**List of Subjects in 48 CFR Part 216**

Government procurement.

**Ynette R. Shelkin,**

*Editor, Defense Acquisition Regulations System.*

■ Therefore, 48 CFR part 216 is amended as follows:

## PART 216—TYPES OF CONTRACTS

■ 1. The authority citation for 48 CFR part 216 continues to read as follows:

**Authority:** 41 U.S.C. 421 and 48 CFR chapter 1.

■ 2. Section 216.603–2 is added to read as follows:

**216.603–2 Application.**

(c)(3) In accordance with 10 U.S.C. 2326, establish definitization schedules for letter contracts following the requirements at 217.7404–3(a) instead of the requirements at FAR 16.603–2(c)(3).

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## DEPARTMENT OF DEFENSE

### Defense Acquisition Regulations System

### 48 CFR Parts 228, 231, and 252

**RIN 0750–AF72**

### Defense Federal Acquisition Regulation Supplement; Ground and Flight Risk Clause (DFARS Case 2007–D009)

**AGENCY:** Defense Acquisition Regulations System, Department of Defense (DoD).

**ACTION:** Final rule.

**SUMMARY:** DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to revise and combine contract clauses addressing assumption of risk of loss under contracts that furnish aircraft to the Government. The final rule establishes requirements that apply consistently to all contract types.

**DATES:** *Effective Date:* June 8, 2010.

**FOR FURTHER INFORMATION CONTACT:** Julian Thrash, 703–602–0310.

**SUPPLEMENTARY INFORMATION:**

### A. Background

The DFARS clauses at 252.228–7001, Ground and Flight Risk, and 252.228–7002, Aircraft Flight Risk, are presently used in contracts that involve the furnishing of aircraft to the Government. The clause at 252.228–7001 is used in negotiated fixed-price contracts, and the clause at 252.228–7002 is used in cost-reimbursement contracts. A proposed rule was published in the **Federal Register** at 72 FR 69177 on December 7, 2007. This final rule revises and combines the two clauses into a single ground and flight risk clause, applying requirements consistently to all contract types. In addition, a new subsection is added at DFARS 231.205–19 to explain the treatment of insurance costs under the new clause and all similar clauses.

The final rule changes include—

○ Applying the clause to all contracts for the purchase, development, production, maintenance, repair, flight, or overhaul of aircraft, with exceptions for contracts for activities incidental to the normal operations of aircraft, FAR Part 12 contracts, and contracts where a non-DoD customer has declined to accept the risk of loss for its aircraft asset;

○ Adding a requirement for inclusion of the clause in subcontracts at all tiers;

○ Adding a statement that the Government property clause is not applicable if the Government withdraws its self-insurance coverage;

○ Adding a statement that commercial insurance costs or self-insurance charges that duplicate the Government's self- insurance are unallowable; and

○ Establishing a share of loss for the contractor that is the lesser of $100,000 or twenty percent of the estimated contract cost or price. This is consistent with the contractor's share of loss presently specified in the clause at 252.228–7002. The clause at 252.228–7001 presently prescribes a share of loss of $25,000 for the contractor.

### B. Public Comments

Three respondents submitted comments on the proposed rule. Specific comments received are addressed in paragraphs 1 through 8 of this section.

*1. Applicability*

*Comment:* The respondent recommended adding an additional exception to the requirement for inclusion of the Ground and Flight Risk clause by inserting a new paragraph (b)(1)(iv) in DFARS 228.370 to read: "For Commercial Derivative Aircraft that continue to be maintained to FAA Airworthiness Standards and the work will be conducted at a licensed FAA Repair Station."

*Response:* Commercial Derivative Aircraft are militarized versions of commercial aircraft platforms. Their repair at FAA repair stations most often denotes a commercial services contract. Normal commercial terms and conditions would apply and, thus, payment for insurance and acceptance of FAA standards is appropriate. In addition to adding the recommended new exception, DoD is changing DFARS 228.370(b)(1)(ii) to read: "Awarded under FAR Part 12 for the acquisition, development, production, modification, maintenance, repair, flight, or overhaul of aircraft, or otherwise involving the furnishing of aircraft."

