracts, with rights in data provisions that meet agency mission needs yet protect free speech and freedom of expression, as well as the artistic license of the creator of the work.

(2) Existing works. The clause at AMS 3.5-17, Rights in Data - Existing Works, is for use in contracts exclusively for the acquisition (without modification) of existing works such as, motion pictures, television recordings, and other audiovisual works; sound recordings; musical, dramatic, and literary works; pantomimes and choreographic works; pictorial, graphic, and sculptural works; and works of a similar nature. The contract may set forth limitations consistent with the purposes for which the works covered by the contract are being acquired. Examples of these limitations are means of exhibition or transmission, time, type of audience, and geographical location. However, if the contract requires that works of the type indicated in this paragraph are to be modified through editing, translation, or addition of subject matter, etc. (rather than purchased in existing form), then see T3.5.A.4.e.(1).

(3) Commercial computer software.

(a) When contracting other than from GSA's Multiple Award Schedule contracts for the acquisition of commercial computer software, no specific contract clause prescribed in this subpart need be used, but the contract shall specifically address the Government's rights to use, disclose, modify, distribute, and reproduce the software. Commercial computer software or commercial computer software documentation shall be acquired under licenses customarily provided to the public to the extent the license is consistent with Federal law and otherwise satisfies the needs of the FAA. The clause at AMS 3.5-18, Commercial Computer Software License, may be used when there is any confusion as to whether the Government's needs are satisfied or whether a customary commercial license is consistent with Federal law. Additional or lesser rights may be negotiated using the guidance concerning restricted rights as set forth in ~~T3.5.A.4.d(~~T3.5.A.4.d ~~(~~2~~)(~~) (d), or the clause at AMS 3.5-18, Commercial Computer Software License. If greater rights than the minimum rights identified in the clause at AMS 3.5-18 are needed, or lesser rights are to be acquired, they shall be negotiated and set forth in the contract. This includes any additions to, or limitations on, the rights set forth in paragraph (b) of the clause at AMS 3.5-18 when used. Examples of greater rights may be those necessary for networking purposes or use of the software from remote terminals communicating with a host computer where the software is located. If the computer software is to be acquired with unlimited rights, the contract shall also so state. In addition, the contract shall adequately describe the computer programs and/or databases, the media on which it is recorded, and all the necessary documentation.

(b) If the contract incorporates, makes reference to, or uses a vendor's standard commercial lease, license, or purchase agreement, the contracting officer shall ensure that the agreement is consistent with paragraph (a)(1) of this subsection. The contracting officer should exercise caution in accepting a vendor's terms and conditions, since they may be directed to commercial sales and may not be appropriate for Government contracts. Any inconsistencies in a vendor's standard

commercial agreement shall be addressed in the contract and the contract terms shall take precedence over the vendor's standard commercial agreement. If the clause at AMS 3.5-18 is used, inconsistencies in the vendor's standard commercial agreement regarding the Government's right to use, reproduce or disclose the computer software are reconciled by that clause.

(c) If a prime contractor under a contract containing the clause at AMS 3.5-13, Rights in Data - General, with paragraph (g)(4) (Alternate III) in the clause, acquires restricted computer software from a subcontractor (at any tier) as a separate acquisition for delivery to or for use on behalf of the Government, the contracting officer may approve any additions to, or limitations on the restricted rights in the Restricted Rights Notice of paragraph (g)(4) in a collateral agreement incorporated in and made part of the contract.

(4) Other existing data.

(a) Except for existing works pursuant to ~~T3.5.A.4.e(~~T3.5.A.4.e (2) or commercial computer software pursuant to ~~T3.5.A.e(~~T3.5.A.e (3), no clause contained in this subpart is required to be included in

(i) Contracts solely for the acquisition of books, periodicals, and other printed items in the exact form in which these items are to be obtained unless reproduction rights are to be acquired; or

(ii) Other contracts that require only existing data (other than limited rights data) to be delivered and the data are available without disclosure prohibitions, unless reproduction rights to the data are to be obtained.

(b) If the reproduction rights to the data are to be obtained in any contract of the type described in paragraph (b~~)(~~) (1) (i) or (ii) of this section, the rights shall be specifically set forth in the contract. No clause contained in this subpart is required to be included in contracts substantially for on-line data base services in the same form as they are normally available to the general public.

f. Acquisition of data.

(1) General

(a) It is the FAA's practice to determine, to the extent feasible, its data requirements in time for inclusion in SIR's. The data requirements may be subject to revision during contract negotiations. Since the preparation, reformatting, maintenance and updating, cataloging, and storage of data represents an expense to both the FAA and the contractor, efforts should be made to keep the contract data requirements to a minimum, consistent with the purposes of the contract.

(b) The contracting officer shall specify in the contract all known data requirements, including the time and place for delivery and any limitations and restrictions to be imposed on the contractor in the handling of the data. Further, and to the extent feasible, in major system acquisitions, the contracting officer shall set out data requirements as separate contract line items. In establishing the contract data requirements and in specifying data items to be delivered by a contractor, agencies may, consistent with paragraph (a) of this subsection, develop their own contract schedule provisions. Agency procedures may, among other things, provide for listing, specifying, identifying source, assuring delivery, and handling any data required to be delivered, first produced, or specifically used in the performance of the contract.

(c) Data delivery requirements should normally not require that a contractor provide the Government, as a condition of the procurement, unlimited rights in data that qualify as limited rights data or restricted computer software. Rather, form, fit, and function data may be furnished with unlimited rights instead of the qualifying data, or the qualifying data may be furnished with limited rights or restricted rights if needed (see T3.5.A.4.d~~(~~. (1)(c) and (d). If greater rights are needed, they should be clearly set forth in the solicitation and the contractor fairly compensated for the greater rights.

(2) Additional data requirements.

(a) In some contracting situations, such as experimental, developmental, research, or demonstration contracts, it may not be feasible to ascertain all the data requirements at contract award. The clause at AMS 3.5-15, Additional Data Requirements, may be used to enable the subsequent ordering by the contracting officer of additional data first produced or specifically used in the performance of these contracts as the actual requirements become known. The clause shall normally be used in solicitations and contracts involving experimental, developmental, research or demonstration work (other than basic or applied research to be performed under a contract solely by a university or college when the contract amount will be $500,000 or less) unless all the requirements for data are believed to be known at the time of contracting and specified in the contract. If the contract is for basic or applied research to be performed by a university or college, and the contracting officer believes the contract effort will in the future exceed $500,000, even though the initial award does not, the contracting officer may include the clause in the initial award.

(b) Data may be ordered under the clause at AMS 3.5-15 at any time during contract performance or within a period of 3 years after acceptance of all items to be delivered under the contract. The contractor is to be compensated for converting the data into the prescribed form, for reproduction, and for
delivery. In order to minimize storage costs for the retention of data, the contracting officer may relieve the contractor of the retention requirements for specified data items at any time during the retention period required by the clause. The contracting officer may permit the contractor to identify and specify in the contract data not to be ordered for delivery under the clause if the data is not necessary to meet the FAA's

requirements for data. Also, the contracting officer may alter the clause by deleting the term "or specifically used" in paragraph (a) of the clause if delivery of the data is not necessary to meet the FAA's requirements for data. Any data ordered under this clause will be subject to the clause at AMS 3.5-13, Rights in Data - General, (or other equivalent clause setting forth the respective rights of the Government and the contractor) in the contract. Data authorized to be withheld under such clause will not be required to be delivered under the clause at AMS 3.5-15, except as provided in Alternate II or Alternate III, if included (see T3.5.A.4.d.1(c) and (d)).

(c) Absent an established program for dissemination of computer software, the FAA should not order additional computer software under the clause at AMS 3.5-15, for the sole purpose of disseminating or marketing the software to the public. In ordering software for internal purposes, the contracting officer shall consider, consistent with the Government's needs, not ordering particular source codes, algorithms, processes, formulas, or flow charts of the software if the contractor shows that this aids its efforts to disseminate or market the software.

(3) Major system acquisition.

(a) The clause at AMS 3.5-20, Technical Data Declaration, Revision, and Withholding of Payment - Major Systems, should be used when the FAA is acquiring a major system, as may be designated by the Administrator. When using the clause at AMS 3.5-20, the section of the contract specifying data delivery requirements (see T3.5.A.4.f~~.~~(. (1)(b)) shall expressly identify those line items of technical data to which the clause applies. Upon delivery of the technical data, the contracting officer shall review the technical data and the contractor's declaration relating to it to assure that the data are complete, accurate, and comply with contract requirements. If the data are not complete, accurate, or compliant, the contracting officer should request the contractor to correct the deficiencies, and may withhold payment. Final payment shall not be made under the contract until it has been determined that the delivery requirements of those line items of data to which the clause applies have been satisfactorily met.

(b) In a contract for, or in support of, a major system awarded by the FAA, the following applies:

(i) The contracting officer shall require the delivery of any technical data relating to the major system or supplies for the major system, that are to be developed exclusively with Federal funds if the delivery of the technical data is needed to ensure the competitive acquisition of supplies or services that will be required in substantial quantities in the future. The clause at AMS 3.5-22, Major System - Minimum Rights, is used in addition to the clause at AMS 3.5-13, Rights in Data - General, and other required clauses, to ensure that the Government acquires at least those minimum rights appropriate for a major system in technical data developed with Federal funds.

