Liability!!!

- I've done LOTS of presentations on the issue of Liability – and there are a WHOLE bunch of Liability clauses – BEYOND the Government Property Clause – FAR 52.245-1

Overview of Today’s Session

- THE GROUND AND FLIGHT RISK CLAUSE
  - Policy on Use of Ground and Flight Risk (GFR) Clause
  - Old Clauses
  - Current Clause
  - Some Discussion

Accidents do happen!
Policy on Using the GFR Clause

• Note:
  – Prior to June of 2010 the DoD had TWO (2) different clauses…
    • 252.228-7001 Ground and Flight Risk.
    • 252.228-7002 Aircraft Flight Risk.
  – In 2010 they “smushed” the two together to create one clause applicable to multiple environments.

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OLD Policy on Using the GFR Clauses

• 252.228-7001 Ground and Flight Risk.
  – POLICY at DFARS 228.370
    • (b)(1) Use the clause at 252.228-7001, Ground and Flight Risk, in NEGOTIATED FIXED-PRICE contracts for aircraft production, modification, maintenance, repair, or overhaul, unless—
      – (i) The aircraft is being acquired for a foreign military sale and the foreign government has not agreed to assume the risk; or
      – (ii) The cost of insurance for damage, loss, or destruction of aircraft does not exceed $500, and the contracting officer agrees to recognize the insurance costs.
OLD Policy on Using the GFR Clauses

• 252.228-7002 Aircraft Flight Risk.
  – POLICY at DFARS 228.370
    • (c)(1) Use the clause at 252.228-7002, Aircraft Flight Risk, in COST REIMBURSEMENT contracts—
      • (i) For the development, production, modification, maintenance, repair, or overhaul of aircraft; or
      • (ii) Otherwise involving the furnishing of aircraft to the contractor by the Government.
      • (iii) With the definition of “aircraft” modified, if appropriate, to include helicopters, vertical take-off aircraft, lighter-than-air airships or other nonconventional aircraft.
    • (2) Use the clause at 252.228-7002, Aircraft Flight Risk, appropriately modified, in fixed price contracts when—
      • (i) The clause at 252.228-7001, Ground and Flight Risk, is not used; and
      • (ii) Contract performance involves the flight of Government furnished aircraft.

IMPORTANT ISSUE

• The Pricing Arrangements were segregated, i.e.,
  – FIXED PRICE
  – COST REIMBURSEMENT
• Remember this issue… it comes into play at the discussion stage!!!
CURRENT POLICY on Using the 2010 GFR Clause

- DFARS 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 dedicated to non-recurring or development activities (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 acquisition, 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) standards (e.g., the work will be performed at a licensed FAA repair station).

Policy on Using the GFR Clause

- SOME FURTHER POLICY ALLOWANCES ON THE PART OF THE GOVERNMENT:
  - (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.
IMPORTANT TAKE AWAY!!!
You **CANNOT** apply the clause
**WITHOUT KNOWING** these DEFINITIONS!!! And More to come.

AND THE DOD PGI GUIDANCE

- **PGI 228.370**
  - (b)(3) DFARS 252.228-7001, Ground and Flight Risk Clause, requires the assignment of a Government Flight Representative (GFR) to administer the requirements of the combined instruction Contractor’s Flight and Ground Operations, (DCMA INST 8210.1, AFI 10-220, AR 95-20, NAVAIRINST 3710.1 (Series), and COMDTINST M13020.3).
  - Dated February 11, 2016
  - At the time the solicitation is issued, contracting officers shall contact DCMA Aircraft Operations (AO) and the appropriate Military Service to obtain technical advice and allow adequate lead time for assigning a GFR. Make requests for assignment of a GFR to—
  - And it gives addresses!

