The New FAR Property Rule and Its Impact on Contractors

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In June, 2007, the government issued the new FAR Property Rule, 52.245-1 and a rewrite of FAR Part 45. As contractors, we’ve known for a long time this was coming. There are major changes with what is now in the rule, but especially with what is missing.

There are several reasons why this change needed to occur: The old language of Part 45 contained inconsistent, conflicting and obsolete guidance; it was at odds with modern materials management technology such as Enterprise Resource Planning (ERP), relational databases, Item Unique Identification (IUID), radio frequency identification tags (RFID), bar-coding, and the general trend toward commercialization of components; and it was not compatible with acquisition reform (i.e., does not allow an environment that fosters efficiency, creativity and innovation).

This rewrite was a complete restructure of the property rules. It deleted several government property clauses and created one main government property clause. Within this one main clause, it provides for “limited risk of loss”, and the alternate clause provides for “full risk of loss”, which is just the opposite of how it has been for fifty years. In addition, all of the facilities government property clauses were replaced by 52.245-1, and several that have served the industry well such as the Special Tooling (ST) and Special Test Equipment (STE) clauses were eliminated.

Before I get into the “meat” of the new property clause, 52.245-1, I want to discuss the changes within FAR Part 45. The new Part 45 has been totally revised to reflect direction to Government Contracting Officers. This is now consistent with the other parts of the FAR, and has put direction to contractors in Part 52, which is where it should have been all along. With that said, let’s look at the new Part 45.

FAR Part 45.000 – Scope of Part

This section explains to the government the policies and procedures to be used when providing government property. Within this section, one of the biggest changes is the guidance that this Part does NOT apply to software and intellectual property.

Part 45.1 – General

This section is divided into 7 subparts, 45.101 through 45.107. Each subpart is discussed below.

45.101 - Definitions

Several new terms and definitions are now included within this section. These are Cannibalize, Contractor Inventory, Demilitarization, Equipment, and Sensitive Property. In addition, all of the definitions have been put in one section. In the previous FAR, the definitions were scattered everywhere.

Now that these new definitions have been added, there are some concerns that you need to be aware of.

The definition for Contractor Inventory actually defines Government-Owned Property, either acquired or furnished, that is excess.

Demilitarization is another new definition to the FAR and contractors should be aware that this could add cost when disposing of Government Property.

Equipment is also a new term to the FAR and is defined as “a tangible asset that is functionally complete for its intended purpose, durable, nonexpendable, and needed for the performance of a contract. Equipment is not intended for sale, and does not ordinarily lose its identity or become a component part of another article when put into use.” This definition now covers what used to be Plant Equipment, Special Test Equipment, and Special Tooling.

Sensitive Property is another new term to the FAR and was previously defined in the DoD Property Manual, 4161.2-M. Again, because of the inclusion of the terminology within the FAR, contractors should be aware of potential additional administrative activity and cost.

A change to the definition for Material has excluded the terminology of “small tools expended.” Again, contractors need to be aware that this will add cost due to the new requirement to track small tools as equipment.

A major change within Part 45.1 is the elimination of the ability to provide Special Tooling (45.306) and Special Test Equipment (45.307). This elimination does not afford the ability for a contractor to identify a requirement in general terms. If you will require Special Tooling or Special Test Equipment during the performance of your contract, the contractor must make these items deliverables on the contract. Once they are built and delivered, they are then furnished back to the contractor as Government Furnished Property. To accomplish this, a contract modification will need to be written.

45.102 – Policy

The new language in 45.102 has significantly changed. It states:

(b) Contracting officers shall provide property to contractors only when it is clearly demonstrated --
(1) To be in the Government’s best interest;
(2) That the overall benefit to the acquisition significantly outweighs the increased cost of administration, including ultimate property disposal;
(3) That providing the property does not substantially increase the Government’s assumption of risk; and
(4) That Government requirements cannot otherwise be met.
This terminology reinforces the policy that the contractor shall provide ALL property required to perform all requirements under the contract. The government has said for years that they wanted to get out of the “property business”, and that contractors have to provide the property they need to meet their contractual requirements.

A new subparagraph under 45.102 was added which states “(d) Exception. Property provided to contractors for repair or overhaul is not subject to the requirements of paragraph (b) of this section.” (Paragraph “b” is above) This provides clarification on items received on overhaul and repair contracts.