(ii) Technical data, relating to a major system or supplies for a major system, procured or to be procured by the Government and also relating to the design, development, or manufacture of products or processes offered or to be offered for sale to the public (except for such data as may be necessary for the Government to operate or maintain the product, or use the process if obtained by the Government as an element of performance under the contract), shall not be required to be provided to the Government from persons who have developed such products or processes as a condition for the procurement of such products or processes by the Government.

g. Rights to technical data in successful proposals.

The clause at AMS 3.5-23, Rights to Proposal Data (Technical), allows the Government to acquire unlimited rights to technical data in successful proposals. Pursuant to the clause, the prospective contractor is afforded the opportunity to specifically identify pages containing technical data to be excluded from the grant of unlimited rights. This exclusion is not dispositive of the protective status of the data, but any excluded technical data, as well as any commercial and financial information contained in the proposal, will remain subject to the AMS policies relating to proposal information (e.g., will be used for evaluation purposes only). If there is a need to have access to any of the excluded technical data during contract performance, consideration should be given to acquiring the data with limited rights, if they so qualify, in accordance with T3.5.A.4.d~~(~~. (2)(c).

h. Cosponsored research and development activities.

(1) In contracts involving cosponsored research and development that require the contractor to make substantial contributions of funds or resources (e.g., by cost-sharing or by repayment of nonrecurring costs), and the contractor's and the FAA's respective contributions to any item, component, process, or computer software, developed or produced under the contract are not readily segregable, the Contracting Officer may limit the acquisition of, or acquire less than unlimited rights to, any data developed and delivered under the contract. The Contracting Officer should make such decisions in consultation with legal counsel. Lesser rights shall, at a minimum, assure use of the data for agreed-to Governmental purposes (including reprocurement rights as appropriate), and address any disclosure limitations or restrictions to be imposed on the data. Also, consideration may be given to requiring the contractor to directly license others if needed to carry out the objectives of the contract. Since the purpose of the cosponsored research and development, the legitimate proprietary interests of the contractor, the needs of the FAA, and the respective contributions of both parties may vary, no specific clauses are prescribed, but a clause providing less than unlimited rights in the Government for data developed and delivered under the contract (such as license rights) may be tailored to the circumstances consistent with the foregoing and the policy set forth in T3.5.A.4.b. As a guide, a clause may be appropriate when the contractor contributes money or resources, or agrees to make repayment of nonrecurring costs, of a value of approximately 50 percent of the total cost of the contract (i.e., Government, contractor, and/or third party paid costs), and the respective contributions are not readily segregable for any work element to be performed under the contract. A clause may be used for all or for only specifically identified tasks or work elements

under the contract. In the latter instance, its use will be in addition to whatever other data rights clause is prescribed under this subpart, with the contract specifically identifying which clause is to apply to which tasks or work elements. Further, this type of clause may not be appropriate where the purpose of the contract is to produce data for dissemination to the public, or to develop or demonstrate technologies that will be available, in any event, to the public for their direct use.

(2) Where the contractor's contributions are readily segregable (by performance requirements and the funding for the contract) and so identified in the contract, any resulting data may be treated under this clause as limited rights data or restricted computer software in accordance with T3.5.A.4.d.(2)(c) or (d), as applicable; or if this treatment is inconsistent with the purpose of the contract, rights to the data may, if so negotiated and stated in the contract, be treated in a manner consistent with paragraph (a) of this section.

5 Foreign License and Technical Assistance Agreements **Revised 1/2009**

The FAA shall provide all necessary rules and regulations as are required for the proper application of the laws and policies of the U.S. Government regarding:

a. Elimination in agreements between domestic concerns and foreign governments or foreign concerns of charges for the use of patents in which the U.S. Government has a royalty-free license or of charges in agreements for the use of data that the U.S. Government has a right to use and disclose to others, that is in the public domain, or that was acquired by the U.S. Government with the unrestricted right to use, duplicate, or disclose and to have or permit others to do so;

b. Foreign license and technical assistance agreements between the U.S. Government and United States domestic concerns;

c. Guidance on negotiating contract prices and terms concerning patents and data, including royalties, in contracts between the U.S. Government and a foreign government or foreign concern; and

d. Regulations and guidance on controls on the exportation of data relating to certain designated items, such as arms or munitions of war, and guidance on reviews of agreements involving such data (see 22 CFR 124).

B Clauses

view contract clauses

C Forms **Revised 1/2009**

view procurement forms

Sections Revised:

3.6.4 A 3 – Buy American Act – Construction Materials
3.6.4 A 4 – FAA Buy American – Steel and Manufactured Products
3.6.4 A 5 – Balance of Payments Program
3.6.4 A 7 – Trade Agreements
3.6.4 A 9 – Prohibition of Contracting with Entities that Engage in Certain Activities or Transactions Relating to Iran
3.6.4 A 14 – Export Control
3.6.4 A 15 - Definitions

Procurement Guidance - (~~7/2020~~ 9/2020)

T3.6.4 Foreign Acquisition Revised 10/2007
- A Foreign Acquisition
  - 1 Applicability of Buy American Added 10/2014
  - 2 Buy American Act - Supplies Revised 10/2019
  - 3 Buy American Act - Construction Materials Revised ~~10/2019~~ 9/2020
  - 4 FAA Buy American - Steel and Manufactured Products Revised ~~10/2012~~ 9/2020
  - 5 Balance of Payments Program Revised 9/2020
  - 6 Payment in Local Foreign Currency
  - 7 Trade Agreements Revised ~~4/2020~~ 9/2020
  - 8 Restrictions on Certain Foreign Purchases Revised 7/2006
  - 9 Prohibition on Contracting with Entities that Engage in Certain Activities or Transactions Relating to Iran Revised ~~4/2013~~ 9/2020
  - 10 Customs and Duties
  - 11 International Agreements and Coordination Revised 1/2007
  - 12 Examination of Records by Comptroller General
  - 13 Inconsistency Between English Version and Translation of Contract
  - 14 Export Control ~~Added 4/2014~~ Revised 9/2020
  - 15 Definitions Revised ~~4/2014~~ 9/2020
  - 16 Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment Revised 1/2020
- B Clauses
- C Forms

T3.6.4 Foreign Acquisition Revised 10/2007

A Foreign Acquisition

1 Applicability of Buy American Added 10/2014

~~a. FAA~~a. FAA-specific Buy American provisions (49 U.S.C. §50101) apply when acquiring steel or manufactured products, as described in Section 4 below. In many instances, the Buy American Act (41 U.S.C. §§ 8301-8305) requirements for supplies and construction will only apply when acquiring raw and unmanufactured materials.

b. Canadian and Mexican steel and manufactured products under certain conditions, and civil aircraft and related supplies of countries that are parties to the Agreement on Civil Aircraft, are treated as domestic for purposes of FAA Buy American and the Buy American Act. See Section 7 Trade Agreements below.

2 Buy American Act - Supplies Revised 10/2019

~~a. The~~a. The FAA is subject to the Buy American Act when acquiring supplies, services involving supplies, and construction, alteration or repair in the United States. With limited exceptions, the Buy American Act expresses a strong preference for acquiring only domestic end products. The Buy American Act uses a two-part test to define a domestic end product:

(1) The article must be manufactured in the United States; and

(2) The cost of domestic components must exceed 50 percent of the cost of all the components.

~~b. *Exceptions*~~b. Exceptions. When one of the following exceptions applies, FAA may acquire a foreign end product without regard to Buy American Act restrictions:

(1) A supply purchase valued at the micro-purchase threshold or less;

(2) The Administrator, in a written nondelegable determination, states that preference for a domestic end item is not in the public interest;

(3) The CO determines that articles, materials, and supplies are:

(a) For use outside of the U.S.;

(b) Unreasonable in terms of cost (see subsection d. below); or

(c) End items or components not mined, produced, or manufactured in the U.S. in sufficient and reasonably available commercial quantities and of a satisfactory quality. When a competitive acquisition results in no offers of domestic end products, the end

products can be considered unavailable in the U.S. The articles listed in subsection e. below are considered unavailable domestically; or

(4) The purchase is for information technology that is a commercial item (AMS Policy Appendix C defines commercial item).

~~c. *Documentation*~~c. Documentation. The CO must document all exceptions to the Buy American Act.

~~d. *Determining*~~d. Determining *Reasonableness of Cost*.

(1) This subsection applies to all acquisition of articles, materials, and supplies not covered by the below paragraph e. "Excepted Articles, Materials, and Supplies." ~~If an~~If an offer for a domestic end product is not the low offer, and an offer for a foreign end product is the low offer, the CO must determine the reasonableness of the cost of the domestic offer by adding to the cost of the low foreign offer, inclusive of duty, evaluation percentages as follows:

(a) 6 percent, if the lowest domestic offer is from a large business concern; or

(b) 12 percent, if the lowest domestic offer is from a small business concern. The CO must use this factor in small business set-asides if the low offer is from a small business concern not offering a domestic end product.

The increased percentage is for evaluation purposes only in determining best value. It does not affect any vendor's offered price. Examples of best value reasonableness of cost evaluation scenarios are as follows:

Example 1. Lowest domestic offer is from a small business concern. Because a small business is offering a domestic end product, every vendor offering a foreign end product will have the price for the foreign product increased by 12% only for evaluation purposes.

Offeror	Business Size	Domestic End Product	Foreign End Product CLIN	Evaluation Factor	Offer Price	Evaluated Price (including applicable evaluation factor)
A	Large		x	12%	$100.00	$112.00
B	Small		x	12%	170.00	190.40
C	Large	x		N/A	200.00	200.00
D	Small	x		N/A	175.00	175.00

The new adjusted prices will be used for evaluation purposes against all other vendors, and not just the vendor offering the domestic end product.

