



DEPARTMENT OF THE NAVY
NAVAL FACILITIES ENGINEERING COMMAND
200 STOVALL STREET
ALEXANDRIA, VA 22332

IN REPLY REFER TO
ACQ 021
12 Nov 98

MEMORANDUM FOR DISTRIBUTION

Subj: DEPARTMENTAL MEMORANDUMS (98-60)

Ref: (a) NAVFAC ltr Ser 111A/96-197 of 31 Oct 96 (53-96)
(b) NAVFAC ltr Ser ACQ-111A-97-105 of 18 Nov 97 (97-52)

Encl: (1) ASN(RD&A)/ABM memo of 13 Oct 98

1. Enclosure (1) is furnished for your information and action, as appropriate.
2. The class deviation provided by reference (a) authorizing use of a deviation to FAR clause 52.245-9, Use and Charges, has been extended through 30 September 1999 or until FAR Part 45 is revised to include these provisions, whichever occurs first.
3. The class deviation on special tooling provided by reference (b) has been extended through 16 October 1999 or until FAR is revised to include these provisions, whichever occurs first.

A handwritten signature in black ink, appearing to read "M. F. Howard".

MICHAEL F. HOWARD
Director, Strategic Operations/
Community Management

DEPARTMENT OF THE NAVY
OFFICE OF THE ASSISTANT SECRETARY
RESEARCH, DEVELOPMENT AND ACQUISITION
1000 NAVY PENTAGON
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Oct 13 1998

MEMORANDUM FOR DISTRIBUTION

Subj: DEPARTMENTAL MEMORANDUMS

Encl: (1)  OUSD DP(DAR) memo dtd 22 Sep 1998; Subj:
Case: 98-00011 - Extension to Class Deviation-Special
Tooling
(2)  OUSD DP(DAR) memo dtd 25 Sep 1998; Subj:
Case: 98-00010 - Class Deviation--Use and Charges Clause

Ref: (a) OASN(RD&A)/ABM memo of 16 Oct 96

Enclosure (1) provides notification that the period of effectivity for the subject class deviation has been extended through October 16, 1999, or until the FAR is revised to include these provisions, whichever event occurs first.

Enclosure (2) is forwarded for your information and immediate implementation, as appropriate. It supersedes the reference (a) class deviation and provides notification that the period of effectivity for the subject class deviation is effective through September 30, 1999, or until FAR Part 45 is revised to include these provisions, whichever occurs first.


Elliott B. Branch
Executive Director
Acquisition & Business
Management



OFFICE OF THE UNDER SECRETARY OF DEFENSE

3000 DEFENSE PENTAGON
WASHINGTON, DC 20301-3000

SEPT 22, 1998

ACQUISITION AND
TECHNOLOGY

DP (DAR)

In reply refer to
DAR Tracking Number: 98-00011

MEMORANDUM FOR DIRECTORS OF DEFENSE AGENCIES
DEPUTY FOR ACQUISITION AND BUSINESS MANAGEMENT,
ASN(RD&A)/ABM
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE
(CONTRACTING), SAF/AQC
DEPUTY ASSISTANT SECRETARY OF THE ARMY (PROCUREMENT)
COMMANDER, DEFENSE CONTRACT MANAGEMENT COMMAND,
DEFENSE LOGISTICS AGENCY

SUBJECT: Extension to Class Deviation--Special Tooling

I extend the authority for all military departments and defense agencies to use the April 1984 edition of the Special Tooling clause and its related prescriptive language (attached) in lieu of the clause at 52.245-17 and its prescriptive language at 45.306-5. I also waive that portion of the Government Property (Fixed-Price Contracts) clause at 52.245-2 that states that special tooling is subject to title provisions in the Special Tooling clause. This waiver is necessary because the 1984 edition of the Special Tooling clause does not contain title provisions.

I am extending the class deviation for a one-year period ending October 16, 1999, or until the FAR is revised to include these provisions, whichever occurs first.

A handwritten signature in black ink that reads "Eleanor R. Spector". The signature is written in a cursive, flowing style.

Eleanor R. Spector
Director of Defense Procurement

Attachment



45.305 Additional clauses for facilities contracts.

(a)(1) The contracting officer shall, when contracting by negotiation, insert the clause at 52.245-17, Special Tooling, in solicitations and contracts when: a fixed-price contract is contemplated, the contracting officer decides (see 45.306-2(d)) to acquire rights to the contractor's special tooling, and it is not practical to identify the special tooling required.

(2) If the Government does not intend to acquire special tooling from subcontractors and an appropriate price reduction is obtained, the contracting officer shall use the clause with its Alternate I.

52.245-17 Special Tooling.