SO, LET’S LOOK AT THE CLAUSE!
**DFARS 252.228-7001**
(JUNE 2010 CURRENT VERSION)
THE GFR CLAUSE
DFARS 252.228-7001

(a) Definitions
(b) Combined regulation/instruction.
(c) Government as self-insurer.
(d) Conditions for Government's self-insurance.
(e) Exclusions from the Government's assumption of risk.
(f) Contractor's share of loss and Contractor's deductible under the Government's self-insurance.
(g) Subcontractor possession or control.
(h) Contractor's exclusion of insurance costs.
(i) Procedures in the event of loss.
(j) Loss prior to delivery.
(k) Reimbursement from a third party.
(l) Government acceptance of liability.
(m) Subcontracts.
GFR CLAUSE DEFINITIONS

• (2) “Contractor’s managerial personnel” means the Contractor’s directors, officers, managers, superintendents, or 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 returned 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 been 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.
GFR CLAUSE DEFINITIONS

• (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.

GFR CLAUSE DEFINITIONS

• CRITICAL DEFINITION

• (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.

DEFINITIONS IN THE GFR CLAUSE

ONCE AGAIN!!!
You CANNOT apply the clause
WITHOUT KNOWING these
DEFINITIONS!!!
GFR CLAUSE
Manual Incorporated by Reference

• (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.
  - Dated February 11, 2016
    – Plus other sites have the document

Point 1 – an INCORPORATION by REFERENCE and
Point 2 – Make sure you are using the right one for your contract!
Point 3 – it is 123 pages long!!!

LIABILITY ISSUES

• OVERARCHING GOVERNMENT POLICY
  – VERY SIMILAR TO THE LIMITED RISK OF LOSS PROVISIONS FOR OTHER FORMS OF GP
  – (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.

WHAT???

LIABILITY ISSUES

• OVERARCHING GOVERNMENT POLICY
  – So, its important to note that there is VARIATION here from the “NORMAL” Government assumption of risk…
  – “…beyond the Contractor’s share of loss amount under the Government’s self-insurance.”
  – HUH?? Under the “NORMAL” GP Risk of Loss provisions there is no “Contractor’s share of loss!”
LIABILITY ISSUES

• Remember!!!
  – We read under Paragraph (a)(6) that:
    • 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.

    But, except...

LIABILITY ISSUES

• (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.

  (Map, looked at this on a earlier slide)

  The Contractor shall be bound by the operating procedure contained
  in the combined regulation/instruction entitled “Contractor’s Flight and Ground Operations”
  (A joint Service reg – you probably know it as DCMA Instruction 8210.1)
  in effect on the date of contract award

LIABILITY ISSUES

• UNDER THIS PARAGRAPH (d) THERE ARE
  TWO ACTIONS – One on the part of the
  Government CO and the other on the part of
  the Contractor

  – (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.

  Define Reasonable?
LIABILITY ISSUES

(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.

Ahhhh, but there is more!

(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.

CONTRACTOR ACTION

FAR 52.233-1

SO THE CONTRACTOR MUST ACT, TAKE ACTION!!!

OPINION DOESN'T MATTER!!!

DEFINE PROMPTLY?!?!

LIABILITY ISSUES

How the G terminates its assumption of risk

(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.

Hmmm…

How do we know when it is received?

LIABILITY ISSUES

G terminates its assumption of risk

(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.

In this situation, THE GFR CLAUSE OVERRIDES THE GP CLAUSE!!!
LIABILITY ISSUES

(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 notice of correction until the Contractor is notified that the Government will resume the risk of loss.

So, the Government must respond PROMPTLY, i.e., within 3 days after receipt.

(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.”
NOW HERE IS WHERE WE GET INTO SOME REALLY INTERESTING STUFF!!!

EXCLUSIONS FROM THE GOVERNMENT’S ASSUMPTION OF RISK

LIABILITY ISSUES

• (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 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;

Same construct as the GP clause

No joy riding pilots

For Transportation loss GFP is Covered - CAP is NOT COVERED – More on this later!!!

LIABILITY ISSUES

• (e) Exclusions from the Government’s assumption of risk. (Continued)—
  – (4) Is covered by insurance;
  – (5) Consists of
    – wear and tear;
    – deterioration (including rust and corrosion);
    – freezing;
    – mechanical, structural, or electrical breakdown or failure, unless these are the result of other loss, damage or destruction covered by this clause.

So, with the following statement – THIS part of the statement applies to CAP.