Example 2. Small business set-aside, low offer is from a small business concern offering the product of a small business concern that is not a domestic end product.

Offeror	Business Size	Domestic End Product	Foreign End Product of another small business concern CLIN	Evaluation Factor	Offer Price	Evaluated Price (including applicable evaluation factor)
A	Small		x	12%	$100.00	$112.00
B	Small	x		N/A	150.00	150.00
C	Small		x	12%	200.00	224.00
D	Small	x		N/A	175.00	175.00

The new adjusted prices will be used for evaluation purposes against all other vendors, and not just the vendor offering the domestic end product.

Example 3. Lowest domestic offer is from a large business concern.

Offeror	Business Size	Domestic End Product	Foreign End Product of another small business concern CLIN	Evaluation Factor	Offer Price	Evaluated Price (including applicable evaluation factor)
A	Large		x	6%	$100.00	$106.00
B	Large	x		N/A	150.00	150.00
C	Small		x	6%	200.00	212.00
D	Large	x		N/A	175.00	175.00

The new adjusted prices will be used for evaluation purposes against all other vendors, and not just the vendor offering the domestic end product.

(2) The price of the domestic offer is reasonable if it does not exceed the evaluated price of the low foreign offer after addition of the appropriate evaluation factor.

(3) The evaluation factor does not apply to offers of Canadian or Mexican end products, or to civil aircraft and related supplies of countries that are parties to the Agreement on Civil Aircraft. Offers of these products are considered domestic end products for evaluation purposes (see below "Trade Agreements" section).

(4) The CO must apply the evaluation procedures to each line item of an offer unless either the offer or the solicitation specifies evaluation on a group basis. The evaluated cost of each offer received is adjusted by any applied Buy American Act evaluation factor for each CLIN, as described in this subsection.

(5) After applying the evaluation factor to the cost or price, the CO may determine which offer represents the best value for award purposes.

~~e. *Excepted*~~e. Excepted *Articles, Materials, and Supplies.* The following articles, materials or supplies are not mined, produced, or manufactured in the U.S. in sufficient and reasonably available commercial quantities of a satisfactory quality. These items may be treated as domestic products for purposes of the Buy American Act requirements:

Acetylene, black.	Emetine, bulk.	Petroleum, crude oil, unfinished oils, and finished products.
Agar, bulk.	Ergot, crude.	Pine needle oil.
Anise.	Erythrityl tetranitrate.	Platinum and related group metals, refined, as sponge, powder, ingots, or cast bars.
Antimony, as metal or oxide.	Fair linen, altar.	Pyrethrum flowers.
Asbestos, amosite, chrysotile, and crocidolite.	Fibers of the following types: abaca, abace, agave, coir, flax, jute, jute burlaps, palmyra, and sisal.	Quartz crystals.
Bamboo shoots.	Goat and kidskins.	Quebracho.
Bananas.	Goat hair canvas.	Quinidine.
Bauxite.	Grapefruit sections, canned.	Quinine.
Beef, corned, canned.	Graphite, natural, crystalline, crucible grade.	Rabbit fur felt.
Beef extract.	Hand file sets (Swiss pattern).	Radium salts, source and special nuclear materials.
Bephenium hydroxynapthoate.	Handsewing needles.	Rosettes.
Bismuth.	Hemp yarn.	Rubber, crude and latex.
Books, trade, text, technical, or scientific; newspapers; pamphlets; magazines; periodicals; printed briefs and films; not printed in the United States and for which domestic editions are not available.	Hog bristles for brushes.	Rutile.
Brazil nuts, unroasted	Hyoscine, bulk.	Santonin, crude.
Cadmium, ores and flue dust.	Ipecac, root.	Secretin.
	Iodine, crude.	Shellac.

Calcium cyanamide. Capers. Cashew nuts. Castor beans and castor oil. Chalk, English. Chestnuts. Chicle. Chrome ore or chromite. Cinchona bark. Cobalt, in cathodes, rondelles, or other primary ore and metal forms. Cocoa beans. Coconut and coconut meat, unsweetened, in shredded, desiccated, or similarly prepared form. Coffee, raw or green bean. Colchicine alkaloid, raw. Copra. Cork, wood or bark and waste. Cover glass, microscope slide. Crane rail (85-pound per foot). Cryolite, natural. Dammar gum.	Kaurigum. Lac. Leather, sheepskin, hair type. Lavender oil. Manganese. Menthol, natural bulk. Mica. Microprocessor chips (brought onto a Government construction site as separate units for incorporation into building systems during construction or repair and alteration of real property). Modacrylic fur ruff. Nickel, primary, in ingots, pigs, shots, cathodes, or similar forms; nickel oxide and nickel salts. Nitroguanidine (also known as picrite). Nux vomica, crude. Oiticica oil. Olive oil. Olives (green), pitted or unpitted, or stuffed, in bulk. Opium, crude. Oranges, mandarin, canned.	Silk, raw and unmanufactured. Spare and replacement parts for equipment of foreign manufacture, and for which domestic parts are not available. Spices and herbs, in bulk. Sugars, raw. Swords and scabbards. Talc, block, steatite. Tantalum. Tapioca flour and cassava. Tartar, crude; tartaric acid and cream of tartar in bulk. Tea in bulk. Thread, metallic (gold). Thyme oil. Tin in bars, blocks, and pigs. Triprolidine hydrochloride. Tungsten. Vanilla beans. Venom, cobra. Water chestnuts. Wax, carnauba. Wire glass.

Diamonds, industrial, stones and abrasives.		Woods; logs, veneer, and lumber of the following species: Alaskan yellow cedar, angelique, balsa, ekki, greenheart, lignum vitae, mahogany, and teak. Yarn, 50 Denier rayon.

3 Buy American Act - Construction Materials **Revised ~~10/2019~~ 9/2020**

a. The Buy American Act requires that only domestic materials be used in construction, alteration, or repair in the United States.

b. *Exceptions*. The FAA may acquire foreign construction material without regard to Buy American Act restrictions when one of the following exceptions applies:

(1) A construction material purchase valued at the micro-purchase threshold or less.

(2) The Administrator, in written nondelegable determination, states applying the Buy American Act to a construction material is not in the public interest;

(3) When the CO determines the construction material:

(a) Is unreasonable in terms of cost. Unreasonable cost is when the cost of domestic construction material exceeds the cost of foreign construction material by more than 6 percent, unless the agency head determines a higher percentage to be appropriate (see Executive Order 10582);

(b) It is impracticable to use a particular domestic construction material; or

(c) The construction material is not mined, produced, or manufactured in the U.S. in sufficient and reasonably available commercial quantities or of a satisfactory quality. Contractors may also request to use foreign construction material in the contract on these grounds. The contractor must fully document and substantiate the request according to AMS clause 3.6.4-3 "Buy American Act - Construction Materials." The CO will approve or disapprove the contractor's request.

(4) For construction contracts with an estimated acquisition value of $~~10,441,216~~10,802,884 or more, ~~Canadian and~~ Mexican construction materials may be treated as domestic for purposes of Buy American Act restrictions, pursuant to the ~~NAFTA~~USMCA Implementation Act.

(5) The Buy American Act restrictions do not apply ~~to information~~to information technology that is a commercial item.

c. *Documentation for Exception*. The CO should document the basis for all exceptions taken.

d. *Excepted Material*. The CO should list excepted materials in the contract. Documentation justifying the exception will be made available for public inspection.

e. *Alternate Offers*. Offerors may submit alternate offers based on use of equivalent domestic construction material to avoid possible rejection of the entire offer, if the Government determines that an exception permitting use of a particular foreign construction material does not apply.

f. *Noncompliance*. The CO is responsible for Buy American Act investigations when available information indicates such action is warranted. Unless fraud is suspected, the CO must notify the contractor of the apparent unauthorized use of foreign construction material and request a reply, including proposed corrective action. If an investigation reveals a contractor or subcontractor used foreign construction material without authorization, the CO must take appropriate action, including one or more of the following:

(1) Process a determination of inapplicability of the Buy American Act.

(2) Consider requiring removal and replacement of the unauthorized foreign construction material.

(3) If removal and replacement of foreign construction material incorporated in a building or work would be impracticable, cause undue delay, or otherwise be detrimental to the Government's interests, the CO may determine in writing that the foreign construction material need not be removed and replaced. The determination to retain foreign construction material does not constitute a determination that an exception to the Buy American Act applies, and this should be stated in the determination. The determination to retain foreign construction material does not affect the Government's right to suspend or debar a contractor, subcontractor, or supplier for violating of the Buy American Act, or to exercise other contractual rights and remedies, such as reducing the contract price or terminating the contract for default.

(4) If the noncompliance is sufficiently serious, the CO should consider exercising appropriate contractual remedies, such as terminating the contract for default, or consider preparing and forwarding a report for suspension or debarment, including findings and supporting evidence. If the noncompliance appears to be fraudulent, the CO should refer the matter to other appropriate agency officials for criminal investigation.