*2. Compliance*

*Comment:* Two comments addressed potentially confusing language on compliance and the cost of compliance. One respondent indicated that paragraph (b)(2)(iii) of DFARS 228.370 was confusing as to intent and purpose. The respondent was concerned that, when a contracting officer expressly defines "contractor premises," the contractor might be able to avoid compliance with DCMAI 8210.1 (the Joint Instruction) by moving performance to a different location. Another respondent commented that DFARS 228.370 appears to require the Ground and Flight Risk clause for all aircraft, including unmanned aerial vehicles, without taking into account significant variations in size, cost, or vehicle ceiling. The respondent expressed concern that use of the clause constitutes costly overkill in cases of small/micro unmanned aerial vehicles (UAVs).

*Response:* DoD believes the language is clear and unambiguous as is, and it presents no meaningful basis for a contractor to avoid compliance with the DCMAI 8210.1. The definition of "contractor premises" is applicable solely to the determination of the Government's acceptance of the risk of loss. DFARS 252.228–7001(b) requires the contractor to assure compliance with DCMAI 8210.1 regardless of the location of the aircraft.

With regard to the cost of compliance, DFARS 228.370(b)(2)(i) allows tailoring of the definition of "aircraft" to appropriately cover atypical and "nonconventional" aircraft. If contracting officers wish to omit small/micro UAVs, the clause allows that flexibility. The contracting officer is required to make this determination on a case-by-case basis in coordination with the program office. While the respondent's concerns could be legitimate in some cases, these concerns should be addressed during the preaward phase on an individual contract basis. There is sufficient flexibility in the approval process for the clause to recognize unique requirements or the absence of standard

ground and flight operation requirements for small/micro UAVs.

*3. Definitions*

*Comment:* Two respondents expressed concerns in this area. One requested inclusion of a new definition for "temporarily removed," as follows: "Those items removed for the duration of the contracted work with the intent to add the item back to the same aircraft." Another respondent recommended revising the definition of "in the open" so that it includes "located on the Contractor's premises or other places described in the Schedule."

*Response:* DoD does not believe that it is necessary to define "temporarily removed" because, as long as a removed item retains its relationship with a particular tail number or aircraft, the clause covers the method for determining risk of loss. If an item intended for reinstallation is found to be unsuitable for re-introduction onto the aircraft, it loses its relationship with the aircraft; it will be handled under the property clause from that point forward. DoD declines to revise the definition of "in the open," which is substantially unchanged from prior versions. The respondent's recommended language would significantly expand the Government's acceptance of risk for new production aircraft. It would shift the triggering event for Government liability to the production line and potentially expose the Government to claims for the cost of rework and production mishaps.

*4. Conditions Under Which the Government Retains Risk*

*Comment:* Three comments were submitted on this topic. One respondent recommended revising DFARS 252–228.7001(e)(5) to read "Consists of wear and tear; deterioration (including rust and corrosion) * * * (This exclusion does not apply to Government-furnished property if damage consists of reasonable wear and tear or deterioration, *damage caused by or relating to wear and tear or deterioration,* or results from inherent vice (*e.g.,* a known condition or design defect in the property)." As an example of "damage caused by or relating to wear and tear or deterioration," the respondent refers to a situation where a defect in the aircraft allows rain water to enter the aircraft and damage its electronic systems.

In a similar vein, another comment was to change DFARS 252.228–7001(f)(1)(i) to read as follows: "The first $100,000 of loss or damage to aircraft in the open, during operation in flight resulting from each separate event, except for reasonable wear and tear or *deterioration, damage caused by or relating to wear and tear or deterioration, or* to the extent the loss or damage is caused by negligence of Government Personnel." A third comment suggested that the language at DFARS 252.228–7001(e)(6), which provides that the Government does not accept the risk for losses that occur as a result of work on the aircraft unless such losses would have been covered by commercial insurance in the absence of the Ground and Flight Risk clause, is confusing and a source of frequent disputes.

*Response:* While the contractor should not be liable for reasonable wear and tear, handling of the aircraft to prevent damage related to wear and tear is something within the contractor's control. If rain water is allowed to damage electronics, the contractor has failed to take necessary precautions to store the aircraft under reasonable conditions. The damage may have been avoided via closer intake inspection, storing the aircraft indoors, or covering certain areas to avoid water damage. The recommended change would diminish the contractor's incentive to take timely and appropriate action to protect Government assets, and therefore neither paragraph (e) nor (f) of the clause is changed. DoD also disagrees that the language at paragraph (e)(6) of the clause is confusing; it is unchanged from previous versions of the Ground and Flight Risk clause, and DoD is unaware of any disputes arising from the language.

