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Department of Defense General Services Administration National Aeronautics and Space Administration

48 CFR Parts 45 and 52
Federal Acquisition Regulation (FAR);
Special Tooling; Proposed Rule

DEPARTMENT OF DEFENSE

GENERAL SERVICES
ADMINISTRATIONNATIONAL AERONAUTICS AND
SPACE ADMINISTRATION

48 CFR Parts 45 and 52

Federal Acquisition Regulation (FAR);
Special Tooling

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

ACTION: Proposed rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulatory Council are considering a change to FAR 45.306, Providing special tooling, and the clause at 52.245-17, Special Tooling, to provide clear policy and uniform procedures for furnishing or acquiring special tooling under fixed-price contracts. Complementary changes are proposed for sections 45.305, 45.307, and 45.308, and clauses at 52.245-2, 52.245-17, 52.245-18, and 52.245-19.

DATES: Comments should be submitted to the FAR Secretariat at the address shown below on or before October 28, 1988 to be considered in the formulation of a final rule.

ADDRESS: Interested parties should submit written comments to: General Services Administration, FAR Secretariat (VRS), 18th & F Street NW., Room 4041, Washington, DC 20405.

Please cite FAR Case 88-36 in all correspondence related to this issue.

FOR FURTHER INFORMATION CONTACT: Margaret A. Willis, FAR Secretariat, Room 4041, GS Building, Washington, DC 20405, (202) 523-4755.

SUPPLEMENTARY INFORMATION:**A. Background**

FAR 45.306, Providing special tooling, and the clause at 52.245-17, Special Tooling, are proposed for revision to clarify that the Special Tooling clause is used in fixed-price contracts when the Government will furnish special tooling to the contractor, or the contractor will acquire or fabricate special tooling, and the Government intends to maintain rights to the special tooling until such time that the Government decides it wants full title to the special tooling, or has no further interest in the special tooling.

Under the proposed revision to the Special Tooling clause, the types of information which contractors must

keep in their property control systems is delineated. The periodic reporting of this information to the Government is also defined. The costs of increased recordkeeping is offset by reductions in contractors' management costs by eliminating the requirements for physical inventories, assignment of condition codes, and preparation of inventory schedules.

These FAR changes are intended to improve the management of special tooling, the retention and disposal decisions made by the Government, and the opportunities for using the special tooling to increase competition when contracting for postproduction requirements.

Other changes are made to FAR 45.305, 45.307, and 45.308 to locate the prescriptions for the Special Test Equipment clause and the Government Property Furnished "As Is" clause in the FAR sections which address the policy on the use of these clauses. These changes are intended to clarify when the clauses are to be used.

B. Regulatory Flexibility Act

The proposed changes to FAR Subpart 45.3 and the clauses at 52.245-2 and 52.245-17 may have significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. An Initial Regulatory Flexibility Analysis (IRFA) has been prepared and is on file in the FAR Secretariat. The Initial Analysis will be submitted to the Chief Counsel for Advocacy, Small Business Administration.

A copy of the IRFA may be obtained from the FAR Secretariat, Attn: Margaret A. Willis, Room 4041, GS Building, 18th and F Streets NW., Washington, DC 20405. Comments are invited. Comments from small entities concerning the affected FAR sections will also be considered in accordance with section 610 of the Act. Such comments must be submitted separately and cite FAR Case 88-610 in correspondence.

C. Paperwork Reduction Act

This proposed rule contains an information collection requirement. Accordingly, a revised burden estimate for OMB clearance number 9000-0075 is being submitted to the Office of Management and Budget for approval under 44 U.S.C. 3501, et seq. Public comments concerning this request will be invited through a subsequent Federal Register notice.

List of Subjects in 48 CFR Parts 45 and 52

Government procurement.

Dated: August 17, 1988.

Harry S. Rosinski,
Acting Director, Office of Federal Acquisition
and Regulatory Policy.

Therefore, it is proposed that 48 CFR Parts 45 and 52 be amended as set forth below:

1. The authority citation for Parts 45 and 52 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2473(c).

PART 45—GOVERNMENT PROPERTY**45.305 [Reserved]**

2. Section 45.305 is removed and reserved.

3. Section 45.306-2 is revised to read as follows:

45.306-2 Special tooling under cost-reimbursement contracts.