45.103 – General

(a) Agencies shall--

(1) Allow and encourage contractors to use voluntary consensus standards (see 11.101(c)) and industry-leading practices and standards to manage Government property in their possession.

With this rewrite, the government has eliminated very prescriptive requirements that have been followed for many, many years. This could be dangerous if contractors do not work closely with their Government Property Administrators when implementing standards and industry leading practices, due to differences in interpretations.

45.104 – Responsibility and liability for Government Property

(a) Generally, contractors are not held liable for loss, damage, destruction, or theft of Government property under the following types of contracts:

(1) Cost-reimbursement contracts.
(2) Time-and-material contracts.
(3) Labor-hour contracts.
(4) Fixed-price contracts awarded on the basis of submission of cost or pricing data.

Having the government “self insure” by stating that contractors are not held liable, is a huge win for industry. Typically, in the past, if a contractor has had an approved property system, with minimal losses, the Contracting Officer would allow the alternate limited risk of loss provisions on fixed price contracts by inserting the Alternate I provision or Alternate G paragraph into the contract.

(b) The Contracting Officer may revoke the Government’s assumption of risk when the Property Administrator determines that the contractor’s property management practices are inadequate and/or present an undue risk to the Government.

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With this new language, the Contracting Officer can now penalize the contractor on a Government Property Administrator’s (GPA) recommendation, thus giving the GPA more authority than they have ever had. Prior language required “proof of willful misconduct or lack of good faith on behalf of managerial personnel.”

45.105 – Contractors’ property management system compliance

(b) The property administrator shall notify the contractor in writing when the contractor’s property management system does not comply with contractual requirements, and shall request prompt correction of deficiencies and shall provide a schedule for their completion……

This language states that the GPA will provide a schedule, to the contractor, for completion of any deficiencies.

45.105(b) continued:
If the contractor does not correct the deficiencies in accordance with the schedule, the contracting officer shall notify the contractor, in writing, that failure to take the required corrective action(s) may result in—

(1) Revocation of the Government’s assumption of risk for loss, damage, destruction, or theft; and/or

(2) The exercise of other rights or remedies available to the contracting officer.

This is a significant change from prior language which stated the Contracting Officer had to notify “managerial personnel” by certified letter. This could create risk if communication is not brought to senior management by the employees working the problem.

45.106 – Transferring accountability

Government property shall be transferred from one contract to another only when firm requirements exist under the gaining contract (see 45.102). Such transfers shall be documented by modifications to both gaining and losing contracts. Once transferred, all property shall be considered Government-furnished property to the gaining contract.

This is a significant change from prior language. A modification to both gaining and losing contracts adds administrative resource and additional cost.

Reminder: If Contractor Acquired Property is transferred, the property is now considered Government Furnished Property to the new contract, and IUID requirements will now be invoked. What this means is now the contractor must meet the IUID record system requirements in their property systems and report

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the item(s) to the UID registry. This action will add additional resources and increase administrative cost. Contractors need to ensure the additional cost is identified and put into the contract during the proposal phase. On the positive side, it will eliminate all of the property recorded in contractors systems as “Right to Title” property.

Subpart 45.2 - Solicitation and Evaluation Procedures

45.201 Solicitation.

(a) The contracting officer shall insert a listing of the Government property to be offered in all solicitations where Government-furnished property is anticipated (see 45.102). The listing shall include at a minimum—

(1) The name, part number and description, manufacturer, model number, and National Stock Number (if needed for additional item identification tracking and/or disposition);
(2) Quantity/unit of measure;
(3) Unit acquisition cost;
(4) Unique-item identifier or equivalent (if available and necessary for individual item tracking); and
(5) A statement as to whether the property is to be furnished in an “as-is” condition and instructions for physical inspection.

Contractors must be very careful in accepting property in an “as-is” condition ordinarily “at the contractor’s expense” (out of profit). If you accept property in an as-is condition, and the property is not suitable for use, the company must pay, out of profit, for any repairs, replacement, or capital rehabilitation costs. Industry should not accept any “as-is” language into a contract.