4 FAA Buy American - Steel and Manufactured Products **Revised ~~10/2012~~ 9/2020**

a. *FAA Buy American*. This section implements FAA-specific Buy American preferences at 49 U.S.C §50101. The CO will not obligate any funds for any project unless steel and manufactured products used in the project are produced in the United States. Projects funded by Research, Engineering and Development are excluded from this requirement.

b. *Delegation and Exceptions.* The Administrator delegated to the FAA Acquisition Executive (FAE) authority to make findings waiving the provisions of FAA Buy American (49 U.S.C. §50101) when:

(1) Requiring domestically produced steel and manufactured products is inconsistent with the public interest;

(2) Steel and manufactured products are not produced in the United States in sufficient and reasonably available quantities or of satisfactory quality; or

(3) In the case of acquisition of facilities and equipment under the Airport and Airway Improvement Act of 1982:

(a) The cost of components and subcomponents produced in the United States is more than 60 percent of the cost of all components of the facility or equipment used in the project; and

(b) Final assembly of the facility or equipment has taken place in the United States; or

(4) Including domestic material will increase the cost of the overall project contract by more than 25 percent.

~~c. *Waiver*~~c. Waiver *Redelegation.* The FAE further delegated authority as follows:

(1) The Chief of the Contracting Office (COCO) has authority to make findings waiving FAA Buy American provisions when the cost of including domestic material will increase the cost of the overall project contract by more than 25 percent.

(2) The Contracting Officer has authority to make findings waiving FAA Buy American provisions when the cost of including domestic material will increase the cost of the overall project contract by more than 25 percent for individual contract actions not exceeding $1,000,000 for supplies and $100,000 for construction contracts.

The FAE retains authority for waivers based on public interest and non-availability.

d. *Foreign Offers.* There is no restriction against a vendor offering foreign steel or manufactured products in its proposal. However, FAA may not award to that vendor unless it is pursuant to one of the exceptions listed above.

e. *Component Cost*. For the purposes of this section, labor costs involved in final assembly will not be included ~~in calculating~~in calculating components costs.

f. *Order of Precedence*. Any acquisition of steel or manufactured product not subject to 49

U.S.C. §50101 should be treated as covered under the Buy American Act (unless a Buy American Act exception applies). In the event of a conflict, the "Buy American-Steel and Manufactured Products" clause takes precedence over other Buy American Act-related clauses.

5 Balance of Payments Program **Revised 9/2020**

a. The Balance of Payments Program is applicable to contracts for supplies, services, or construction for use *outside* the United States, and provides for the use of excess or near-excess foreign currency. The Balance of Payments Program restrictions have been waived under certain circumstances under the ~~North American Free Trade Agreement (NAFTA)~~United States- Mexico-Canada Agreement (USMCA) Implementation Act.

b. *Acquiring Foreign End Products.* The FAA may acquire foreign end products or services for use outside the U.S. if any of the following conditions is met:

(1) The CO determines that a requirement can only be filled by a foreign end product or service, and that it is not feasible to forgo filling it or to provide a domestic substitute;

(2) The acquisition is for perishable subsistence items, ice, books, utilities, communications, and other materials or services that, by their nature or as a practical matter, can only be acquired or performed in the country concerned and a U.S. Government capability does not exist;

(3) The acquisition of foreign end products or services is required by a treaty or executive agreement between governments;

(4) Petroleum supplies and their by-products are required;

(5) The end products or services are paid for with excess or near-excess foreign currencies;

(6) The end products or services are mined, produced, or manufactured in Panama and are required by and for the use of United States Forces in Panama; or

c. *Documentation.* The CO should briefly document the file if an exception to the Balance of Payments Program is applied.

d. *Construction Material*. Contracts will require use of domestic construction materials for construction, repair, or maintenance of real property outside the United States, except when the cost of these materials (including transportation and handling costs) exceeds the cost of foreign construction materials by more than 50 percent. A differential greater than 50 percent may be used when specifically authorized by the CO.

e. *Procedures.*

(1) Screening Information Requests (SIRs) should specifically identify articles, materials, supplies, and services that are excepted from the Balance of Payments Program. When quotations are obtained orally, vendors should be informed that only domestic end products or services will be acceptable, except for those items that have been excepted or when the price for the foreign end products or services meets the evaluation criteria.

(2) For purposes of evaluation, each foreign offer will be adjusted by increasing it 50 percent. If this adjustment results in a tie between a foreign offer as evaluated and a domestic offer, the domestic offer should be considered the successful offer. When this procedure results in the acquisition of foreign end products or services, the CO may conclude that acquisition of domestic end products or services is unreasonable in cost or inconsistent with the public interest.

f. *Foreign Excess Currency Program*

(1) DOT/M-60 distributes Office of Management and Budget (OMB) bulletins on excess currencies held by the U.S. for certain countries. The Department of the Treasury, Office of the Assistant Secretary for International Affairs, Office of Development Policy also provides other information that may be relevant.

(2) The CO may use excess and near-excess foreign currencies whenever feasible in payment of contracts over $1 million performed wholly or partly in any of the countries listed in the bulletins referenced in paragraph (1) above. Therefore, the CO should ascertain if the countries where work will be performed are listed for excess currency because the CO may make award, in some cases, to an offeror willing to accept payment, in whole or part, in excess or near-excess foreign currency, even though the offer, when compared to offers in United States dollars, is not the lowest received. Price differentials may be funded from excess or near-excess foreign currencies available without charge to FAA appropriations, subject to OMB Circular No. A-20, May 21, 1966.

(3) Before issuing SIRs for work to be performed wholly or partly in countries listed in the bulletins referenced in paragraph (1) above, the CO should obtain a determination from the FAA budget officials as to the feasibility of using excess or near-excess foreign currency.

(4) The CO should address the probability of using excess or near-excess foreign currency in the SIRs as follows:

(a) Require that offers be stated in U.S. dollars;

(b) Request that offers also be stated, in whole or in part, in excess or near-excess foreign currency; and

(c) Reserve the right to make the award to the responsive offeror

(i) that is willing to accept payment, in whole or in part, in excess or near-excess foreign currency, and

(ii) whose offer is most advantageous to the FAA, even though the total price may be higher than offers in U.S. dollars.

6 Payment in Local Foreign Currency

a. The FAA will pay local foreign contractors in local currency when FAA contracts are entered into and performed outside the U.S. unless an international agreement provides for payment in U.S. dollars or the contracting officer determines the use of local currency to be inequitable or inappropriate.

b. When the local currency increases in value in relation to the dollar, a violation of the Anti-Deficiency Act (31 U.S.C. 665) could occur. To avoid this possibility, the FAA should ensure the availability of adequate dollar appropriations to purchase local currency needed to make payments against the contract.

7 Trade Agreements **Revised ~~4/2020~~ 9/2020**

a. FAA acquisitions are subject to the following trade-related acts:

(1) The ~~NAFTA Implementation Act (Pub. L. 103-182, 107 Stat. 2057) which involves offers of Canadian or Mexican end products~~ United States-Mexico-Canada Agreement, (USMCA) as approved by Congress in the United States- Mexico-Canada Agreement Implementation Act (Government Procurement Agreement Applicable only to the United States and Mexico) (Pub. L. 116-113) (19 U.S.C. chapter 29 (sections 4501-4732)); and

(2) The Agreement on Civil Aircraft (19 U.S.C. 2513) which involves aircraft and related supplies from countries participating in the Agreement.

b. FAA acquisitions are *not* subject to the following trade-related acts:

TITLE	REFERENCE
United States-Bahrain Free Trade Agreement Implementation Act	P.L. 109-169
The Caribbean Basin Trade Initiative (CBTI) under the Caribbean Basin Economic Recovery Act (Note: Except for Panama)	19 U.S.C. 2701
The Dominican Republic-Central America-United States Free Trade Agreement Implementation Act	P.L. 109-53
The least developed country designation made by the U.S. Trade Representative,	19 U.S.C. 2511(b)(4)

pursuant to the Trade Agreements Act	
United States- Australia Free Trade Agreement Implementation Act	P.L. 108-286
United States-Chile Free Trade Agreement Implementation Act	P.L. 108-77
United States-Colombia Trade Promotion Agreement Implementation Act	P.L. 112-42
United States-Israel Free Trade Area Implementation Act	19 U.S.C. 2112
United States-Korea Free Trade Agreement Implementation Act	P.L. 112-41
United States-Morocco Free Trade Agreement Implementation Act	P.L. 108-302
United States – Oman Free Trade Agreement Implementation Act	P.L. 109-283
United States-Panama Trade Promotion Agreement Implementation Act	P.L. 112-43
United States-Peru Trade Promotion Agreement Implementation Act	P.L. 110-138
United States-Singapore Free Trade Agreement Implementation Act	P.L. 108-78

c. ~~*North American Free Trade*~~*United States- Mexico-Canada Agreement (USMCA).*

(1) As required by the ~~NAFTA~~USMCA Implementation Act, the CO will evaluate offers of the following ~~NAFTA~~USMCA country end products without regard to the restrictions of the Buy American Act or the Balance of Payments Program as follows:

(a) ~~NAFTA~~Mexican country construction materials under construction contracts with an estimated acquisition value equal to or exceeding $10,802,884.

(b) ~~Canadian end products under supply contracts with an estimated value equal to or exceeding $25,000 and~~ Mexican end products under supply contracts with an estimated value equal to or exceeding $83,099.

(c) ~~Canadian and~~ Mexican end products under service contracts with an estimated value equal to or exceeding $83,099.

(2) To determine whether ~~NAFTA~~USMCA applies to the acquisition of products by lease, rental, or lease-purchase contract (including lease-to-ownership, or lease-with-option-to purchase), the CO should calculate the estimated acquisition value as follows:

(a) If a fixed-term contract of 12 months or less is contemplated, use the total estimated value of the acquisition.

(b) If a fixed-term contract of more than 12 months is contemplated, use the total estimated value of the acquisition plus the estimated residual value of the leased equipment at the conclusion of the contemplated term of the contract.