• ANOTHER BUT and EXCEPT … (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
LIABILITY ISSUES

• Exclusions from the Government’s assumption of risk
  (Continued)—
  – (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.

PROBLEM #1. Talk about CONDITIONAL STATEMENTS!!!
Would be… Would have been… But for….

PROBLEM #2. This is where everyone is having a problem with the issue of WORKMANSHIP!!!

SIX SITUATIONS FOR AIRCRAFT:

1) WM, 1 of GF
   Kit Mgr. Personnel
   The “NORMAL”
   Government Liability
   Contractor!

2) Sustained during flight – Flight or Flight Crew NOT
   Approved in writing

3) During Transportation
   Unless it is GFP!

4) Is covered by Insurance!

5) W&T, deterioration, freezing, or mechanical, structural or electrical breakdown – UNLESS these are the result of other LD&D Covered by the clause!
   If GFP – reasonable W&T is covered.

6) And the one causing a lot of GRIEF – WORKMANSHIP!!!
   LD&D sustained while aircraft is being worked on
   And is a direct result of the work
   UNLESS
   Blah, Blah, Blah
   Covered under previous slide.

Most of these are simple to understand – really black and white issues.

CONTRACTOR’S SHARE…

• (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 transportation, or on flight resulting from each separate event, except for reasonable wear and tear and to the extent the loss of damage is caused by negligence of Government personnel; or
    • (ii) Twenty percent of the price or estimated cost of this contract.

   THESE ARE THE CONTRACTOR’S POTENTIAL LOSS SHARE AMOUNTS

   MAXIMUM THRESHOLDS!!!
CONTRACTOR’S SHARE…

• (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.

  3 Different Valuations or Quantum!

• (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.

  • And one more…

• (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.

  These are really DCAA and Cost Accounting issues! Contractors – check your CAS Disclosure Statement!
SUBCONTRACTOR LIABILITY

• (g) Subcontractor possession or control. The [PRIME] 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.

What does this mean?

• 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.

SUBCONTRACTOR LIABILITY

• EVEN THE JOINT INSTRUCTIONS SPECIFY THIS REQUIREMENT

– 3.6. Subcontractors. The prime contractor is responsible for all contract requirements subcontracted or delegated to other sources. The prime contractor has the responsibility for ensuring that the subcontractor has procedures in place to implement the requirements of this Instruction. Per the June 2010 Ground and Flight Risk Clause (DFARS 252.228-7001), a prime contractor is not relieved from liability for damage, loss, or destruction of aircraft while contract 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. The means the Government’s indemnification of the contractor through the GFRC does not automatically flow down to subcontractors unless specifically stated in the contract. The requirements of this Instruction apply even when the Government’s assumption of risk through the GFRC does not flow down to a subcontractor.

INSURANCE COSTS

• (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’s share of loss in this clause, even if the assumption may be terminated for aircraft in the open.

CAREFUL – TINA may kick in!!!
PROCEDURES

• (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.

Note: This clause goes to the CO, not the GPA or the GFR.

Similar to
The GP clause
Reporting
Requirements

Common to
The GP clause
Reporting
Requirements

PROCEDURES

• DCMA Instruction 124 dated March 2014/January 2016 says differently:
  3.15. ENSURE CONTRACTOR REPORTING OF PROPERTY LOSS.
  Consistent with DFARS 252.245-7002, “Reporting Loss of Government
  Property” (Reference (ac)), PAs shall ensure contractors provide (within
  the Property Loss etool’s “contractor narrative” section) the information
  required by FAR 52.245-1(f) (1)(vii)(B)(1) through (12) (Reference (ad)).
  Property loss reporting includes losses of any kind (including
damage), including those that occur under contracts containing
DFARS 252.228-7001, “Ground-and-Fight Risk” (Reference (ae)).

  – NOTE (1): The liability requirements of DFARS 252.228-7001 pertain to and prevail in cases of loss, damage
    or destruction of aircraft that occur “in the open,” “during operation,” and “in flight” (Reference (ae)).
  – NOTE (2): The Government Flight Representative and alternates are also responsible for making liability
    recommendations to the ACO for all incidents involving loss of Government aircraft when DFARS 252.228-
    7001 is in the contract. (See Reference (ae)).
  – NOTE (3): Property loss reporting is separate from requirements found under DCMA-INST 8210.2, “Aircraft
    Operations” (Reference (acaf)) and DoD Instruction 6055.07, “Mishap Notification, Investigation, Reporting,
    and Record Keeping” (Reference (adag)).