45.201 Solicitation (cont’d)

(b) When Government property is offered for use in a competitive acquisition, solicitations should specify that the contractor is responsible for all costs related to making the property available for use, such as payment of all transportation, installation or rehabilitation costs.

(c) The solicitation shall describe the evaluation procedures to be followed, including rental charges or equivalents and other costs or savings to be evaluated, and shall require all offerors to submit the following information with their offers—

(1) A list or description of all Government property that the offeror or its subcontractors propose to use on a rent-free basis. The list shall identify the accountable contract under which the property is held and the authorization for its use (from the contracting officer having cognizance of the property)...

Contractor proposal teams must address this issue. If property is not identified during the proposal phase, and a request is submitted after contract award, the Government will expect compensation. Not to mention that a contract modification will be required to authorize the item(s) and a contract modification to add the item to the list of Government-furnished property.

Subpart 45.4—Title to Government Property

45.402 Title to contractor-acquired property.

(a) Under fixed price type contracts, the contractor retains title to all property acquired by the contractor for use on the contract, except for property identified as a deliverable end item. The Government acquires title to property acquired or fabricated by the contractor in accordance with the financing provisions or other specific requirements for passage of title in the contract. If a deliverable item is to be retained by the contractor for use after inspection and acceptance by the Government, it shall be made accountable to the contract through a contract modification listing the item as Government-furnished property.

Clarification of this policy has been added, but a contract modification is now required if the property is a deliverable end item in the contract and furnished back to the contract for use. Again, this adds additional resource and administrative cost.

(b) Under cost type and time-and-material contracts, the Government acquires title to all property to which the contractor is entitled to reimbursement, in accordance with paragraph (e)(3) of clause 52.245-1.

There is no change to this paragraph from previous language, but this has been misunderstood by the workforce for years. Everything that is charged as a direct item of cost to a Government contract, and reimbursement is received, is government property.

45.5 Support Government Property Administration

45.501 Prime Contractor Alternate Locations

The property administrator assigned to the prime contract may request support property administration from another contract administration office, for purposes of evaluating prime contractor management of property located at subcontractors’ and alternate locations.

Subcontractors’ and alternate locations should be treated differently. The Government can NOT request
support administration without consent from the Prime. The Government realizes a mistake was made in this statement due to privity of contract issues. The Government is in the process of opening a new FAR case to address this issue and several other “administrative” type issues. Until the correction is made, industry should address this issue in their property management plans.

45.502 Subcontractor locations.
(a) For property located at a subcontractor, FAR 52.245-1(g) requires that the prime contractor allow support property administration. Should the prime contractor fail to comply with FAR 52.245-1(g), the property administrator assigned to the prime contractor shall immediately refer the matter to the contracting officer.

Again, this is a mistake that will be corrected in the new FAR case and property plans must address this issue.

As you can see, numerous changes were made in Part 45. Some of these changes were good, and some were not so good. This is an entirely new way of doing business and, in my opinion, will take a few years for contractors and the Government to work out all the issues.

THE NEW PROPERTY CLAUSE
Now, let’s begin a review of the new FAR Part 52.245. There are major changes with what has been added, but especially with what has been deleted.

The new format of 52.245 is as follows:

52.245-1 Government Property
Three Variants
• 52.245-1
• 52.245-1 with ALTERNATE I
• 52.245-1 with ALTERNATE II
52.245-2 Government Property Installation Operation Services
52.245-9 Use and Charges
In prior publication of FAR Part 52.245, there were 19 subparts; now, there are only 3. While all of the subparts were deleted, most were incorporated into the basic 52.245-1 clause. Let’s take a look at what is there, and I’ll discuss the things that are missing along the way.

52.245-1 Government Property.
(a) Definitions.

The definitions in this clause are consistent with the definitions in the new Part 45.

(b) Property Management
(1) The Contractor shall have a system to manage (control, use, preserve, protect, repair and maintain) Government property in its possession. The system shall be adequate to satisfy the requirements of this clause. In doing so, the Contractor shall initiate and maintain the processes, systems, procedures, records, and methodologies necessary for effective control of Government property… consistent with voluntary consensus standards and/or industry-leading practices and standards for Government property management…

This is a significant change from the previous language. The prior language was very prescriptive in accordance with the requirements of Part 45. Voluntary Consensus Standards for property management are new, and only a few exist, although more are being adopted every year. Industry leading practices could possibly be considered proprietary information by the company that created them and they may not want to share them with competitors.