*5. Avoidance of Liability*

*Comment:* Three comments were received on this subject. One respondent expressed concern that the frequent necessity for Government Flight Representatives to approve flight crew members via telephone call or e-mail message may violate the DFARS 252.228–7001(e)(2) requirement for approval "in writing." Also, DFARS 252.228–7001(e)(4) provides that the Government will not accept the liability for losses covered by insurance. The respondent expressed concern that contractors could avoid application of the clause's requirements by purchasing insurance. The respondent recommended inclusion of the following language currently found in DFARS 252.228.7002: "The Contractor shall not be reimbursed for liability to third persons for loss or damage to property, or for death or bodily injury, caused by aircraft during flight unless the flight crew members previously have been approved in writing by the Government Flight Representative, who has been authorized in accordance with the combined regulation entitled 'Contractor's Flight and Ground Operations'."

*Response:* DoD believes that telephonic and e-mail approvals are adequate as long as the Government Flight Representative follows up with a formal written approval as soon as practicable. The language at 252.228–7001(e)(4) is included to prevent a duplicate recovery for a single loss. In no case does the purchase of insurance relieve the contractor of its obligation to comply with the clause requirements. While DoD agrees that contractors should not be reimbursed for third-party liability if the Government Flight Representative had not approved the flight crew members, it does not concur in the respondent's assumption that Government acceptance of third-party liability arises from the cited language in DFARS 252.228–7002, Aircraft Flight Risk. The current language merely establishes a condition precedent to the Government's express acceptance of third-party liability under other provisions of the contract (*e.g.,* FAR 52.228–7, Insurance—Liability to Third Persons). DoD has added a paragraph to the Ground and Flight Risk clause as follows: "To the extent that the Government has accepted such liability under other provisions of this contract, the Contractor shall not be reimbursed for liability to third persons for loss or damage to property, or for death or bodily injury caused by aircraft during flight, unless the flight crew members previously have been approved for this flight in writing by the Government Flight Representative, who has been authorized in accordance with the combined regulation entitled 'Contractor's Flight and Ground Operations'."

*6. Contractor's Share of Loss*

*Comment:* One respondent recommended revising DFARS 252.228–7001(f) to reduce the maximum share of loss to $50,000 for all contracts. The respondent suggested that the increase may negatively impact small businesses that do not have the resources to absorb an increased share of loss. The respondent also recommended separate language addressing the contractor's share of loss on firm-fixed price contracts and flexibly-priced contracts. Another respondent cited concerns that the use of the phrase "twenty percent of the estimated price or cost of this contract" creates confusion because prices on firm fixed-price contracts are not usually "estimated." The respondent recommended that the language in the current DFARS clause defining the contractor's share of loss on cost-type

contracts as "Twenty percent of the estimated cost of the contract" remain unchanged.

*Response:* While DoD's review indicates a fairly even split between fixed-price and flexibly-priced aircraft contracts, there is a decided weighting toward flexibly-priced contracts for aircraft repair, overhaul, and maintenance. Such contracts are typically where the bulk of damage arises that results in liability assessments. Therefore, the majority of contracts where liability arises already contain a $100,000 maximum share of loss, consistent with the previous DFARS 252.228–7002 language. Lowering the share of loss on all contracts to $50,000 would produce an inequitable and counter-productive result. Further, DoD disagrees that raising the liability to $100,000 will disproportionately disadvantage small businesses. Most of the small businesses participating in these contracts do so as repair, overhaul, and maintenance prime contractors or as commercial subcontractors.

DoD does not agree that separate language is necessary to address firm- and flexibly-priced contracts. However, DoD is revising the proposed language of DFARS 252.228–7001(f) to clarify the language cited by the respondent and provide guidance for determination of the contractor's share of loss on task or delivery order contracts. The recommended revision defines the contractor's share of loss as the lesser of "(i) the first $100,000 * * *, or (ii) twenty percent of the price or estimated cost of the contract" and adds a statement that "for task order and delivery order contracts, the DoD's share of loss shall be the lesser of $100,000 or twenty percent of the combined total price or estimated cost of those orders to which the clause applies."