Oops – Loss Prior to Delivery

• (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—
      • (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.
Oops – Loss Prior to Delivery

• (j) Loss prior to delivery. (Cont’d)
  – (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.

Third Party Issue

• (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.

Another Third Party Issue

• (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”.

Gimme the Money! Uphold My Rights!

A Question – additional costs versus what??? I didn’t plan on getting rid of a plane – so of course there will be costs. Therefore, Equitable Adjustment is sorta’ mandatory!
SUBCONTRACTS

• (m) Subcontracts.
  – The Contractor shall incorporate the requirements of this clause, including this paragraph (m), in all subcontracts.
  – My lowly opinion – there is a conflict BECAUSE…
    • Paragraph (g) says, “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.”
    • Incorporating the “requirements of this clause” is FAR MORE than just requiring the aircraft to be returned in “as Good a Condition as when received”?
    • But that one is for the Legal folks to debate!!!
WHY the GFR CLAUSE???

POINT OF ARGUMENT # 1
– For all other forms of “pure” Government property, accountable under a contract, the Government – under the limited risk of loss provision (FAR 52.245-1(h)) – assumes the risk of loss for ALL Government property – with few exceptions:
  • WM, L of GF, Contractor’s Managerial Personnel
  • Risk Insured
  • Disapproved Property Management System
– Covers ALL classes of Government Property – in all situations!!! Army contracts, Navy Contracts, AF Contracts, etc!

SO, WHAT IS SO SPECIAL ABOUT AIRCRAFT VERSUS OTHER WEAPON PLATFORMS ACQUIRED BY THE GOVERNMENT???
WHY the GFR CLAUSE???

• POINT OF ARGUMENT # 2
  – The GFR Clause ONLY ADDRESSES AIRCRAFT!!! And it has an amplified definition.
  – Certainly Aircraft are high dollar value items.
  – But so are numerous OTHER Weapons Platforms.
  • Why do these not have a SIMILAR LIABILITY CONSTRUCT?!?!?
  • Why are AIRCRAFT singled out???

WHY the GFR CLAUSE???

• POINT OF ARGUMENT # 3
  – WORKMANSHIP??? (d)(6)
  – Why is this issue of "workmanship" addressed ONLY in the GFR Clause – and in no other Property Related Clause(s)?
  • Certainly there are workmanship issues while working on Tanks, or APVs, or Missiles – or potentially EVERY OTHER PRODUCT delivered to the Government?
  • An Interesting NOTE: WORKMANSHIP IS addressed in FAR 52.246-2, the Inspection of Supplies – Fixed Price Clause. Is it possible that the thought process was carried over from a DIFFERENT CONTRACTUAL CONSTRUCT by the Quality Assurance World to the GFR World?

HMMMM????

• Quite clearly under a FIXED PRICE CONTRACT with deliverables the Government DOES NOT PAY for workmanship errors. The Government expects, nay DEMANDS, that the Deliverable meet the specs in the contract… and can reject the deliverable if it does NOT meet this standard!
• 52.246-2Inspection of Supplies FIXED PRICE
  – (f) Supplies are nonconforming when they are defective in material or workmanship or are otherwise not in conformity with contract requirements.
  • I am putting this in smaller print because I do not want to admit to it and I fear it will be noted – it has the same provision in the COST REIMBURSEMENT Inspection of Supplies Clause, 52.246-3
WHY the GFR CLAUSE???

• POINT OF ARGUMENT # 3 Cont’d
  – WORKMANSHIP??  (d)(6)
  – When the Government (DOD) Smushed the two flight risk clauses together – they merged a FIXED PRICE clause with a COST REIMBURSEMENT clause
  • POLICY DFARS 228.370 PRE-2010
  • THE OLD CLAUSES:
    – DFARS 252.228-7001  FIXED PRICE CONTRACTS
    – DFARS 252.228-7002 COST REIMBURSEMENT CONTRACT (With an allowance for use with FP contracts with GF Aircraft)

WHY the GFR CLAUSE???