(c) If an indefinite-term contract is contemplated, use the estimated monthly payment multiplied by 48.

(d) If there is any doubt as to the contemplated term of the contract, use the estimated monthly payment multiplied by 48.

(e) If a contemplated acquisition includes an option clause, when calculating the threshold for application of ~~NAFTA~~USMCA provisions include the value of all options.

d. *Civil Aircraft and Related Articles.* The Buy American Act does not apply to acquiring civil aircraft and related articles of countries or instrumentalities that are parties to the Agreement on Civil Aircraft pursuant to a waiver from the U.S. Trade Representative, on February 19, 1980 (45FR 12349, February 25, 1980). The current list of countries and instrumentalities that are parties to the agreement are on the U.S. Trade Representative website. For the purpose of this waiver, an article is a product of a country or instrumentality when:

(1) It is wholly the growth, product, or manufacture of that country or instrumentality; or

(2) In the case of an article that consists in whole or in part of materials from another country or instrumentality, it has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed.

e. This section "Trade Agreements" does not apply to:

(1) Purchases below an applicable dollar threshold cited in a trade agreement;

(2) Purchases under small or small disadvantaged business programs~~;~~, unless the source of the purchase under the small or small disadvantage business program is a large business subcontractor.

(3) Purchases indispensable for national security or for national defense purposes, subject to policies established by the U.S. Trade Representative.

(4) Research and development contracts;

(5) Purchases of items for resale;

(6) Purchases from Federal Prison Industries, Inc. and nonprofit agencies employing people who are blind or severely disabled.

8 Restrictions on Certain Foreign Purchases **Revised 7/2006**

a. Except as authorized by the Office of Foreign Assets Control (OFAC) in the Department of the Treasury, the FAA and its contractors and subcontractors must not acquire any supplies or services if any proclamation, Executive order, or statute administered by OFAC, or if OFAC'S implementing regulations at 31 CFR Chapter V, would prohibit such a transaction by a person subject to the jurisdiction of the United States.

b. Except as authorized by OFAC, most transactions involving Cuba, Iran, and Sudan are prohibited, as are most imports from North Korea into the United States or its outlying areas. In addition, lists of entities and individuals subject to economic sanctions are included online in OFAC's List of Specially Designated Nationals and Blocked Persons. More information about these restrictions, as well as updates, is available in OFAC's regulations at 31 CFR Chapter V and/or on OFAC's website.

c. Questions concerning the restrictions for foreign purchases may be addressed to:

Department of the Treasury
Office of Foreign Assets Control
Washington, DC 20220
(202) 622-2490

9 Prohibition on Contracting with Entities that Engage in Certain Activities or Transactions Relating to Iran **Revised ~~4/2013~~ 9/2020**

a. *Certification.*

(1) As required by the Iran Sanctions Act of 1996 and the Comprehensive Iran Sanctions, Accountability and Divestment Act of 2010, and Titles II and III of the Iran Threat Reduction and Syria Human Rights Act of 2012 unless an exception applies or a waiver is granted according to paragraph (c) or (d) of this section, each offeror must certify that the offeror, and any other entity owned or controlled by or person controlled by the offeror, does not engage in any activity for which sanctions may be imposed under section 5 of the Iran Sanctions Act. Such activities, which are described under section 5 of the Iran Sanctions Act relate to the energy sector of Iran and the development by Iran of weapons of mass destruction or other military capabilities.

(2) As required in section 6(b)(1)(B) of the Iran Sanctions Act, unless an exception applies or a waiver is granted in accordance with paragraphs (c) or (d) of this section, each offeror must certify that the offeror, and any other entity owned or controlled by or person controlled by the offeror, does not knowingly engage in a transaction exceeding $3,000 with Iran's Revolutionary Guard Corps or any of its officials, agents, affiliates, the property and interests in property of which are blocked in accordance with the International Emergency Economic Powers Act (see the Department of the Treasury's Office of Foreign Assets Control's (OFAC's) Specially Designated Nationals and Blocked Persons List on their website).

b. *Remedies.* Upon determining a false certification under paragraph (a) of this section, FAA will take one or more of the following actions:

(1) The CO may terminate the contract.

(2) The suspending official may suspend the contractor according to the procedures in AMS Suspensions Procurement Guidance.

(3) The debarring official may debar the contractor for a period of at least two years according to the procedures in AMS Debarment Procurement Guidance.

c. *Exception for trade agreements.* The certification requirements of paragraph (a) of this section do not apply to procuring eligible products, as defined in the ~~NAFTA~~USMCA Implementation Act (Pub. L. ~~103-182, 107 Stat 2057~~116-113) (19 U.S.C. chapter 29 (sections 4501-4732)) or the Agreement on Civil Aircraft (19 U.S.C. 2513) (see AMS Trade Agreements Procurement Guidance).

d. *Waiver.*

(1) The President may waive the requirement for certification on a case-by-case basis if the President determines and certifies in writing to the appropriate congressional committees (Committee on Armed Services of the Senate, Committee on Finance of the Senate, Committee on Banking, Housing, and Urban Affairs of the Senate, Committee on Foreign Relations of the Senate, Committee on Armed Services of the House of Representatives, Committee on Ways and Means of the House of Representatives, Committee on Financial Services of the House of Representatives, and Committee on Foreign Services of the House of Representatives) that it is in the national interest to do so.

(2) If FAA or a contractor seeks a waiver of the requirement, it must submit the request through the Office of Federal Procurement Policy (OFPP), allowing sufficient time for review and approval. Upon receipt of the waiver request, OFPP will consult with the President's National Security Council, the Office of Terrorism and Financial Intelligence in the Department of the Treasury, and the Office of Terrorism Finance and Economic Sanctions Policy, Bureau of Economic, Energy, and Business Affairs in the State Department, allowing sufficient time for review and approval.

(3) In general, all waiver requests should include the following information:

(a) Agency name, complete mailing address, and point of contact name, telephone number, and email address.

(b) Offeror's name, complete mailing address, and point of contact name.

(c) Description/nature of product or service.

(d) The total cost and length of the contract.

(e) Justification with market research demonstrating that no other offeror can provide the product or service and stating why the product or service must be procured from this offeror, as well as why it is in the national interest for the President to waive the prohibition on contracting with this offeror that-

(i) Conducts activities for which sanctions may be imposed under section 5 of the Iran Sanctions Act of 1996; or

(ii) Exports sensitive technology to the government of Iran or any entities or individuals owned or controlled by, or acting on behalf of or at the direction of the government of Iran.

(iii) Engages in any transactions with Iran's Revolutionary Guard Corps as described in ~~a(~~a (2) above. In addition to the requirements of ~~d(~~d (3) above, the justification for such transactions must address why a waiver is essential to the security interests of the United States.

(f) Documentation regarding this offeror's past performance and integrity (see the Past Performance Information Retrieval System and any other relevant information).

(g) Information regarding the offeror's relationship or connection with other firms that conduct activities as specified under subparagraph ~~d(~~d (3~~)(~~) (e) above.

(h) The activities in which the offeror is engaged as specified in subparagraph d.~~(~~. (3)(e) above.

e. *Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, Section 106.* The head of an executive agency may not enter into or extend a contract for the procurement of goods and services with a person that exports certain sensitive technology to Iran, as determined by the President and listed on the System for Award Management (SAM).

10 Customs and Duties

a. Except as provided elsewhere in the Customs Regulations (see 19 CFR 10.100), all shipments of imported supplies purchased under Government contracts are subject to the usual Customs entry and examination requirements. However, DOT/FAA are not covered by the applicable Treasury regulation/statute allowing entry of duty free goods.

11 International Agreements and Coordination Revised 1/2007

a. Treaties and agreements between the United States. and foreign governments affect contracting within foreign countries. The CO should determine the existence and applicability of any international agreement to contracts being planned or processed, and ensure compliance with these agreements.

b. When applicable, the CO should conduct the necessary advance acquisition planning and coordination between the appropriate United States executive agencies and foreign interests as required by these agreements.

c. Many international agreements are compiled in the "United States Treaties and Other International Agreements" series published by the Department of State. Copies of this publication are normally available in overseas legal offices and United States diplomatic missions.

d. All contracts with Taiwanese firms or organizations must be awarded through the American Institute of Taiwan (AIT). AIT is under contract to the Department of State.

12 Examination of Records by Comptroller General

a. The CO should, whenever possible, include the clause "Audit and Records" in negotiated contracts with foreign contractors.

b. *Exceptions*. The clause may be omitted from contracts with foreign contractors in the following instances (authority cited for the HOA is not delegable):

(1) HOA, with concurrence of the Comptroller General, or designee, determines that the omission will serve the best interests of the U.S.; or

(2) The contractor or subcontractor is a foreign government or agency thereof or is precluded by the laws of the country involved from making its books, document, papers, or records available for examination and the HOA determines, after taking into account the price and availability of the property or services from the U.S. sources, that the public interest would be best served by the omission of the clause.

c. *Congressional Notification*. When the CO does not include clause "Audit and Records," the CO will prepare and forward a determination to DOT/M-60 for inclusion in a report to Congress

explaining why the omission of the clause will serve the interest of the United States. The determination should:

(1) Identify the contract and its purpose, and whether it is a contract with a foreign contractor or with a foreign government or agency thereof;

(2) Describe the efforts to include the clause;

(3) When applicable, state the reasons for the contractor's refusal to include the clause;

(4) Describe the price and availability of the property or services from the United States and other sources; and

(5) Determine that it will serve the interest of the United States to omit the clause.