*7. Compliance With DCMA Regulation*

*Comment:* The respondent expressed concern that DFARS 252.228–7001(b) imposes an absolute requirement for contractor compliance with DCMAI 8210.1, Combined Regulation/Instruction. Under certain circumstances, the respondent claims that imposition of this requirement is inappropriate. The respondent recommends modifying the initial sentence of the paragraph to provide some flexibility, as follows: "Unless specified otherwise in the contract Schedule, the Contractor shall be bound * * *"

*Response:* The requirement to comply with the Joint Instruction is not a substantive change; paragraph (k) of the existing clause imposes the identical requirement. The Joint Instruction itself provides adequate flexibility to address the commenter's concern. With few exceptions, the Instruction's standard for contractor procedures is simply that they be "safe and effective."

*8. Flowdown*

*Comment:* One respondent recommended revising DFARS 252.228–7001(g) to add: "The Contractor is required to ensure that each of its subcontractors also complies with the combined regulation/instruction entitled "Contractor's Flight and Ground Operations." Another respondent, noting that DFARS 228.252–7001(l) requires contractors to assure that subcontractors at all tiers comply with the clause, recommended that the clause provide some flexibility in the imposition of flowdown requirements.

*Response:* The addition recommended by the first respondent is unnecessary because the effect of the suggested change is already provided for at DFARS 252.228–7001(b), Combined Regulation/Instruction, which requires flowdown to subcontracts at all tiers.

As to providing flexibility in the flowdown requirement, DoD considers the Joint Instruction itself to provide adequate flexibility to address the commenter's concern. With few exceptions, the Instruction's standard for contractor procedures is simply that they be "safe and effective." Any subcontractor in possession or control of a Government aircraft should have "safe and effective" procedures in place.

This rule was subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993. This is not a major rule under 5 U.S.C. 804.

**C. Regulatory Flexibility Act**

DoD has prepared a final regulatory flexibility analysis consistent with 5 U.S.C. 604. A copy of the analysis may be obtained from the individual specified in the contact-information section of this notice. The analysis is summarized as follows:

The objective of the rule is to clearly and consistently address the responsibilities of the Government and the contractor with regard to incidents that may occur under contracts involving the furnishing of aircraft to the Government. The rule applies to DoD contractors and their subcontractors under contracts for the acquisition, development, production, or servicing of aircraft. Excluded are contracts for activities strictly incidental to the normal operations of an aircraft; contracts awarded under FAR Part 12, Acquisition of Commercial Items; and contracts where a non-DoD customer does not assume risk for loss of or damage to the aircraft. The impact on small entities is expected to be minimal based on the fact that most contractors engaged in this type of business have historically been large businesses.

**D. Paperwork Reduction Act**

The Paperwork Reduction Act does not apply because the rule does not impose any information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

**List of Subjects in 48 CFR Parts 228, 231, and 252**

Government procurement.

**Ynette R. Shelkin,**

*Editor, Defense Acquisition Regulations System.*

■ Therefore, 48 CFR parts 228, 231, and 252 are amended as follows:

■ 1. The authority citation for 48 CFR parts 228, 231, and 252 continues to read as follows:

**Authority:** 41 U.S.C. 421 and 48 CFR chapter 1.

## PART 228—BONDS AND INSURANCE

■ 2. Section 228.370 is amended as follows:

■ a. By revising paragraph (b);

■ b. By removing paragraph (c); and

■ c. By redesignating paragraphs (d) through (f) as paragraphs (c) through (e) respectively.

The revised text reads as follows:

**228.370 Additional clauses.**

* * * * *

(b)(1) Use the clause at 252.228–7001, Ground and Flight Risk, in all solicitations and contracts for the acquisition, development, production, modification, maintenance, repair, flight, or overhaul of aircraft, except those solicitations and contracts—

(i) That are strictly for activities incidental to the normal operations of the aircraft (*e.g.,* refueling operations, minor non-structural actions not requiring towing such as replacing aircraft tires due to wear and tear);

(ii) That are awarded under FAR Part 12 procedures and are for the development, production, modification, maintenance, repair, flight, or overhaul of aircraft; or otherwise involving the furnishing of aircraft;

(iii) For which a non-DoD customer (including a foreign military sales customer) has not agreed to assume the risk for loss or destruction of, or damages to, the aircraft; or

(iv) For commercial derivative aircraft that are to be maintained to Federal

Aviation Administration (FAA) airworthiness when the work will be performed at a licensed FAA repair station.