As prescribed in 45.305(a)(1), when contracting by negotiation, insert the following clause in solicitations and contracts when a fixed-price contract is contemplated, the contracting officer decides to acquire rights to the contractor's special tooling, and it is not practical to identify the special tooling required:

SPECIAL TOOLING (APR 1984) (DEVIATION)

(a) *Definition.* "Special tooling" means jigs, dies, fixtures, molds, patterns, taps, gauges, other equipment and manufacturing aids, all components of these items, and replacement of these items, that are of such a specialized nature that without substantial modification or alteration their use is limited to the development or production of particular supplies or parts thereof or performing particular services. It does not include material, special test equipment, facilities (except foundations and similar improvements necessary for installing special tooling), general or special machine tools, or similar capital items. Special tooling, for the purpose of this clause, does not include any item acquired by the Contractor before the effective date of this contract, or replacement of such items, whether or not altered or adapted for use in performing this contract, or items specifically excluded by the Schedule of this contract.

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

(c) *Initial list of special tooling.* If the Contracting Officer so requests, the Contractor shall furnish the Government an initial list of all special tooling acquired or manufactured by the Contractor for performing this contract (but see paragraph (d) for tooling that has become obsolete). The list shall specify the nomenclature, tool number, related product part number (or service

performed), and unit or group cost of the special tooling. The list shall be furnished within 60 days after delivery of the first production end item under this contract unless a later date is prescribed.

(d) *Changes in design.* Changes in the design or specifications of the end items being produced under this contract may affect the interchangeability of end item parts. In such an event, unless otherwise agreed to by the Contracting Officer, the Contractor shall notify the Contracting Officer of any part not interchangeable with a new or superseding part. Pending disposition instructions, such usable tooling shall be retained and maintained by the Contractor.

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

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

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

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

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

(h) *Final list of special tooling.* When all or a substantial part of the work under this contract is completed or terminated, the Contractor shall furnish the Contracting Officer a final list of special tooling with the same information as required for the initial list under paragraph (c) of this clause. The final list shall include all items not previously reported under paragraph (c). The Contracting Officer may provide a written waiver of this requirement or grant an extension. The requirement may be extended until the completion of this contract together with the completion of other contracts and subcontracts authorizing the use of the special tooling under paragraph (b) of this clause. Special tooling that has become obsolete as a result of changes in design or specification need not be reported except as provided for in paragraph (d).

(i) *Disposition instructions.* The Contracting Officer shall provide the Contractor with disposition instructions for special tooling identified in a list or notice submitted under paragraphs (c), (d), or (h) of this clause. The instructions shall be provided within 90 days of receipt of the list or notice, unless the period is extended by mutual agreement. The Contracting Officer may direct disposition by any of the methods listed in subparagraphs (1) through (4) of this paragraph, or a combination of such methods. Any failure of the Contracting Officer to provide specific instructions within the 90 day period shall be construed as direction under subparagraph (i)(3).

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

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

(3) The Contracting Officer may direct the Contractor to sell, or dispose of as scrap, for the account of the Government, any special tooling reported by the Contractor under this clause. The net proceeds of all sales shall either be deducted from amounts due the Contractor under this contract or shall be otherwise paid to the Government as

directed by the Contracting Officer. To the extent that the Contractor incurs any costs occasioned by compliance with such directions, for which it is not otherwise compensated, the contract price shall be equitably adjusted in accordance with the Changes clause of this contract.

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

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

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

(End of clause)

Alternate I (Apr 1984). If the Government does not intend to acquire special tooling from subcontractors and an appropriate price reduction is obtained, delete paragraph (k) from the basic clause.



OFFICE OF THE UNDER SECRETARY OF DEFENSE

3000 DEFENSE PENTAGON
WASHINGTON, DC 20301-3000

September 25, 1998

ACQUISITION AND
TECHNOLOGY

DP (DAR)

In reply refer to
DAR Tracking Number: 98-00010

MEMORANDUM FOR DIRECTORS OF DEFENSE AGENCIES
DEPUTY FOR ACQUISITION AND BUSINESS MANAGEMENT,
ASN(RD&A)/ABM
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE
(CONTRACTING), SAF/AQC
DEPUTY ASSISTANT SECRETARY OF THE ARMY (PROCUREMENT)
COMMANDER, DEFENSE CONTRACT MANAGEMENT COMMAND,
DEFENSE LOGISTICS AGENCY

SUBJECT: Class Deviation--Use and Charges Clause

By memorandum dated September 6, 1996, I authorized all military departments and defense agencies to use the attached clause and its related guidance and prescriptive language in lieu of the clause at FAR 52.245-9 and its guidance and prescriptive language at 45.202-1, 45.205(c), 45.302-6(c), and 45.403(a) and (b). Contracting officers may add the clause to existing contracts after the date of this memorandum if adequate consideration is received.

The clause makes the time property is actually used for commercial purposes the rental basis, permits contractors to obtain property appraisals from independent appraisers, permits appraisal-based rentals for all property, and allows contracting officers to consider alternate bases for determining rentals. These rental policy changes are intended to encourage dual use of DoD government property.