13 Inconsistency Between English Version and Translation of Contract

When translation of a contract from English into another language is anticipated, the CO should include a statement indicating that the English meaning will control in the event of an inconsistency between the translated and English terms.

14 Export Control ~~Added 4/2014~~ Revised 9/2020

a. All FAA employees, contractors and other agents working in support of the FAA must be familiar with export control requirements and seek appropriate guidance before transferring or disclosing items, services, or information to a foreign entity or foreign national, and must comply with U.S. export control requirements.

b. *Foreign Nationals.* In addition to being subject to AMS Personnel Security Guidance, the use of foreign nationals on a contract may be considered an export and thus require a successful export control review to be conducted prior to the foreign national working on the contract.

c. *Export Control Review Process*. Before transferring or disclosing items, services or information to a foreign entity or foreign national, the following process must be followed consistent with FAA Order 1240.13 and the FAA Export Control Compliance- Supplemental Guidance ("Supplemental Guidance") found at ~~https://my.faa.gov/org/staffoffices/apl/offices/api/)~~https://my.faa.gov/content/dam/myfaa/org/staffoffices/apl/offices/api/media/Export_Control_Guidance.pdf (***FAA Only***). The export control review effort is a team effort between the Contracting Officers, FAA Lines of Business (LOBs)/program offices, and AGC-500. Depending on the foreign party (e.g. Government entity vs. private corporation), different types of contract vehicles (e.g. international agreement vs. contract) may be required and the transaction itself may fall under different FAA offices (e.g., ATO International). If there is a question as to the appropriate vehicle for the transaction with a foreign entity, contact the LOB international staff or the Office of International Affairs (API).

(1) *Initial Determination.*

Consistent with FAA Order 1240.13 and the Supplemental Guidance Key Questions, the COR must initially determine if the item, services or information to be provided under the contract or Other Transaction (OT) Agreement is export controlled. Examples of export controlled items include FAA equipment, parts and maintenance services delivered outside the United States even for FAA purposes. It also includes giving or sending items such as documents, CDs, key fobs, thumb drives, etc., to a foreign entity or foreign national.

If the item, services, or information is initially determined to be export controlled, then a formal Export Control Review is required. The Export Control Review process is set forth in detail in the Supplemental Guidance. This review involves the following:

(a) Completing the Export Control Workbook ("Workbook") with all required information, including the Export Control Classification Number (found at www.bis.doc.gov). When completing the Workbook, be as detailed as possible. A Workbook should be completed for each export control review. The Workbook is available at ~~https://employees.faa.gov/org/staffoffices/apl/offices/api/~~https://my.faa.gov/org/staffoffices/apl/offices/api.html ***(FAA only).***

(b) Emailing the completed Export Control Workbook to AGC-500 at ~~9-AWA-AGC-EXPORTS@faa.gov~~9-AWA-AGC-Exports@faa.gov. In the email subject line, write: "[Country Name] Export Control [Item Description]" (e.g. Bermuda Export Control Mode-S).

(c) When the Export Control Review is completed, AGC-500 will provide an email from the export control mailbox stating whether the transaction is "Export Eligible."

(i) If the transaction is "Export Eligible" or "Not Controlled" then it may proceed (e.g., the documentation may be released at an industry day, for a vendor visit, or with a SIR; or a particular foreign national may work on the contract).
(ii) If the transaction is "Not Export Eligible," or if an export license is required, then AGC-500 and the procurement team must discuss the issue before taking further action.

(2) *Name Checking.*
Name checking is an important part of the export control review process because some

foreign nationals and entities are on what are commonly known as "prohibited persons lists." People and entities on these lists are prohibited from receiving exports.

Instructions for completing a name check are included in ~~the Workbook~~the Workbook. Full name, organization and citizenship information is required to complete the name check against the Consolidated Screening List at ~~https://employees.faa.gov/org/staffoffices/apl/offices/api/~~ https://2016.export.gov/ecr/eg_main_023148.asp ~~(***FAA only***)~~.

Because of a slightly different focus between the two lists, checking ~~the System~~the System for Award Management (SAM) "Exclusions" list cannot substitute for checking the Consolidated Screening List. Each list must be checked at the appropriate time for each acquisition.

(3) *Documentation.*

Completed Export Control Workbooks and export eligibility determinations from AGC-500 must be retained in the contract file, either in hard copy or electronically.

(4) *Responsibilities.*

(a) *Contracting Officer.*

(i) Identifying potential export control issues during acquisition planning activities, SIR/contract issuance, and contract administration;

(ii) Checking foreign nationals identified in the- Workbook against the Consolidated Screening List to determine if recipients of the export controlled items are on the lists of prohibited persons/entities, and documenting the results of the name check and the date the check was conducted.

(iii) Ensuring that appropriate export clauses are included in contracts and OT agreements either performed abroad, by foreign nationals, or involving deliveries to foreign locations.

(iv) Ensuring that all required security reviews, initial export control determinations and any required export control reviews are performed for foreign nationals working on FAA contracts and OT Agreements.

(v) Supporting CFIUS Reviews, as requested.

(vi) Supporting AGC-500 during the export review process.

(b) *COR/Program Office.*

(i) Identifying/anticipating export control issues in program activities, including, but not limited to, acquisition planning, contract administration, program industry days, and meeting with foreign entities and foreign nationals.

(ii) Answering Supplemental Guidance Key Questions, make the initial export control review determination, and advise the Contracting Officer of such determination and its basis in writing.

(iii) Supporting the Contracting Officer with respect to any export control issues that arise and relaying potential export controlled activities identified to the Contracting Officer.

(iv) Completing the Workbook, including identifying the Export Control Classification Numbers (ECCN) and recipients.

(v) Supporting CFIUS Reviews, as requested.

(vi) Supporting AGC-500 during the Export Control Review process.

(c) *AGC-500.*

AGC-500 is responsible for conducting the export control review once a completed Export Control Workbook is submitted to the Export Control Mailbox, and providing an export eligibility determination to the CO.

d. *Committee on Foreign Investment in the United States Review (CFIUS).*

(1) *CFIUS Background.*

CFIUS is an inter-agency committee authorized to review transactions that could result in control of a U.S. business by a foreign person ("covered transaction") in order to determine the effect of such transactions on the national security of the United States. CFIUS operates pursuant to section 721 of the Defense Production Act of 1950, as amended by the Foreign Investment and National Security Act of 2007 (FINSA) (section 721) and as implemented by Executive Order 11858, as amended, and regulations at 31 C.F.R. Part 800.
CFIUS issues arise when a non-U.S. company seeks to buy or merge with a U.S. company. CFIUS examines the covered transaction in order to identify and address, as appropriate, any national security concerns that arise as a result of the transaction. During the review period, CFIUS members, through the Department of the Treasury as Committee Chair, may request additional information on related FAA contracts.

(2**)** *CFIUS Review Responsibilities.*

(a) Contracting Officers: Contracting Officers are responsible for identifying all contracts (and any subcontract) that the FAA has with the U.S. business involved in the covered transaction that is subject to the CFIUS review and for identifying/producing any contract provisions affecting contractor roles access or duties.

(b) Contracting Officer's Representative: The COR is responsible for identifying the contractor's duties and data, software, systems, equipment, etc., that the contractor has delivered or has continuing access to and helping determine whether this could affect national security.

e. *Foreign Visitors*. Certain types of visits by foreign nationals to FAA facilities, and meetings with FAA personnel, regardless of the location, are subject to export control requirements. In particular, visits or meetings involving the demonstration of technology and/or software, and visits or meetings that involve the release of source code or other technical documentation to foreign nationals may require a review of the Supplemental Guidance Key Questions. Cognizant FAA LOBs and Staff Offices are responsible for ensuring that all information to be shared with foreign nationals during visits or meetings with the FAA has been reviewed. FAA Order 1600.74 Visitor Procedures for FAA Facilities contains guidelines for the conduct of visits by foreign nationals to FAA facilities.

f. *Foreign Travel*. See FAA International Travel Policy and FAA Order 1600.61B International Travel Security Briefing & Contact Reporting Requirements for FAA Employees and Contractors.

g. *Definitions.*

Note: These definitions are applicable to the export control review process only.

Business Process: Any explanation of the management, operational, and supporting processes that the FAA conducts to accomplish its mission. Examples of business processes include, but are not limited to, the following: how to create a flight procedure, how to redesign airspace, how to certify aircraft parts, how to conduct Safety Risk Management reviews, how to mobilize disaster relief efforts, and organizational charts with roles and responsibilities. Business process information is not export-controlled.

Consolidated Screening List: A list of entities and individuals for which the USG maintains restrictions on certain financial transactions, exports, re-exports or transfers of items, services or information.

Country of Concern: Countries subject to sanctions or embargoes, or countries that condone terrorist-supporting activities (e.g., Cuba, Iran, North Korea, Sudan, Syria). The EAR identifies countries of concern as "Country Group E" and lists them in the EAR at 15 CFR 740, Supplement 1. The U.S. Departments of State and Treasury track a broader list for countries of concern subject to their regulations. Transactions with countries of concern receive a higher degree of scrutiny and usually require a transaction-specific license. See the Additional Resources section of the Supplemental Guidance for more detail.

Export: Any item, service or information that is sent from the United States to a foreign destination is an export. Export means taking or sending an item, service or information out of the United States even if the item (e.g., test equipment) will be returned to the United States. Export also means giving an item, service or information to a foreign national or entity who might take it out of the United States. Items include commodities, software or technology, and technical data. Services include the furnishing of assistance (including training, design, maintenance, testing, installation, enhancement or use of item(s)) to a foreign national or entity whether in the United States or abroad. The release of technology or source code to a foreign national in the United States is "deemed" to be an export to the home country of the foreign national under the EAR.