(2) The clause at 252.228–7001 may be modified only as follows:

(i) Include a modified definition of "aircraft" if the contract covers other than conventional types of winged aircraft, *i.e.,* helicopters, vertical take-off or landing aircraft, lighter-than-air airships, unmanned aerial vehicles, or other nonconventional aircraft. The modified definition should describe a stage of manufacture comparable to the standard definition.

(ii) Modify "in the open" to include "hush houses," test hangars and comparable structures, and other designated areas.

(iii) Expressly define the "contractor's premises" where the aircraft will be located during and for contract performance. These locations may include contract premises which are owned or leased by the contractor or subcontractor, or premises where the contractor or subcontractor is a permittee or licensee or has a right to use, including Government airfields.

(iv) Revise paragraph (e)(3) of the clause to provide Government assumption of risk for transportation by conveyance on streets or highways when transportation is—

(A) Limited to the vicinity of contractor premises; and

(B) Incidental to work performed under the contract.

(3) Follow the procedures at PGI 228.370(b) when using the clause at 252.228–7001.

* * * * *

## PART 231—CONTRACT COST PRINCIPLES AND PROCEDURES

■ 3. Section 231.205–19 is added to read as follows:

### 231.205–19 Insurance and indemnification.

(e) In addition to the cost limitations in FAR 31.205–19(e), self-insurance and purchased insurance costs are subject to the requirements of the clauses at 252.217–7012, Liability and Insurance, and 252.228–7001, Ground and Flight Risk.

## PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 4. Section 252.228–7001 is revised to read as follows:

### 252.228–7001 Ground and flight risk.

As prescribed in 228.370(b), use the following clause:

**GROUND AND FLIGHT RISK (JUN 2010)**

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

(1) *Aircraft,* unless otherwise provided in the contract

Schedule, means—

(i) Aircraft to be delivered to the Government under this contract (either before or after Government acceptance), including complete aircraft and aircraft in the process of being manufactured, disassembled, or reassembled; provided that an engine, portion of a wing, or a wing is attached to a fuselage of the aircraft;

(ii) Aircraft, whether in a state of disassembly or reassembly, furnished by the Government to the Contractor under this contract, including all Government property installed, in the process of installation, or temporarily removed; provided that the aircraft and property are not covered by a separate bailment agreement;

(iii) Aircraft furnished by the Contractor under this contract (either before or after Government acceptance); or

(iv) Conventional winged aircraft, as well as helicopters, vertical take-off or landing aircraft, lighter-than-air airships, unmanned aerial vehicles, or other nonconventional aircraft specified in this contract.

(2) *Contractor's managerial personnel* means the Contractor's directors, officers, and any of the Contractor's managers, superintendents, or other equivalent representatives who have supervision or direction of—

(i) All or substantially all of the Contractor's business;

(ii) All or substantially all of the Contractor's operation at any one plant or separate location; or

(iii) A separate and complete major industrial operation.

(3) *Contractor's premises* means those premises, including subcontractors' premises, designated in the Schedule or in writing by the Contracting Officer, and any other place the aircraft is moved for safeguarding.

(4) *Flight* means any flight demonstration, flight test, taxi test, or other flight made in the performance of this contract, or for the purpose of safeguarding the aircraft, or previously approved in writing by the Contracting Officer.

(i) For land-based aircraft, "flight" begins with the taxi roll from a flight line on the Contractor's premises and continues until the aircraft has completed the taxi roll in returning to a flight line on the Contractor's premises.

(ii) For seaplanes, "flight" begins with the launching from a ramp on the Contractor's premises and continues until the aircraft has completed its landing run and is beached at a ramp on the Contractor's premises.

(iii) For helicopters, "flight" begins upon engagement of the rotors for the purpose of take-off from the Contractor's premises and continues until the aircraft has returned to the ground on the Contractor's premises and the rotors are disengaged.