Title to special tooling under cost-reimbursement contracts is acquired in all cases. The clause used for this purpose is 52.245-5, Government Property (Cost-Reimbursement, Time-and-Material, or Labor-Hour Contracts).

4. Section 45.306-3 is revised to read as follows:

45.306-3 Special tooling under fixed-price contracts.

(a) *Criteria for acquisition.* In deciding whether or not to acquire title to special tooling, or rights to title, under fixed-price contracts, the contracting officer shall consider the following factors:

(1) The current or probable future need of the Government for the items involved (including in-house use) and the estimated cost of producing them if not acquired.

(2) The estimated residual value of the items.

(3) The administrative burden and other expenses incident to reporting, recordkeeping, preparation, handling, transportation, and storage.

(4) The feasibility and probable cost of making the items available to other offerors in the event of future acquisitions.

(5) The amount offered by the contractor for the right to retain the items.

(6) The effect on future competition and contract pricing.

(b) *Decision not to acquire special tooling.* In contracts in which the Government will not acquire title to special tooling, or rights to title, special requirements may be included in the Schedule of the contract (e.g.,

requirement governing the contractor's capitalization of special tooling costs).

(c) *Contract clause.* The contracting officer shall insert the clause at 52.245-17, Special Tooling, in solicitations and contracts when a fixed-price contract is contemplated, and either the contract will include special tooling provided by the Government or the Government will acquire title or right to title in special tooling to be acquired or fabricated by the contractor for the Government, other than special tooling to be delivered as an end item under the contract. The Special Tooling clause shall apply to all special tooling accountable to the contract.

45.306.4 [Removed]

5. Section 45.306-4 is removed.

6. Section 45.307-1 is amended by removing in paragraph (b) the reference "45.306-2(c)" and inserting in its place the reference "45.306-3(a)", and by adding paragraph (c) to read as follows:

45.307-1 General.

* * * * *

(c) The contracting officer shall insert the clause at 52.245-18, Special Test Equipment, in solicitations and contracts when contracting by negotiation and the contractor will acquire or fabricate special test equipment for the Government but the exact identification of the special test equipment to be acquired or fabricated is unknown.

7. Section 45.308 is amended by adding paragraph (c) to read as follows:

45.308 Providing Government production and research property "as is."

* * * * *

(c) The contracting officer shall insert the clause at 52.245-19, Government Property Furnished "As Is," in solicitations and contracts when a contract other than a consolidated facilities contract, a facilities acquisition contract, or a facilities use contract is contemplated and Government production and research property is to be furnished "as is" (see 45.106 for additional clauses that may be required).

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

8. Section 52.245-2 is amended by removing in the title of the clause the date "(APR 1984)" and inserting in its place the date "(AUG 1988);" by adding in paragraph (c)(2) a second sentence; and by revising paragraph (c)(3) to read as follows:

52.245-2 Government Property (Fixed-Price Contracts)

As prescribed in 45.106(b)(1), insert the following clause:

* * * * *

(c) * * *

(2) * * * However, special tooling accountable to this contract is subject to the provisions of the Special Tooling clause and is not subject to the provisions of this clause. * * *

(3) Title to each item of facilities, and special test equipment acquired by the Contractor for the Government under this contract shall pass to and vest in the Government when its use in performing this contract commences or when the Government has paid for it, whichever is earlier, whether or not title previously vested in the Government.

* * * * *

9. Section 52.245-17 is revised to read as follows:

52.245-17 Special Tooling.

As prescribed in 45.306-3(c), insert the following clause:

SPECIAL TOOLING (AUG 1988)

(a) *Definition.* "Special Tooling" means jigs, dies, fixtures, molds, patterns, tapes, gauges, other equipment and manufacturing aids, all components of these items, and replacements 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, includes all special tooling acquired or fabricated by the Contractor for the Government (other than special tooling to be delivered as a line item) or furnished by the Government for use in connection with and under the terms of the contract.