• POINT OF ARGUMENT # 3 Cont’d
  – OLD CLAUSES
  – DFARS 252.228-7001 FIXED PRICE CONTRACTS
    • HAS a paragraph (6) requirement regarding WORKMANSHIP!
    • Why? FIXED PRICE CONTRACT to DELIVER an END ITEM.
    • Workmanship issue raised under 52.246-2?!!!
  – DFARS 252.228-7002 COST REIMBURSEMENT CONTRACT
    • The KICKER – NO DISCUSSION OF WORKMANSHIP!!!
    • WHY???

WHY the GFR CLAUSE???

• POINT OF ARGUMENT # 3 Cont’d
  – If LOGIC were to PREVAIL, and the Government applied its Risk of Loss Concept CONSISTENTLY – Either workmanship should apply to ALL FORMS OF RISK OF LOSS or Workmanship should apply to none!!!
  • But the Government’s application of Liability is INCONSISTENT!!!
  – But – it appears that, in my opinion, in the “smushing” process it, the Government, failed to PROPERLY recognize the DIFFERENCES BETWEEN THE OLD CLAUSES!!!
### Technical Issue...

- There is no policy that says...
  - If you use the GFR clause that you ALSO NEED to use the
  - FAR GP Clause at 52.245-1

- Even though the two clauses INTERACT!!!
  - Need to fix the FAR to correct this oversight!

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### DECISION TABLES

**Government Furnished Aircraft**

**NOTE:** Government Furnished Material (GFM) is being installed – Overhaul & Maintenance (on flight line, “in the open”) – Always an Aircraft and always considered to be “IN THE OPEN.”

**SITUATION:**
- Government Furnished Material (GFM) is being installed – Overhaul & Maintenance (on flight line, “in the open”) – GP clause applies
- GFM to be installed – Overhaul & Maintenance (in storeroom) - Government Property (GP) clause applies
  - GP material is already allocated to an aircraft tail number then GFR clause applies. (Remember GF Aircraft are ALWAYS Aircraft and “in the open.”)
- GFR clause applies during overhaul & maintenance (or during movement to install) – GP clause applies. Why? Issued to a GF Aircraft
- Parts temporarily removed to be reinstalled - GFR clause applies
- Parts removed from aircraft for disposal - no longer a part of the aircraft - GP clause applies

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### DECISION TABLES

**Manufacture of NEW Aircraft**

(Where an engine, portion of a wing, or a wing is attached to a fuselage) - Generally, the GFRC does not apply until the aircraft is “in the open.”

- GFM is being installed - (on the production line NOT in the open) – GP clause applies
- GFM is being installed - (on the aircraft “in the open”) - GFR clause applies
- GFM (in storeroom) –
  - GP clause applies
  - GP is allocated to an aircraft ID number for aircraft that are “in the open.”
  - If the GFM is not associated with an aircraft “in the open,” then GFR clause applies.
- GFM to be installed - (during movement to install) if aircraft is “in the open” - GFR clause applies
- GFM to be installed - (in transit to install) on aircraft NOT “in the open” – GP clause applies
- Parts temporarily removed to be reinstalled - if aircraft is “in the open” - GFR clause applies
- Parts temporarily removed to be reinstalled - if aircraft is in a building (not “in the open”) - GP clause applies.
DECISION TABLES

Manufacture of New Aircraft
(Which DOES NOT include engine, portion of a wing, or a wing is attached to a fuselage)

- In all cases, GP clause applies
  - GFM is being installed - (on production line) - GP clause applies
  - GFM to be installed - (in storeroom) - GP clause applies
  - GFM to be installed - (in transit to install) - GP clause applies
  - Parts temporarily removed to be reinstalled - GP clause applies

BOTTOM LINE

- GFR clause is a COMPLEX clause that need to be broken down into its simplest components, applying terms DEFINED in the clause and making decisions BASED UPON the situation that has occurred!
- No Easy Task!

THANK YOU!
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