(iv) For vertical take-off or landing aircraft, "flight" begins upon disengagement from any launching platform or device on the Contractor's premises and continues until the aircraft has been engaged to any launching platform or device on the Contractor's premises.

(v) All aircraft off the Contractor's premises shall be considered to be in flight when on the ground or water for reasonable periods of time following emergency landings, landings made in performance of this contract, or landings approved in writing by the Contracting Officer.

(5) *Flight crew member* means the pilot, the co-pilot, and, unless otherwise provided in the Schedule, the flight engineer, navigator, and bombardier-navigator when assigned to their respective crew positions for the purpose of conducting any flight on behalf of the Contractor. It also includes any pilot or operator of an unmanned aerial vehicle. If required, a defense systems operator may also be assigned as a flight crew member.

(6) *In the open* means located wholly outside of buildings on the Contractor's premises or other places described in the Schedule as being "in the open." Government-furnished aircraft shall be considered to be located "in the open" at all times while in the Contractor's possession, care, custody, or control.

(7) *Operation* means operations and tests of the aircraft and its installed equipment, accessories, and power plants, while the aircraft is in the open or in motion. The term does not apply to aircraft on any production line or in flight.

(b) *Combined regulation/instruction.* The Contractor shall be bound by the operating procedures contained in the combined regulation/instruction entitled "Contractor's Flight and Ground Operations" (Air Force Instruction 10–220, Army Regulation 95–20, NAVAIR Instruction 3710.1 (Series), Coast Guard Instruction M13020.3, and Defense Contract Management Agency Instruction 8210.1) in effect on the date of contract award.

(c) *Government as self-insurer.* Subject to the conditions in paragraph (d) of this clause, the Government self-insures and assumes the risk of damage to, or loss or destruction of aircraft "in the open," during "operation," and in "flight," except as may be specifically provided in the Schedule as an exception to this clause. The Contractor shall not be liable to the Government for such damage, loss, or destruction beyond the Contractor's share of loss amount under the Government's self-insurance.

(d) *Conditions for Government's self-insurance.* The Government's assumption of risk for aircraft in the open shall continue unless the Contracting Officer finds that the Contractor has failed to comply with paragraph (b) of this clause, or that the aircraft is in the open under unreasonable conditions, and the Contractor fails to take prompt corrective action.

(1) The Contracting Officer, when finding that the Contractor has failed to comply with paragraph (b) of this clause or that the aircraft is in the open under unreasonable conditions, shall notify the Contractor in writing and shall require the Contractor to make corrections within a reasonable time.

(2) Upon receipt of the notice, the Contractor shall promptly correct the cited

conditions, regardless of whether there is agreement that the conditions are unreasonable.

(i) If the Contracting Officer later determines that the cited conditions were not unreasonable, an equitable adjustment shall be made in the contract price for any additional costs incurred in correcting the conditions.

(ii) Any dispute as to the unreasonableness of the conditions or the equitable adjustment shall be considered a dispute under the Disputes clause of this contract.

(3) If the Contracting Officer finds that the Contractor failed to act promptly to correct the cited conditions or failed to correct the conditions within a reasonable time, the Contracting Officer may terminate the Government's assumption of risk for any aircraft in the open under the cited conditions. The termination will be effective at 12:01 a.m. on the fifteenth day following the day the written notice is received by the Contractor.

(i) If the Contracting Officer later determines that the Contractor acted promptly to correct the cited conditions or that the time taken by the Contractor was not unreasonable, an equitable adjustment shall be made in the contract price for any additional costs incurred as a result of termination of the Government's assumption of risk.

(ii) Any dispute as to the timeliness of the Contractor's action or the equitable adjustment shall be considered a dispute under the Disputes clause of this contract.

(4) If the Government terminates its assumption of risk pursuant to the terms of this clause—

(i) The Contractor shall thereafter assume the entire risk for damage, loss, or destruction of the affected aircraft;

(ii) Any costs incurred by the Contractor (including the costs of the Contractor's self-insurance, insurance premiums paid to insure the Contractor's assumption of risk, deductibles associated with such purchased insurance, etc.) to mitigate its assumption of risk are unallowable costs; and

(iii) The liability provisions of the Government Property clause of this contract are not applicable to the affected aircraft.

(5) The Contractor shall promptly notify the Contracting Officer when unreasonable conditions have been corrected.