(b) Property management
(3) The Contractor shall include the requirements of this clause in all subcontracts under which Government property is acquired or furnished for subcontract performance.

This is a major change. Contractors are now required to flowdown this property clause to its subcontractors, which could include the limited risk of loss provision. If you don’t want your subcontractors to have the limited risk of loss provision, you will need to flowdown the Alternate I to 52.245-1. Contracts personnel need to be aware of this significant change.

(c) Use of Government property. The Contractor shall use Government property, either furnished or acquired under this contract, only for performing this contract, unless otherwise provided for in this contract or approved by the Contracting Officer. The Contractor shall not modify, cannibalize, or make alterations to Government property unless this contract specifically identifies the modifica-
tions, alterations or improvements as work to be performed.

There is no real change with the wording of this, but subtle improvements. It limits the use of Government Property only on the performing contract, and any other contract that has authorization to use the property. The second sentence clarifies the age old issue of cannibalization.

(d) Government-furnished property.
(1) The Government shall deliver to the Contractor the Government-furnished property described in this contract. The Government shall furnish related data and information needed for the intended use of the property. The warranties of suitability of use and timely delivery of Government-furnished property do not apply to property acquired or fabricated by the Contractor as contractor-acquired property and subsequently transferred to another contract with this Contractor.

(2) The delivery and/or performance dates specified in this contract are based upon the expectation that the Government-furnished property will be suitable for contract performance and will be delivered to the Contractor by the dates stated in the contract.
(i) If the property is not delivered to the Contractor by the dates stated in the contract, the Contracting Officer shall, upon the Contractor's timely written request, consider an equitable adjustment to the contract.

Contractors need to be very careful and aware of Contractor-Acquired property being delivered and furnished back to the contractor, with relation to warranty issues. Although the clause does NOT invoke the “as-is” wording, it does not warranty the item(s) the same way as property furnished (by the Government). It appears that since the “as-is” wording was excluded from this clause, costs associated with late delivery or “fit for use” would be valid indirect costs.

(ii) In the event property is received by the Contractor, or for Government-furnished property after receipt and installation, in a condition not suitable for its intended use, the Contracting Officer shall, upon the Contractor's timely written request, advise the Contractor on a course of action to remedy the problem. Such action may include repairing, replacing, modifying, returning, or otherwise disposing of the property at the Government's expense. Upon completion of the required action(s), the Contracting Officer shall consider an equitable adjustment to the contract (see also paragraph (f)(1)(ii)(A) of this clause).

The new wording “or for Government-furnished property after receipt and installation” is a huge win for industry. This means the contractor can now install and test Government-furnished property to ascertain its suitability for use. Remember, the contractor must submit, a “timely written request” to the Contracting Officer justifying the equitable adjustment for property either not received in a timely manner, or not suitable for use.

(3) (i) The Contracting Officer may by written notice, at any time—
(A) Increase or decrease the amount of Government-furnished property under this contract;
(B) Substitute other Government-furnished property for the property previously furnished, to be furnished, or to be acquired by the Contractor for the Government under this contract; or
(C) Withdraw authority to use property.
(ii) Upon completion of any action(s) under paragraph (d)(3)(i) of this clause, and the Contractor's timely written request, the Contracting Officer shall consider an equitable adjustment to the contract.

There is no change with this language from the previous language.

(e) Title to Government property.

I have not listed the entire section of (e) Title to Government Property. The language in this new version has consolidated the fixed price title language (52.245-2) and cost type title language (52.245-5) into one clause. One minor difference is the replacement of the term “facilities” with the term “equipment.”

(f) Contractor plans and systems.
(1) Contractors shall establish and implement property management plans, systems, and procedures at the contract, program, site or entity level to enable the following outcomes:

This is a significant change from the previous version. The structure of the old clause was very prescriptive and desired “outcomes” were already defined and defendable. The “rules were the rules” and compliance could be easily demonstrated. Outcomes will now be judgmental with the utilization of voluntary consensus standards and industry leading practices. This does provide for a more open environment, BUT, there are more opportunities for conflict due to less “certainty of terms.”

(i) Acquisition of Property. The Contractor shall document that all property was acquired consistent with its engineering, production planning, and material control operations.