(b) *Title.* The Government retains title or option to take title to all special tooling subject to this clause until such time as title or option to take title is relinquished by the Contracting Officer as provided for in subparagraphs (j)(2) and (j)(3) of this clause.

(c) *Risk of loss.* Except to the extent that the Government shall have otherwise assumed the risk of the loss to special tooling applicable to this clause, in the event of the loss, theft or destruction of or damage to any such property, the repair or replacement shall be accomplished by the Contractor at its own expense.

(d) *Special tooling furnished by the Government.*

(1) Except as otherwise provided, all Government furnished special tooling is provided "as is." The Government makes no warranty whatsoever with respect to special tooling furnished "as is," except that the property is in the same condition when placed at the f.o.b. point specified in the

solicitation as when last available for inspection by the Contractor under the solicitation.

(2) The Contractor may repair any special tooling made available on an "as is" basis. Such repair will be at the Contractor's expense except as otherwise provided in this clause. Such property may be modified as necessary for use under this contract at the Contractor's expense, except as otherwise directed by the Contracting Officer. Any repair or modification of property furnished "as is" shall not affect the title of the Government.

(3) If there is any change in the condition of special tooling furnished "as is" from the time inspected or last available for inspection under the solicitation to the time placed on board at the location specified in the solicitation or the Government directs a change in the quantity of special tooling furnished or to be furnished, and such change will adversely affect the Contractor, the Contractor shall, upon receipt of the property, notify the Contracting Officer detailing the facts, and, as directed by the Contracting Officer, either (a) return such items at the Government's expense or otherwise dispose of the property or (b) effect repair to return the property to its condition when inspected under the solicitation or, if not inspected, last available for inspection under the solicitation. After completing the directed action and upon request of the Contractor, the Contracting Officer shall equitably adjust any contractual provisions affected by the return, disposition, or repair in accordance with procedures provided for in the Changes clause of this contract. The foregoing provisions for adjustment are the exclusive remedy available to the Contractor, and the Government shall not be otherwise liable for any delivery of special tooling in a condition or in quantities other than that when originally offered.

(e) *Use of special tooling.* The Contractor may use special tooling subject to this clause on other Government effort when specifically approved by the Contracting Officer for this contract and the Contracting Officer for the contract under which the special tooling will be used. Any other use of the special tooling shall be subject to advance written approval of the Contracting Officer. In the event the Government elects to remove any special tooling that is required for continued contract performance, the contract shall be equitably adjusted in accordance with paragraph (m) of this clause.

(f) *Property control.*

(1) *Records.* The Contractor's special tooling records shall provide the following minimum information regarding each item of special tooling subject to this clause and shall be made available for Government inspection at all reasonable times.

(i) Number or code of the contract to which the tooling is accountable and the number or code of the contract for which the tooling was originally acquired or fabricated.

(ii) Retention codes as defined below:

(A) *Primary Code.* Assign one of the following to each item of special tooling.

Code A. Spares Tooling. Required to provide a provisioned spare part or assembly.

Code B. Judgment (Insurance) Tooling. Fabrication tools for parts that are not provisioned spares but which in the judgment of the Contractor will be required at some time for logistic support of the end item.

Code C. Rate Tooling. Necessary to economically produce at increased rates (e.g., for mobilization or surge) but not essential for parts fabrication at low production rates.

Code D. Assembly Tooling. Required for manufacture of the end product but not required for production of spare parts. Those items having no postproduction need except for potential modification or resumed production programs.

(B) Secondary Code. Assign one or more of the following codes, as applicable, to each item of special tooling:

Code 1. Repair Tooling. Items which are capable of being used for repair of provisioned parts or assemblies.

Code 2. Replaceable Tooling. Spares or judgment tooling (primary retention codes A or B) which, in the opinion of the Contractor, can be effectively and economically replaced by "soft" tooling on an "as required" basis in lieu of retention of the "hard" production tooling for supporting postproduction requirements.

Code 3. Maintenance Tooling. Items which are capable of being used for depot level maintenance of the applicable end item or components thereof.

Code 4. Crash Damage Tooling. Items which apply to provisioned or nonprovisioned parts or assemblies which are designated as or have the potential of being required for crash damage repairs.