For a definition of information, see Technical Data/Documentation.

Export Administration Regulations (EAR): U.S. Department of Commerce regulations for the export and re-export of most commercial items. The EAR does not control all items, services or information. Other U.S. government agencies may regulate other items not controlled by the EAR.
Export-Controlled: Items, services or information subject to U.S. export control requirements.
Export Control Classification Number (ECCN): A U.S. Department of Commerce alpha-numeric export code, e.g., 5A991, which describes the item, service or information being exported

and indicates licensing requirements. All ECCNs are listed in the Commerce Control List (CCL) and can usually be obtained from a hardware/software manufacturer.

Export Control Review: An FAA process, including a legal review and a name check of foreign nationals and entities against the U.S. Government Consolidated Screening List, to determine whether a potential transaction is eligible for export.

Export Control Workbook: An FAA document that includes worksheets for equipment/hardware, software, and training, as well as contact information for API and/or FAA Line of Business (LOB) Points of Contact, and country information, and which highlights potential areas of concern and informs AGC-500 that foreign nationals involved in the transaction have been checked against the Consolidated Screening List. A completed Workbook is required for all export control reviews.

Note**:** In accordance with the Paperwork Reduction Act, the export control review process and Workbook have been established for the Government to complete. The Export Control Workbook is for internal FAA use and must be completed by FAA employees, contractors and other agents working in support of the Agency.

Export Eligible: A legal determination that the intended transaction would be a lawful export. The determination is based on an identification of an export code, whether a transaction-specific license is required, and a confirmation that the person(s) and organization(s) to which the export is being made are not identified on the list(s) of known or suspected export violators.

Foreign Entity: Any organization, corporation or government agency located, incorporated or organized to do business in a country other than the United States. Foreign entities also include foreign branches, subsidiaries, and affiliates of U.S. companies, as well as other U.S. entities located in foreign countries.

Foreign National: A non-U.S. citizen. Holders of U.S. green cards and those with permanent residency in the United States are not considered foreign nationals for export control purposes.

International Traffic in Arms Regulations (ITAR): Regulations that control the export and import of defense articles and defense services. The U.S. Department of State is responsible for the administration of the ITAR.

Name Check: A process that includes a review of foreign nationals and organizations involved in an international transaction against the Consolidated Screening List. The name check is part of the Export Control Workbook, which must be completed for all export control reviews.

Publicly Available/Public Domain: Information is publicly available or in the public domain when it is generally accessible to the interested public in any form. Examples of items that are publicly available include: Web Page Documents, Performance Specifications, and Business Process Information. Information that is publicly available or that exists in the public domain, with the exception of encryption software, is not export-controlled. Information related to commercial space transportation may be subject to ITAR and treated differently even if publicly available; consult the designated LOB Point of Contact or AGC-500.

Technical Data/Documentation: Information, other than software or items posted on public websites, which is required for the design, development, prototyping, production, manufacture, assembly, use, testing, maintenance (inspection, overhaul, repair, preservation, and replacement of parts), rebuild, preventative maintenance, enhancement or modification of NAS systems, mission support systems, administrative systems, aircraft, or commercial space or launch systems. Training courses often involve the transfer of technical data. Examples of documentation include Maintenance Handbooks, Interface Control Documents, test plans, test procedures, schematics, configuration documents, software developers' kits, etc., regardless of medium or storage format.

Characteristics of technical data include materials that usually are proprietary or sensitive. Most technical data is export-controlled.

Transaction: The transfer or disclosure of items, services or information to a foreign entity or foreign national. Transactions may also include allowing foreign nationals to visit FAA facilities or work on FAA contracts.

15 Definitions **Revised ~~4/2014~~ 9/2020**

~~a. *"Canadian end product"* means an article that (a) is wholly the growth, product, or manufacture of Canada, or (b) in the case of an article which consists in whole or in part of materials from another country or instrumentality, has been substantially transformed in Canada into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to its supply; provided, that the value of those incidental services does not exceed that of the product itself.~~

~~b~~a. *"Civil aircraft and related articles"* means (a) all aircraft other than aircraft to be purchased for use by the Department of Defense or the U.S. Coast Guard; (b) the engines (and parts and components for incorporation into the engines) of these aircraft; (c) any other parts, components, and subassemblies for incorporation into the aircraft; and (d) any ground flight simulators, and parts and components of these simulators, for use with respect to the aircraft, whether to be used as original or replacement equipment in the manufacture, repair, maintenance, rebuilding, modification, or conversion of the aircraft and without regard to whether the aircraft or articles receive duty-free treatment under section 601(a)(2) of the Trade Agreements Act of 1979.

~~c~~b. *"Components"* means those articles, materials, and supplies incorporated directly into the end products, or in the case of construction those articles, materials, and supplies incorporated directly into construction materials.

~~d~~c. *"Construction"* means construction, alteration, or repair of any public building or public work in the United States.

~~e~~d. *"Construction Materials*" means an article, material, or supply brought to the construction site for incorporation into the building or work. *"Construction Materials*" also includes an item brought to the site pre-assembled from articles, materials, and supplies. However, emergency life safety systems, such as emergency lighting, fire alarm, and audio evacuation systems, which are discrete systems incorporated into a public building or work and which are produced as a complete system, shall be evaluated as a single and distinct construction material regardless of when or how the individual parts or components of such systems are delivered to the construction site.

~~f~~e. *"Customs territory of the United States,"* as it applies to customs and duties, means the States, the District of Columbia, and Puerto Rico.

~~g~~f. *"Domestic construction material"* means (a) an unmanufactured construction material mined or produced in the United States, or (b) a construction material manufactured in the United States, if the cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. (In determining whether a construction material is domestic, only the construction material and its components shall be considered.) The cost of each component includes transportation costs to the place of incorporation into the construction material and any applicable duty (whether or not a duty-free entry certificate is issued).

~~h~~g. *"Domestic end product"* means (a) an unmanufactured end product mined or produced in the United States, or (b) an end product manufactured in the United States, if the cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. (In determining if an end product is domestic, only the end product and its components shall be considered.) The cost of each component includes transportation costs to the place of incorporation into the end product and any applicable duty (whether or not a duty-free entry certificate is issued). Scrap generated, collected, and prepared for processing in the United States is considered domestic.

~~i~~h. *"Domestic offer"* means an offered price for a domestic end product, including transportation to destination.

~~j~~i. *"Domestic services"* means services performed in the United States. If services provided under a single contract are performed both inside and outside the United States, they shall be considered domestic if 25 percent or less of their total cost is attributable to services (including incidental supplies used in connection with these services) performed outside the United States.

~~k~~j. *"End product"* means those articles, materials, and supplies to be acquired for public use under the contract.

~~l~~k. *"Foreign construction material"* means a construction material other than a domestic construction material.

~~m~~l. *"Foreign contractor"* means a contractor or subcontractor organized or existing under the laws of a country other than the United States, its territories, or possessions.

~~n~~m. *"Foreign end product"* means an end product other than a domestic end product.

~~o~~n. *"Foreign offer"* means an offered price for a foreign end product, including transportation to destination and duty (whether or not a duty-free entry certificate is issued).

~~p~~o. *"Foreign services"* means services other than domestic services.

~~q~~p. *"Instrumentality"* does not include an agency or division of the government of a country, but may be construed to include arrangements such as the European Union.

~~r~~q. *"Manufactured product"* as it applies to "Buy American-Steel and Manufactured Products" means an item produced as a result of the manufacturing process.

~~s~~r. *"Manufacturing process"* as it applies to "Buy American-Steel and Manufactured Products" means the application of processes to alter the form or function of materials or of elements of the product in a manner adding value and transforming those materials or elements so that they represent a new end product functionally different from that which would result from mere assembly of the elements or materials.

~~t~~s. *"Mexican end product"* means an article that (a) is wholly the growth, product, or manufacture of Mexico, or (b) in the case of an article which consists in whole or in part of materials from another country or instrumentality, has been substantially transformed in Mexico into a new and different article of commerce with a name, character, or use distinct from, that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to its supply; provided, that the value of those incidental services does not exceed that of the product itself.

~~u. *"North American Free Trade Agreement (NAFTA) country"* means Canada or Mexico.~~

~~v. *"NAFTA country construction material"* means a construction material that (a) is wholly the growth, product, or manufacture of a NAFTA country or (b) in the case of a construction material which consists in whole or in part of materials from another country or instrumentality, has been substantially transformed in a NAFTA country into a new and different construction material distinct from the materials from which it was transformed.~~

~~w. *"NAFTA country end product"* means a Canadian end product or a Mexican end product~~.

~~x~~t. *"Person"* (1) Means-(i) A natural person;(ii) A corporation, business association, partnership, society, trust, financial institution, insurer, underwriter, guarantor, and any other business organization, any other nongovernmental entity, organization, or group, and any governmental entity operating as a business enterprise; and (iii) Any successor to any entity described in paragraph (1)(ii) of this definition; and (2) Does not include a government or governmental entity that is not operating as a business enterprise.

~~y~~u. *"Petroleum terms"*

1. *"Crude oil"* means crude petroleum, as it is produced at the wellhead, and liquids (under atmospheric conditions) that have been recovered from mixtures of hydrocarbons that existed in a vaporous phase in a reservoir and that are not natural gas products.