There is a slight change to the wording, but the intent is the same.
(f) Contractor plans and systems (continued)
(ii) Receipt of Government Property. The Contractor
shall receive Government property (document the
receipt), record the information necessary to meet
the record requirements of paragraph (f)(1)(iii)(A)(1)
through (5) of this clause, identify as Government
owned in a manner appropriate to the type of
property (e.g., stamp, tag, mark, or other
identification), and manage any discrepancies
incident to shipment.

(A) Government-furnished property. The Contractor
shall furnish a written statement to the Property
Administrator containing all relevant facts, such as
cause or condition and a recommended course(s) of
action, if overages, shortages, or damages and/or
other discrepancies are discovered upon receipt of
Government-furnished property.

There was a significant change to this wording.
Previously, the Government Property Administrator
was responsible for resolving any discrepancies with
Government-furnished property. Now, the contractor
has to do this for ALL Government property, furnished
and acquired. This, again, adds resource requirements
and administrative cost.

(f) Contractor plans and systems (continued)
(ii) Receipt of Government property (Cont’d)
(B) Contractor-acquired property.
(iii) Records of Government property.

No change to these parts, except it MUST be
described in the contractor’s plan.

(f) Contractor plans and systems (continued)
(iii) Records of Government property. The Contractor
shall create and maintain records of all Government
property accountable to the contract, including
Government-furnished and Contractor-acquired
property.

(A) Property records shall enable a complete, current,
auditable record of all transactions and shall, unless
otherwise approved by the Property Administrator,
contain the following:
(1) The name, part number and description,
manufacturer, model number, and National Stock
Number (if needed for additional item identification
tracking and/or disposition).
(2) Quantity received (or fabricated), issued, and
balance-on-hand.
(3) Unit acquisition cost.
(4) Unique-item identifier or equivalent (if available
and necessary for individual item tracking).
(5) Unit of measure.
(6) Accountable contract number or equivalent
code designation.

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(7) Location.
(8) Disposition.
(9) Posting reference and date of transaction.
(10) Date placed in service.

Unique-item identifier and date placed in service are new requirements, and property systems will need to be upgraded in order to accommodate these new requirements. New contracts issued will require contractors who receive Government-furnished property with an acquisition cost of $5000 or more, to establish IUID and report to the registry. The Government has recognized the substantial administrative cost associated with research of legacy assets, and has established a policy that excludes legacy assets.

(f) Contractor plans and systems (continued)
(iv) Physical inventory. The Contractor shall periodically perform, record, and disclose physical inventory results. A final physical inventory shall be performed upon contract completion or termination. The Property Administrator may waive this final inventory requirement, depending on the circumstances (e.g., overall reliability of the Contractor’s system or the property is to be transferred to a follow-on contract).

The previous language permitted a closeout inventory “adequate for disposal purposes” and this language does not clarify the use of “electronic techniques” currently utilized (i.e., barcode scanners, RFID, etc.). Make sure your property plan describes your processes.

(f) Contractor plans and systems (continued)
(v) Subcontractor control. (A) The Contractor shall award subcontracts that clearly identify assets to be provided and shall ensure appropriate flow down of contract terms and conditions (e.g., extent of liability for loss, damage, destruction or theft of Government property).

New language which states you must identify the assets provided to subcontractors in the contract itself. Again, if your company does not normally flowdown the limited risk provisions to your subcontractors, your contracts personnel will need to be aware to include the Alternate I clause to the new 52.245-1. I’m sure the Government is referring to “Government Assets”, but they do not say it in the clause.

(f) Contractor plans and systems (continued)
(B) The Contractor shall assure its subcontracts are properly administered and reviews are periodically performed to determine the adequacy of the subcontractor’s property management system.

The old language only required the contractor “ensure” compliance and did not require periodic reviews. Again, this will require additional resource and cost that your contracts personnel should be aware of and bid the proposal accordingly.

(f) Contractor plans and systems (continued)
(vi) Reports. The Contractor shall have a process to create and provide reports of discrepancies; loss, damage, destruction, or theft; physical inventory results; audits and self-assessments; corrective actions; and other property related reports as directed by the Contracting Officer.