(iii) Nomenclature, function or comparable code.

(iv) Tool part number or code.

(v) Tool identification number, or quantity of each tool part number or code, if tool identification number is not assigned.

(vi) Part number(s) of item(s) on which used (complete hierarchy of part numbers).

(vii) Unit price.

(viii) Storage method code. Assign one of the following:

Code J. Inside storage.

Code K. Outside storage.

Code L. Other.

(ix) Estimated weight of tool, if over 25 pounds.

(x) Estimated volume of tool, if over 3 cubic feet.

(xi) Location of Contractor, subcontractor, vendor for each item. Use Federal Supply Code for Manufacturers (FSCM), or name and address if code is not available.

(xii) All operation sheets and other data as are necessary to show the manufacturing operation or processes for which such items were used, designed, or modified.

(2) Identification or tagging. To the extent practicable, the Contractor shall identify all special tooling subject to this clause in accordance with the Contractor's identification procedures.

(g) Maintenance. The Contractor shall maintain special tooling in accordance with sound industrial practice. These 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 (j). Disposition instructions, of this clause.

(h) Identification of excess special tooling. The Contractor shall promptly identify and report all special tooling in excess of the amounts needed to complete full performance under this contract (see subdivision (i)(3)(i) of this clause).

(i) Lists of special tooling. The Contractor shall periodically prepare and distribute lists of special tooling as described below:

(1) Initial list. If this is a supply contract, the initial list shall be furnished within 60 days after delivery of the first production end item under this contract or completion of the initial provisioning process, whichever is later, and shall include all special tooling subject to this clause as of the reporting date. If this is a contract for storage of special tooling, the initial list shall be provided within 60 days of contract implementation.

(2) Updated list. When the last production end item under this contract is delivered, the Contractor shall furnish an updated list of special tooling that shall contain all tools accountable to the contract. However, if this contract represents the final production contract, the Contractor shall provide this updated list of all tools not later than 180 days prior to scheduled delivery of the last production end item.

(3) Excess special tooling list.

(i) Excess special tooling. Expect for items subject to subdivision (i)(3)(ii) of this clause, lists of special tooling excess to this contract shall be furnished within 60 days of the date that the item is determined to be excess. The Contractor shall include in this list the information prescribed in Format of lists, subparagraph (i)(4) of this clause, as well as the applicable excess code as follows:

Code V. Excess to contract requirements with no follow-on requirements.

Code W. Excess to contract requirements but can be used to support actual or anticipated follow-on requirements.

Code X. Excess due to changes in design or specification of the end items.

Code Y. Excess due to nonserviceable or nonrepairable condition.

Code Z. Other.

(ii) Termination inventory. These items shall be submitted on SF 1432 or by computer list attached to an SF 1432 in accordance with FAR 45.606. Format and content of this submission will be as prescribed by Format of lists, subparagraph (i)(4) of this clause, but will contain information as prescribed by FAR Subpart 45.6, in effect on the date of award of this contract.

(4) Format of lists. Lists furnished by the Contractor shall state the type of list and shall include all information from Records, subparagraph (f)(1) of this clause, items (i) through (xi). All lists will be grouped by primary retention code as prescribed in subdivision (f)(1)(ii)(A) of this clause and further listed in tool part number sequence.

(5) Distribution of lists. The Contractor shall submit two copies of lists to each of the following recipients unless otherwise directed:

(i) The Contracting Officer;

(ii) The Administrative Contracting Officer; and

(iii) The inventory control point designated by the contracting office.

(j) Disposition instructions. The Contracting Officer shall provide the

Contractor with written disposition instructions within 180 days of receipt of the updated list as prescribed by subparagraph (i)(2) of this clause and within 90 days of the receipt of excess special tooling lists reported in accordance with subparagraph (i)(3) of this clause. The Contracting Officer may direct disposition by any of the methods listed in subparagraphs (j)(1) through (j)(3) of this clause, or a combination of such methods. The Contractor shall comply with such disposition instructions.