2. *"Finished products"* means any one or more of the following petroleum oils, or a mixture or combination of these oils, to be used without further processing except blending by mechanical means:

(a) *"Asphalt"*-- a solid or semi-solid cementitious material that (1) gradually liquefies when heated, (2) has bitumens as its predominating constituents, and (3) is obtained in refining crude oil.

(b) *"Fuel oil"*--a liquid or liquefiable petroleum product burned for lighting or for the generation of heat or power and derived directly or indirectly from crude oil, such as kerosene, range oil, distillate fuel oils, gas oil, diesel fuel, topped crude oil, or residues.

(c) *"Gasoline"*--a refined petroleum distillate that, by its composition, is suitable for use as a carburant in internal combustion engines.

(d) *"Jet fuel"*--a refined petroleum distillate used to fuel jet propulsion engines.

(e) *"Liquefied gases"*--hydrocarbon gases recovered from natural gas or produced from petroleum refining and kept under pressure to maintain a liquid state at ambient temperatures.

(f) *"Lubricating oil"*--a refined petroleum distillate or specially treated petroleum residue used to lessen friction between surfaces.

(g) *"Naphtha"*--a refined petroleum distillate falling within a distillation range overlapping the higher gasoline and the lower kerosenes.

(h) *"Natural gas products"*--liquids (under atmospheric conditions), including natural gasoline, that:

(1) Are recovered by a process of absorption, adsorption, compression, refrigeration, cycling, or a combination of these processes, from mixtures of hydrocarbons that existed in a vaporous phase in a reservoir, and

(2) When recovered and without processing in a refinery, definitions of products contained in subdivision (b), (c), (d), and (g) of this definition.

(i) *"Residual fuel oil"*--a topped crude oil or viscous residuum that, as obtained in refining or after blending with other fuel oil, meets or is the equivalent of Military Specification MIL-F-859 for Navy Special Fuel Oil and any more viscous fuel oil, such as No. 5 or Bunker C.

3. *"Unfinished oils"* means one or more of the petroleum oils listed under the definition of finished oils, or a mixture or combination of these oils, that are to be further processed other than by blending by mechanical means.

~~z~~v. *"Sanctioned European Union (EU) construction"* means construction to be performed in a sanctioned member state of the EU and the contract is awarded by a contracting activity located in the United States or its territories.

~~aa~~w. *"Sanctioned EU end product"* means an article that (a) is wholly the growth product or manufacture of a sanctioned member state of the EU or (b) in the case of an article which consists in whole or in part of materials from another country or instrumentality, has been substantially

transformed into a new and different article of commerce with a name, character or use distinct form that from which it was so transformed in a sanctioned member state of the EU. The term includes services (except transportation services) incidental to its supply; provided, that the value of these incidental services does not exceed that of the product itself. It does not include service contracts as such.

~~bb~~x. *"Sanctioned EU services"* means services to be performed in a sanctioned member state of the EU when the contract is awarded by a contracting activity located in the United States or its territories.

~~cc~~y. *"Sanctioned member state of the EU"* means Austria, Belgium, Denmark, Finland, France, Ireland, Italy, Luxembourg, the Netherlands, Sweden, and the United Kingdom.

~~dd~~z. *"United States"* as it relates to the Buy American Act or the Balance of Payments Program means the United States, its possessions, Puerto Rico, and any other place subject to its jurisdiction, but does not include leased bases or trust territories.

16 Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment Revised 1/2020

a. This section implements paragraph (a~~)(~~) (1~~)(~~) (A) of section 889 of the John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115-232). As used in this section –

"*Covered foreign country*" means The People's Republic of China.
"*Covered telecommunications equipment or services*" means–
(1) Telecommunications equipment produced by Huawei Technologies Company or ZTE Corporation, (or any subsidiary or affiliate of such entities);
(2) For the purpose of public safety, security of Government facilities, physical security surveillance of critical infrastructure, and other national security purposes, video surveillance and telecommunications equipment produced by Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company, or Dahua Technology Company (or any subsidiary or affiliate of such entities);
(3) Telecommunications or video surveillance services provided by such entities or using such equipment; or
(4) Telecommunications or video surveillance equipment or services produced or provided by an entity that the Secretary of Defense, in consultation with the Director of National Intelligence or the Director of the Federal Bureau of Investigation, reasonably believes to be an entity owned or controlled by, or otherwise connected to, the government of a covered foreign country.

"*Critical technology*" means–
(1) Defense articles or defense services included on the United States Munitions List set forth in the International Traffic in Arms Regulations under subchapter M of chapter I of title 22, Code of Federal Regulations;
(2) Items included on the Commerce Control List set forth in Supplement No. 1 to part 774 of the Export Administration Regulations under subchapter C of chapter VII of title 15, Code of Federal Regulations, and controlled-

(i) Pursuant to multilateral regimes, including for reasons relating to national security, chemical and biological weapons proliferation, nuclear nonproliferation, or missile technology; or
(ii) For reasons relating to regional stability or surreptitious listening;
(3) Specially designed and prepared nuclear equipment, parts and components, materials, software, and technology covered by part 810 of title 10, Code of Federal Regulations (relating to assistance to foreign atomic energy activities);
(4) Nuclear facilities, equipment, and material covered by part 110 of title 10, Code of Federal Regulations (relating to export and import of nuclear equipment and material);
(5) Select agents and toxins covered by part 331 of title 7, Code of Federal Regulations, part 121 of title 9 of such Code, or part 73 of title 42 of such Code; or
(6) Emerging and foundational technologies controlled pursuant to section 1758 of the Export Control Reform Act of2018 (50 U.S.C. 4817).

"*Substantial or essential component"* means any component necessary for the proper function or performance of a piece of equipment, system, or service.

b. *Prohibited equipment, systems, or service*s
(1) On or after August 13, 2019, agencies are prohibited from procuring or obtaining, or extending or renewing a contract to procure or obtain, any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system, unless an exception at paragraph (b) of this section applies or the covered telecommunications equipment or services are covered by a waiver described in T.3.6.4 A 16 e.
(2) *Exceptions*. This subpart does not prohibit agencies from procuring or contractors from providing-
(a) A service that connects to the facilities of a third-party, such as backhaul, roaming, or interconnection arrangements; or
(b) Telecommunications equipment that cannot route, redirect user data traffic, or permit visibility into any user data or packets that such equipment transmits or otherwise handles.

c. Contracting officers and purchase cardholders shall not procure or obtain, or extend or renew a contract (e.g., exercise an option) to procure or obtain, any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system, unless an exception at T.3.6.4 A b.(2) applies or the covered telecommunications equipment or services are covered by a waiver described in T.3.6.4 A 16.e.

d. *Procedures for Offeror/Vendor Representations and Reports*
(1) Offeror/Vendor Representations.
(a) If an offeror selects "does not" in response to paragraph (c) of provision 3.6.4-24 "Covered Telecommunications or Services – Representation", the contracting officer may rely on the representation unless the contracting officer has reason to question the representation. If the contracting officer has reason to question the representation, the contracting officer will follow agency procedures.

(b) If the offeror selects “does” in response to paragraph (c) of provision 3.6.4-24, the offeror must complete the representation at provision 3.6.4-22 “Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment”.

(c) If an offeror provides an affirmative response to the representations or discloses information in accordance with paragraphs (d) and (e) of the provision at 3.6.4-22 , the contracting officer/purchase cardholder must not make an award to the offeror unless the requiring activity provides a written determination that the covered telecommunications equipment or services included in their offer, in accordance with paragraph (e) of the provision, are not being used as a substantial or essential component of any system, or as critical technology as part of any system. If the requiring activity is unable to provide a written determination as described above and no other offerors provide a negative representation, then no award shall be made unless a waiver is granted.

(d) If the apparently successful offeror provides a negative response to the representation in (d) of provision 3.6.4-22, the contracting officer/purchase cardholder may rely on the representation, unless the contracting officer/purchase cardholder has an independent reason to question the representation. If the contracting officer/purchase cardholder has an independent reason to question a negative representation of the otherwise successful offeror, the contracting officer/purchase cardholder must consult with the requiring activity and legal counsel on how to proceed to ensure that the procurement would not violate the statutory prohibition.

(2) If a contractor provides a report pursuant to paragraph (d) of the clause 3.6.4-23 Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment, the contracting officer/purchase cardholder shall consult with the requiring activity and legal counsel on how to proceed using existing contractual remedies.

e. *Waivers*

(1) *Executive agencies.* The head of an agency may, on a one-time basis, waive the prohibition at (a)(1)(A) of section 889 of the NDAA for FY 2019 with respect to a Government entity (e.g., requirements office, contracting office) that requests such a waiver.

(a) The waiver may be provided, for a period not to extend beyond August 13, 2021, if the Government entity seeking the waiver submits to the head of the executive agency–

(i) A compelling justification for the additional time to implement the requirements under T.3.6.4 A 16, as determined by the head of the executive agency; and

(ii) A full and complete description of the presences of covered telecommunications or video surveillance equipment or services in the relevant supply chain and a phase-out plan to eliminate such covered telecommunications or video surveillance equipment or services from the relevant systems.

(b) The head of an agency shall, not later than 30 days after such approval, submit to the appropriate congressional committees the full and complete description of the presences of covered telecommunications or video surveillance equipment or services in the relevant supply chain and the phase-out plan to eliminate such covered telecommunications or video surveillance equipment or services from the relevant systems.

(2) Director of National Intelligence. The Director of National Intelligence may provide a waiver if the Director determines the waiver is in the national security interests of the United States.

B Clauses

view contract clauses

C Forms

view procurement forms