There were only minor changes to this part, but this has always been “an open ticket” to the contractor’s profitability. Contractors must define what the reporting requirements will be. These reporting requirements should be identified as a line item deliverable in the contract. As part of the Frequently Asked Questions (FAQ’s) on the Defense Procurement and Acquisition Policy website, located at www.acq.osd.mil/dpap/dars/far.html, question # 48 addresses this very issue. It states: “Are contractor generated (Government Property) reports still required? Contractor generated reports are one of several required performance outcomes identified in the new Government Property Clause. However, in order to mitigate the cost of reporting and reduce concerns over format and content, the report requirement should be specifically identified by the Government during the solicitation and proposal phase, preferably as a deliverable in the Contract Data Requirements List. For example: “the contractor shall deliver a report on the 15th of every month; it shall be e-mailed to xxxx; in XML format; with the following data elements, etc.”

(f) Contractor plans and systems (continued)
(vi) Reports (continued)
(A) Loss, damage, destruction, or theft. Unless otherwise directed by the Property Administrator, the Contractor shall investigate and promptly furnish a written narrative of all incidents of loss, damage, destruction, or theft to the property administrator as soon as the facts become known or when requested by the Government.

There was no change in the language other than the addition of the word “theft.”

(f) Contractor plans and systems (continued)
(B) Such reports shall, at a minimum, contain the following information:
(1) Date of incident (if known).
(2) The name, commercial description, manufacturer, model number, and National Stock Number (if applicable).
(3) Quantity.
(4) Unique Item Identifier (if available).
(5) Accountable Contract number.
(6) A statement indicating current or future need.
(7) Acquisition cost, or if applicable, estimated scrap proceeds, estimated repair or replacement costs.
(8) All known interests in commingled property of which the Government property is a part.
(9) Cause and corrective action taken or to be taken to prevent recurrence.
(10) A statement that the Government will receive any reimbursement covering the loss, damage, destruction, or theft, in the event the Contractor was or will be reimbursed or compensated.
(11) Copies of all supporting documentation.
(12) Last known location.
(13) A statement that the property did or did not contain sensitive or hazardous material, and if so, that the appropriate agencies were notified.

This requirement was not in the previous language, it was located in the DoD Property Manual, 4161.2-M, which was not a contractual document for contractors. It is now contractually required to include all the data elements above in the report.

(f) Contractor plans and systems (continued)
(vii) Relief of Stewardship Responsibility.

There were no major changes with this section.

(f) Contractor plans and systems (continued)
(viii) Utilizing Government property.

(A) The Contractor shall utilize, consume, move, and store Government Property only as authorized under this contract. The Contractor shall promptly disclose and report Government property in its possession that is excess to contract performance.

The word “move” was added from the previous language. This could create additional cost. If a contractor wishes to ship a piece of
property to a subcontractor, then by this section, is it required to have that action incorporated into the contract?

(f) Contractor plans and systems 
(continued)
(B) Unless otherwise authorized in this contract or by the Property Administrator the Contractor shall not commingle Government property with property not owned by the Government.

The Government admits this was an error and will be correcting in the new FAR case. The old language stated the contractor shall not commingle “material.” This should be addressed in your property plans utilizing the terminology “co-located” instead of “commingle.”

(f) Contractor plans and systems 
(continued)
(ix) Maintenance. The Contractor shall properly maintain Government property. The Contractor’s maintenance program shall enable the identification, disclosure, and performance of normal and routine preventative maintenance and repair. The Contractor shall disclose and report to the Property Administrator the need for replacement and/or capital rehabilitation.

This wording came from the old Facilities contract requirements, but you need to be very careful. Capital rehabilitation has been interpreted to include the contractor’s facilities since they “protect” Government Property.

(f) Contractor plans and systems 
(continued)
(x) Property closeout. The Contractor shall promptly perform and report to the Property Administrator contract property closeout, to include reporting, investigating and securing closure of all loss, damage, destruction, or theft cases; physically inventorizing all property upon termination or completion of this contract; and disposing of items at the time they are determined to be excess to contractual needs.

This is another new reporting requirement. The old language allowed for an “inventory adequate for disposal purposes.”

(f) Contractor Plans and Systems 
(continued)
(2) The Contractor shall establish and maintain Government accounting source data, as may be required by this contract, particularly in the areas of recognition of acquisitions and dispositions of material and equipment.