This class deviation is effective through September 30, 1999, or until FAR Part 45 is revised to include these provisions, whichever occurs first.

Eleanor R. Spector
Director, Defense Procurement

Attachment

cc: DSMC, Fort Belvoir



PART 45--GOVERNMENT PROPERTY

*** * ***

45.106 Government property clauses.

*** * ***

[(h) The contracting officer shall insert the clause at 52.245-9, Use and Charges (Deviation) in (i) fixed-price or labor-hour solicitations and contracts under which the Government will furnish property for performance of the contract; (ii) amendments that furnish government property under fixed-price or labor-hour contracts that do not include the clause at 52.245-9, Use and Charges, or the clause at 52.245-9, Use and Charges (Deviation); or, (iii) all cost-reimbursement and time-and-materials solicitations and contracts.]

*** * ***

45.202 Evaluation procedures.

45.202-1 Rental equivalents.

If a rental equivalent evaluation factor is used, it shall be equal to the rent allocable to the proposed contract that would otherwise have been charged for the property, as computed in accordance with the clause at 52.245-9, Use and Charges ~~(See 45.205 (b) for solicitation requirements.)~~ **[or 52.245-9, Use and Charges (Deviation), whichever is in the contract.]**

*** * ***

45.205 Solicitation requirements.

*** * ***

(c) Solicitations shall provide that using Government production and research property (other than as described and permitted in the solicitation (see paragraph (b) above)) will not be authorized under the contract unless such use is approved in writing by the contracting officer cognizant of the property, and either rent calculated in accordance with ~~the clause at 52.249-9, Use and Charges [(Deviation)]~~, is charged, or the contract price is reduced by an equivalent amount. (See 45.203 for postaward requests for special tooling and special test equipment and 45.204(c) for solicitation requirements for special tooling and special test equipment with residual value.)

* * *

45.302-6 Required Government property clauses for facilities contracts.

* * *

(c) The contracting officer shall insert the clause at 52.245-9, Use and Charges [**(Deviation)**], in solicitations and contracts ~~(i)~~ when a consolidated facilities contract or a facilities use contract ~~(see 45.301), or (ii) a fixed-price contract is contemplated. , and Government production and research property is provided other than on a rent free basis.~~

* * *

45.403 Rental--Use and Charges clause.

(a) The contracting officer shall charge contractors rent for using Government production and research property, except as prescribed in 45.404 and 45.405. Rent shall be computed in accordance with the clause at 52.245-9, Use and Charges, [**or in accordance with the procedures of the clause at 52.245-9, Use and Charges (Deviation), whichever is in the contract.**] ~~If the agency head or designee determines it to be in the Government's interest,~~ Under the clause at 52.245-9, Use and Charges, rent for classes of production and research property other than plant equipment identified in item (ii) of Table I of the clause at 52.245-9, Use and Charges, may be charged on the basis of use rather than the rental period, or on some other equitable basis [**if the agency head or designee determines it to be in the Government's interest.**] In such cases, the clause at 52.245-9, Use and Charges [**(Deviation)**] ~~, shall be appropriately modified [should be used.]~~

(b) The contracting officer cognizant of the Government production and research property shall ensure the collection of any rent due the Government from the contractor.

* * *

45.407 Non-Government use of plant equipment.

* * *

[(d) Charge an appropriate rental (see 45.403) when non-Governmental use is authorized.]

* * *

[52.245-9 Use and Charges (Deviation)

Use the following clause when government property and real property is to be used for commercial purposes:

USE AND CHARGES (APR 1984) (DEVIATION)

(a) Definitions.

As used in this clause--

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

Government property means property owned or leased by the Government.

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

Rental period means the calendar period during which government property is made available for commercial purposes.

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

(b) General.

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

(2) The Contractor shall not use government property for commercial purposes, including Independent Research and Development, until a rental charge for real property, or

estimated rental charge for other property, is agreed upon. Rented property shall be used only on a non-interference basis.

(c) Rental charge.

(1) Real property and associated fixtures.

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

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

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

(2) Other government property. The Contractor may elect to calculate the final rental charge using the appraisal method described in paragraph (c) (1) of this clause subject to the constraints therein or the following formula in which rental time shall be expressed in increments of not less than one hour with portions of hours rounded to the next higher hour-

$$\text{Rental charge} = \frac{(\text{Rental Time in hours}) (.02 \text{ per hour}) (\text{Acquisition Cost})}{720 \text{ hours per month}}$$

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

(d) Rental payments.

(1) Rent is due at the time and place specified by the Contracting Officer. If a time is not specified, the rental is due 60 days following completion of the rental period. The Contractor shall calculate the rental due, and furnish records or other supporting data in sufficient detail to permit the administrative Contracting Officer to verify the rental time and computation. Unless otherwise permitted by law, payment shall be made by check payable to the Treasurer of the United States and sent to the contract administration office identified in this contract or by electronic funds transfer to that office.

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

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

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

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

(End of clause)]