(i) If, upon receipt of the Contractor's notice of the correction of the unreasonable conditions, the Government elects to again assume the risk of loss and relieve the Contractor of its liability for damage, loss, or destruction of the aircraft, the Contracting Officer will notify the Contractor of the Contracting Officer's decision to resume the Government's risk of loss. The Contractor shall be entitled to an equitable adjustment in the contract price for any insurance costs extending from the end of the third working day after the Government's receipt of the Contractor's notice of correction until the Contractor is notified that the Government will resume the risk of loss.

(ii) If the Government does not again assume the risk of loss and the unreasonable conditions have been corrected, the Contractor shall be entitled to an equitable adjustment for insurance costs, if any, extending after the third working day after the Government's receipt of the Contractor's notice of correction.

(6) The Government's termination of its assumption of risk of loss does not relieve the Contractor of its obligation to comply with all other provisions of this clause, including the combined regulation/instruction entitled "Contractor's Flight and Ground Operations."

(e) *Exclusions from the Government's assumption of risk.* The Government's assumption of risk shall not extend to damage, loss, or destruction of aircraft which—

(1) Results from failure of the Contractor, due to willful misconduct or lack of good faith of any of the Contractor's managerial personnel, to maintain and administer a program for the protection and preservation of aircraft in the open and during operation in accordance with sound industrial practice, including oversight of a subcontractor's program;

(2) Is sustained during flight if either the flight or the flight crew members have not been approved in advance of any flight in writing by the Government Flight Representative, who has been authorized in accordance with the combined regulation/instruction entitled "Contractor's Flight and Ground Operations";

(3) Occurs in the course of transportation by rail, or by conveyance on public streets, highways, or waterways, except for Government-furnished property;

(4) Is covered by insurance;

(5) Consists of wear and tear; deterioration (including rust and corrosion); freezing; or mechanical, structural, or electrical breakdown or failure, unless these are the result of other loss, damage or destruction covered by this clause. (This exclusion does not apply to Government-furnished property if damage consists of reasonable wear and tear or deterioration, or results from inherent vice, *e.g.,* a known condition or design defect in the property); or

(6) Is sustained while the aircraft is being worked on and is a direct result of the work unless such damage, loss, or destruction would be covered by insurance which would have been maintained by the Contractor, but for the Government's assumption of risk.

(f) *Contractor's share of loss and Contractor's deductible under the Government's self-insurance.*

(1) The Contractor assumes the risk of loss and shall be responsible for the Contractor's share of loss under the Government's self-insurance. That share is the lesser of—

(i) The first $100,000 of loss or damage to aircraft in the open, during operation, or in flight resulting from each separate event, except for reasonable wear and tear and to the extent the loss or damage is caused by negligence of Government personnel; or

(ii) Twenty percent of the price or estimated cost of this contract.

(2) If the Government elects to require that the aircraft be replaced or restored by the Contractor to its condition immediately prior to the damage, the equitable adjustment in the price authorized by paragraph (j) of this clause shall not include the dollar amount of the risk assumed by the Contractor.

(3) In the event the Government does not elect repair or replacement, the Contractor agrees to credit the contract price or pay the Government, as directed by the Contracting Officer, the lesser of—

(i) $100,000;

(ii) Twenty percent of the price or estimated cost of this contract; or

(iii) The amount of the loss.

(4) For task order and delivery order contracts, the Contractor's share of the loss shall be the lesser of $100,000 or twenty percent of the combined total price or total estimated cost of those orders issued to date to which the clause applies.

(5) The costs incurred by the Contractor for its share of the loss and for insuring against that loss are unallowable costs, including but not limited to—

(i) The Contractor's share of loss under the Government's self-insurance;

(ii) The costs of the Contractor's self-insurance;

(iii) The deductible for any Contractor-purchased insurance;

(iv) Insurance premiums paid for Contractor-purchased insurance; and

(v) Costs associated with determining, litigating, and defending against the Contractor's liability.

(g) *Subcontractor possession or control.* The Contractor shall not be relieved from liability for damage, loss, or destruction of aircraft while such aircraft is in the possession or control of its subcontractors, except to the extent that the subcontract, with the written approval of the Contracting Officer, provides for relief from each liability. In the absence of approval, the subcontract shall contain provisions requiring the return of aircraft in as good condition as when received, except for reasonable wear and tear or for the utilization of the property in accordance with the provisions of this contract.