(1) The Contracting Officer may identify specific items of special tooling to be retained or give the Contractor a list specifying the products, parts, or services including follow-on requirements for which the Government may require special tooling and request the Contractor to identify all usable items of special tooling on hand that were designed for or used in the production or performance of such products, parts, or services. Once items of usable special tooling required by the Government are identified, the Contracting Officer may:

(i) Direct the Contractor to transfer specified items of special tooling to follow-on contracts requiring their use. Those items shall be furnished for use on the contract(s) as specified by the Contracting Officer and shall be subject to the provisions of the gaining contract(s); or

(ii) Request the Contractor to enter into an appropriate storage contract for special tooling specified to be retained by the Contractor for the Government. Tooling to be stored shall be stored pursuant to a storage contract between the Government and the Contractor; or

(iii) Direct the Contractor to transfer title to the Government (to the extent not previously transferred) and deliver to the Government those items of special tooling which are specified for removal from the Contractor's plant.

(2) The Contracting Officer may direct the Contractor to sell, or dispose of as scrap, for the account of the Government, any special tooling not specified by the Government pursuant to subparagraph (j)(1) of this clause. To the extent that the Contractor incurs any costs occasioned by compliance with such direction, for which it is not otherwise compensated, the contract price shall be equitably adjusted in accordance with the Changes clause of this contract. The net proceeds of all sales shall either be credited to the cost of contract performance or shall be otherwise paid to the Government as directed by the Contracting Officer. Sale of special tooling to the prime Contractor or any of its subcontractors is subject to the prior written approval of the Contracting Officer.

(3) The Contracting Officer may furnish the Contractor with a statement disclaiming further Government interest or right in specified special tooling.

(4) Restoration of Contractor's premises. Unless otherwise provided in this contract, the Government has no obligation to restore or rehabilitate the Contractor's premises under any circumstances (e.g., abandonment, disposition upon completion of need, or upon contract completion). However, if special tooling is withdrawn or if other special

tooling is substituted, then the equitable adjustment under paragraph (m) of this clause may properly include restoration or rehabilitation costs.

(k) *Access to special tooling.* The Contractor shall provide access to special tooling subject to this clause at all reasonable times to all individuals designated by the Contracting Officer.

(l) *Storage or shipment.* The Contractor shall promptly arrange for either the shipment or the storage of special tooling specified in accordance with the final disposition instructions in subdivisions (j)(1)(ii) or (j)(1)(iii) of this clause. Tooling to be shipped shall be properly packaged, packed, and marked in accordance with the directions of the Contracting Officer. All operation sheets and other data necessary to show the manufacturing operations or processes for which the items were used or designed shall accompany special tooling to be shipped or stored or shall otherwise be provided to the Government as directed by the Contracting Officer. To the extent that the Contractor incurs costs for storage, shipment, packing, crating, or handling under this paragraph and not otherwise compensated for, the contractor price shall be equitably

adjusted in accordance with the Changes clause of this contract.

(m) *Equitable adjustment.* When this clause specifies an equitable adjustment, it shall be made to any affected contract provision in accordance with the procedures of the Changes clause. When appropriate, the Contracting Officer may initiate an equitable adjustment in favor of the Government. The right to an equitable adjustment shall be the Contractor's exclusive remedy. The Government shall not be liable to suit for breach of contract for—

(1) Any delay in delivery of Government-furnished special tooling;

(2) Delivery of Government-furnished special tooling in a condition not suitable for its intended use;

(3) A decrease in or substitution of special tooling; or

(4) Failure to repair or replace Government-furnished special tooling for which the Government is responsible.

(n) *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 subcontract appropriate provisions to obtain Government rights and data comparable to the rights of the Government under this clause (unless the Contractor and Contracting Officer agree in writing that such rights are not of 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)

52.245-18 [Amended]

10. Section 52.245-18 is amended by removing in the introduction text the reference "45.305(b)" and inserting in its place the reference "45.307-1(c)".

11. Section 52.245-19 is amended by revising the introductory text to read as follows:

52.245-19 Government Property Furnished "As Is."

As prescribed in 45.308(c), insert the following clause:

* * * * *
[FR Doc. 88-19504 Filed 8-26-88; 8:45 am]
BILLING CODE 6820-61-M