This is a long standing policy and no change from previous language.

(f) Contractor plans and systems 
(continued)
(3) The Contractor shall establish and maintain procedures necessary to assess its property management system effectiveness, and shall perform periodic internal reviews and audits. Significant findings and/or results of such reviews and audits pertaining to Government property shall be made available to the Property Administrator.

This is a significant change and new requirement. This required contractors to have a self assessment program in place, and to make available copies of those assessments to the Government. The Government did accept Industry’s recommendation to add the word “significant findings.” In the draft version, the language just stated “findings” which meant contractors would provide copies of ALL of their assessments. This was a huge win for industry.

(g) Systems analysis.
(1) The Government shall have access to the contractor’s premises and all Government property, at reasonable times, for the purposes of reviewing, inspecting and evaluating the Contractor’s property management plan, systems, procedures, records, and supporting documentation that pertains to Government property.

(2) Records of Government property shall be readily available to authorized Government personnel and shall be safeguarded from tampering or destruction.

(3) Should it be determined by the Government that the Contractor’s property management practices are inadequate or not acceptable for the effective management and/or control of Government property under this contract, and/or present an undue risk to the Government, the Contractor shall immediately take all necessary corrective actions as directed by the Property Administrator.

In instances where the contractor does not accept the recommendations of the Government Property Administrator, differences will be resolved with a consultation with the Contracting Officer.

(g) Systems analysis.
(4) The Contractor shall ensure Government access to subcontractor premises, and all Government property located at subcontractor premises, for the purposes of reviewing, inspecting and evaluating the subcontractor’s property management plan, systems, procedures, records, and supporting documentation that pertains to Government property.
This violates the contractor's privity of contract legal status. This has been acknowledged as an error, by the Government, and will be corrected in the new FAR case.

(h) Contractor Liability for Government Property.

(1) Unless otherwise provided for in the contract, the Contractor shall not be liable for loss, damage, destruction, or theft to the Government property furnished or acquired under this contract...

This was the Alternate I clause in the old provision, now this is in the basic clause. Notice the switch in location!

Under the OLD FAR:
• The FULL Risk of Loss was in the Primary clause
• The LIMITED Risk of Loss was in the ALTERNATE

Under the FINAL RULE
• The LIMITED Risk of Loss is in the PRIMARY Clause and
• The FULL Risk of Loss was in the ALTERNATE

This will be a little tricky for a while, so just be careful.

(i) Equitable Adjustment.

No change to this section.

(k) Abandonment of Government property.

(1) The Government shall not abandon sensitive Government property or termination inventory without the Contractor's written consent.

Contractors need to be very careful when dealing with abandonment issues. This language could allow the government, with the contractor's consent, to abandon property that may require demilitarization which would add substantial cost to the contractor.

Alternate I (June 2007). As prescribed in 45.107(a)(2), substitute the following for paragraph (h)(1) of the basic clause:

(h)(1) The Contractor assumes the risk of, and shall be responsible for, any loss, damage, destruction, or theft of Government property upon its delivery to the Contractor as Government-furnished property. However, the Contractor is not responsible for reasonable wear and tear to Government property or for Government property properly consumed in performing this contract.

This is long standing policy and language that was previously found in the fixed price clause of 52.245-2. Contractors and Government Property Administrators should already be familiar and at ease with this verbiage. Just take note of the new location. According to the government, the full risk of loss was rarely utilized, so it was determined the limited risk of loss should be placed in the basic clause and the full risk in the alternate clause.

Alternate II (June 2007). As prescribed in 45.107(a)(3), substitute the following for paragraph (e)(3) of the basic clause:

(e)(3) Title to property (and other tangible personal property) purchased with funds available for research and having an acquisition cost of less than $5,000 shall vest in the Contractor upon acquisition or as soon thereafter as feasible; provided that the Contractor obtained the Contracting Officer's approval before each acquisition. Title to property purchased with funds available for research and having an acquisition cost of $5,000 or more shall vest as set forth in this contract. If title to property vests in the Contractor under this paragraph, the Contractor agrees that no costs shall be allowed for any depreciation, amortization, or use under any existing or future Government contract or subcontract thereunder. The Contractor shall furnish the Contracting Officer a list of all property to which title is vested in the Contractor under this paragraph within 10 days following the end of the calendar quarter during which it was received. Vesting title under this paragraph is subject to civil rights legislation, 42 U.S.C. 2000d. Before title is vested and by signing this contract, the Contractor accepts and agrees that—

“No person in the United States or its outlying areas shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under this contemplated financial assistance (title to property).”