(h) *Contractor's exclusion of insurance costs.* The Contractor warrants that the contract price does not and will not include, except as may be authorized in this clause, any charge or contingency reserve for insurance covering damage, loss, or destruction of aircraft while in the open, during operation, or in flight when the risk has been assumed by the Government, including the Contractor share of loss in this clause, even if the assumption may be terminated for aircraft in the open.

(i) *Procedures in the event of loss.*

(1) In the event of damage, loss, or destruction of aircraft in the open, during operation, or in flight, the Contractor shall take all reasonable steps to protect the aircraft from further damage, to separate damaged and undamaged aircraft, and to put all aircraft in the best possible order. Except in cases covered by paragraph (f)(2) of this clause, the Contractor shall furnish to the Contracting Officer a statement of—

(i) The damaged, lost, or destroyed aircraft;

(ii) The time and origin of the damage, loss, or destruction;

(iii) All known interests in commingled property of which aircraft are a part; and

(iv) The insurance, if any, covering the interest in commingled property.

(2) The Contracting Officer will make an equitable adjustment for expenditures made

by the Contractor in performing the obligations under this paragraph.

(j) *Loss prior to delivery.*

(1) If prior to delivery and acceptance by the Government, aircraft is damaged, lost, or destroyed and the Government assumed the risk, the Government shall either—

(i) Require that the aircraft be replaced or restored by the Contractor to the condition immediately prior to the damage, in which event the Contracting Officer will make an equitable adjustment in the contract price and the time for contract performance; or

(ii) Terminate this contract with respect to the aircraft. Notwithstanding the provisions in any other termination clause under this contract, in the event of termination, the Contractor shall be paid the contract price for the aircraft (or, if applicable, any work to be performed on the aircraft) less any amount the Contracting Officer determines—

(A) It would have cost the Contractor to complete the aircraft (or any work to be performed on the aircraft) together with anticipated profit on uncompleted work; and

(B) Would be the value of the damaged aircraft or any salvage retained by the Contractor.

(2) The Contracting Officer shall prescribe the manner of disposition of the damaged, lost, or destroyed aircraft, or any parts of the aircraft. If any additional costs of such disposition are incurred by the Contractor, a further equitable adjustment will be made in the amount due the Contractor. Failure of the parties to agree upon termination costs or an equitable adjustment with respect to any aircraft shall be considered a dispute under the Disputes clause of this contract.

(k) *Reimbursement from a third party.* In the event the Contractor is reimbursed or compensated by a third party for damage, loss, or destruction of aircraft and has also been compensated by the Government, the Contractor shall equitably reimburse the Government. The Contractor shall do nothing to prejudice the Government's right to recover against third parties for damage, loss, or destruction. Upon the request of the Contracting Officer or authorized representative, the Contractor shall at Government expense furnish to the Government all reasonable assistance and cooperation (including the prosecution of suit and the execution of instruments of assignment or subrogation) in obtaining recovery.

(l) *Government acceptance of liability.* To the extent the Government has accepted such liability under other provisions of this contract, the Contractor shall not be reimbursed for liability to third persons for loss or damage to property or for death or bodily injury caused by aircraft during flight unless the flight crew members previously have been approved for this flight in writing by the Government Flight Representative, who has been authorized in accordance with the combined regulation entitled "Contractor's Flight and Ground Operations".

(m) *Subcontracts.* The Contractor shall incorporate the requirements of this clause, including this paragraph (m), in all subcontracts.

(End of clause)

**252.228–7002 [Removed and Reserved]**

■ 5. Section 252.228–7002 is removed and reserved.

**252.228–7003 [Amended]**

■ 6. Section 252.228–7003 is amended in the introductory text by removing "228.370(d)" and adding in its place "228.370(c)".

**252.228–7005 [Amended]**

■ 7. Section 252.228–7005 is amended in the introductory text by removing "228.370(e)" and adding in its place "228.370(d)".

**252.228–7006 [Amended]**

■ 8. Section 252.228–7006 is amended in the introductory text by removing "228.370(f)" and adding in its place "228.370(e)".

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