This Alternate II discusses the Non-Profit Title Vesting issues. This language was previously part of 52.245-2 and 52.245-5, as an alternate. No major changes.

Now that I have completed a full review of 52.245-1, I would like to briefly explain any differences in the new clause 52.245-2, Government Property Installation Operation Services, and what contractors should be aware of.

52.245-2 Government Property Installation Operation Services.

As prescribed in 45.107(b), insert the following clause:

GOVERNMENT PROPERTY INSTALLATION OPERATION SERVICES (JUNE 2007)

(a) This Government Property listed in paragraph (e) of this clause is furnished to the Contractor in an “as-is, where is” condition. The Government makes no warranty regarding the suitability for use of the Government property specified in this contract. The Contractor shall be afforded the opportunity to inspect the Government property as specified in the solicitation.

This is a significant new requirement that could add a significant amount of risk for service contractors which usually work under a cost type contract. Contractors need
to remember that “costs” are at contractor’s expense, i.e., out of profit.

(b) The Government bears no responsibility for repair or replacement of any lost, damaged or destroyed Government property. If any or all of the Government property is lost, damaged or destroyed or becomes no longer usable, the Contractor shall be responsible for replacement of the property at Contractor expense. The Contractor shall have title to all replacement property and shall continue to be responsible for contract performance.

The old language stating “except for normal wear and tear” has been eliminated. Again, the costs to repair or replace are at the contractor’s expense.

(c) Unless the Contracting Officer determines otherwise, the Government abandons all rights and title to unserviceable and scrap property resulting from contract performance. Upon notification to the Contracting Officer, the Contractor shall remove such property from the Government premises and dispose of it at Contractor expense.

What the Government is saying here is “I will provide property one time”, then abandoning it to the contractor. While the contractor is not required to use the government disposal system, which is slow and costly, this could be more costly. Additional costs, at the end of contract, to dispose of unserviceable and scrap property, at contractors expense (i.e., out of profit).

(d) Except as provided in this clause, Government property furnished under this contract shall be governed by the Government Property clause of this contract.

(e) Government property provided under this clause:

(End of clause)

Subparagraph (e) above is a new addition and will list individual line items of Government Property provided.

In conclusion, there are many significant impacts with this new regulation. Some of these are:

- Property system changes which will add resource requirements, additional risk, and costs, such as:
  - Data elements and system interface to IUID registry
  - Self audit program required
  - Limited risk of loss issues
  - Audits of subcontractors
  - Many existing Government tasks placed on contractors
  - Open-ended reporting requirements

- Significant contract administration actions will add resource requirements and cost
  - More focus on up-front planning during Bid & Proposal phase
  - No more ST/STE after contract is signed
  - All provided property will be Government-furnished
  - Transfers between contracts require a contract modification to BOTH Contracts
  - Property provided after contract award will require a contract modification & compensation to the Government
  - Watch out for “As Is” language
  - Increased risk from system interpretation, “As Is” language & open reporting requirements
  - Process is no longer prescriptive but interpretive by the Government

Additionally, the Government announced recently (Feb. 2008) that “serially managed” material that is Government-furnished will need to be IUID’d and input into the IUID registry. This will be a tremendous cost impact if this isn’t rescinded. Industry is currently working this issue through the Aerospace Industries Association’s Property Management Committee. Stay tuned for further updates.

Also, the DFAR rewrite has been delayed numerous times. Industry still doesn’t have any idea of how this document is going to appear.

As well as the recently rescinded DoD Property Manual, 4161.2-M. This has been the driving guidance and force behind GPA’s audits of contractors. This guidance is going to be placed into a “PGI” (Procedures, Guidance and Information) document, but no timeframe has been published as of March, 2008.

Property professionals need to stay informed due to the rapid changes occurring with the regulatory requirements that affect our day-to-day operations. Failure to stay current could put your company at risk and add significant cost to your operation.