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ACQUISITION AND  
TECHNOLOGY

DP (DAR)

In reply refer to  
DFARS Case: 97-D326  
D. L. 98-002

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

SUBJECT: Warranties in Weapon System Acquisitions

We have amended Subpart 246.7 of the Defense Federal Acquisition Regulation Supplement (DFARS) to implement Section 847 of the National Defense Authorization Act for Fiscal Year 1998 (Pub. L. 105-85). Section 847 repeals the requirement for contractor guarantees on major weapon systems.

This final DFARS rule is effective immediately and will be published in a future Defense Acquisition Circular.

Eleanor R. Spector  
Director, Defense Procurement

Attachment

cc: DSMC, Ft. Belvoir



**DFARS Case 97-D326, Warranties in Weapon System Acquisitions  
Final Rule**

**SUBPART 246.7—WARRANTIES**

**246.701 Definitions.**

"Acceptance," as defined in FAR 46.701 and as used in this subpart and in the warranty clauses at FAR 52.246-17, Warranty of Supplies of a Noncomplex Nature; FAR 52.246-18, Warranty of Supplies of a Complex Nature; FAR 52.246-19, Warranty of Systems and Equipment Under Performance Specifications or Design Criteria; and FAR 52.246-20, Warranty of Services, includes the execution of an official document (e.g., DD Form 250, Material Inspection and Receiving Report) by an authorized representative of the Government.

"Defect," as used in this subpart, means any condition or characteristic in any supply or service furnished by the contractor under the contract that is not in compliance with the requirements of the contract.

**246.702 General.**

- (c) Departments and agencies shall establish procedures to track and accumulate data on warranty costs.

**246.703 Criteria for use of warranties.**

~~The use of warranties in the acquisition of weapon systems is mandatory (10 U.S.C. 2403) unless a waiver is authorized (see 246.770-8).~~

- (b) *Cost.*  
Contracting officers may include the cost of a warranty as part of an item's price or as a separate contract line item.

**246.704 Authority for use of warranties.**

The chief of the contracting office must approve use of a warranty, except in acquisitions for—

- ~~(1) Weapon systems (see 246.770);~~
- ~~(2) [(1)] Commercial items (see FAR 46.709);~~
- ~~(3) [(2)] Technical data, unless the warranty provides for extended liability (see 246.708);~~
- ~~(4) [(3)] Supplies and services in fixed-price type contracts containing quality assurance provisions that reference higher-level contract quality requirements (see 246.202-4); or~~
- ~~(5) [(4)] Supplies and services in construction contracts when using the warranties that are contained in Federal, military, or construction guide specifications.~~

\* \* \* \*

~~**246.770 Warranties in weapon system acquisitions.**~~

~~This section sets forth policies and procedures for use of warranties in contracts for weapon system production.~~

**246.770-1 Definitions.**

As used in this section—

- (a) ~~"At no additional cost to the Government" means—~~
  - (1) ~~At no increase in price for firm fixed price contracts;~~
  - (2) ~~At no increase in target or ceiling price for fixed price incentive contracts (see also FAR 46.707); or~~
  - (3) ~~At no increase in estimated cost or fee for cost reimbursement contracts.~~
- (b) ~~"Design and manufacturing requirements" means structural and engineering plans and manufacturing particulars, including precise measurements, tolerances, materials and finished product tests for the weapon system being produced.~~
- (c) ~~"Essential performance requirements" means the operating capabilities and maintenance and reliability characteristics of a weapon system that the agency head determines to be necessary to fulfill the military requirement.~~
- (d) ~~"Initial production quantity" means the number of units of a weapon system contracted for in the first program year of full scale production.~~
- (e) ~~"Mature full scale production" means follow on production of a weapon system after manufacture of the lesser of the initial production quantity or one tenth of the eventual total production quantity.~~
- (f) ~~"Weapon system" means a system or major subsystem used directly by the Armed Forces to carry out combat missions.~~
  - (1) ~~The term includes, but is not limited to, the following (if intended for use in carrying out combat missions)—~~
    - (i) ~~Tracked and wheeled combat vehicles;~~
    - (ii) ~~Self propelled, towed and fixed guns, howitzers and mortars;~~
    - (iii) ~~Helicopters;~~
    - (iv) ~~Naval vessels;~~
    - (v) ~~Bomber, fighter, reconnaissance and electronic warfare aircraft;~~
    - (vi) ~~Strategic and tactical missiles including launching systems;~~
    - (vii) ~~Guided munitions;~~
    - (viii) ~~Military surveillance, command, control, and communication systems;~~
    - (ix) ~~Military cargo vehicles and aircraft;~~
    - (x) ~~Mines;~~

- ~~(xi) Torpedoes;~~
- ~~(xii) Fire control systems;~~
- ~~(xiii) Propulsion systems;~~
- ~~(xiv) Electronic warfare systems; and~~
- ~~(xv) Safety and survival systems.~~

~~(2) The term does not include —~~

- ~~(i) Commercial items;~~
- ~~(ii) Spares, repairs, or replenishment parts; or~~
- ~~(iii) Related support equipment (e.g., ground handling equipment, training devices and accessories, ammunition), unless an effective warranty would require inclusion of such items.~~

#### **~~246.770-2 Policy.~~**

~~(a) Under 10 U.S.C. 2403, departments and agencies may not contract for the production of a weapon system with a unit weapon system cost of more than \$100,000 or an estimated total procurement cost in excess of \$10 million unless —~~

~~(1) Each contractor for the weapon system provides the Government written warranties that —~~

- ~~(i) The weapon system conforms to the design and manufacturing requirements in the contract (or any modifications to that contract);~~
- ~~(ii) The weapon system is free from all defects in materials and workmanship at the time of acceptance or delivery as specified in the contract; and~~
- ~~(iii) The weapon system, if manufactured in mature full-scale production, conforms to the essential performance requirements of the contract (or any modification to that contract); and~~

~~(2) The contract terms provide that, in the event the weapon system fails to meet the terms of the above warranties, the contracting officer may —~~

- ~~(i) Require the contractor to promptly take necessary corrective action (e.g., repair, replace, and/or redesign) at no additional cost to the Government;~~
- ~~(ii) Require the contractor to pay costs reasonably incurred by the Government in taking necessary corrective action; or~~
- ~~(iii) Equitably reduce the contract price; or~~

~~(3) A waiver is granted under 246.770-8.~~

- ~~(b) Contracting officers and program managers shall consider the following when developing and negotiating weapon system warranty provisions:~~
- ~~(1) Warranties may not be appropriate in all situations, and a waiver should be sought if a warranty would not be cost effective or would otherwise be inconsistent with the national defense. In drafting warranty provisions, the drafters must ensure they understand the planned operational, maintenance, and supply concepts of the weapon system to be fielded, and must structure a warranty that matches those concepts. A warranty plan should be prepared in consonance with development of the warranty provision early in the weapon system's life cycle. The plan should contain program warranty strategy, terms of the warranty, administration and enforcement requirements, and should be coordinated with the user and support activities.~~
  - ~~(2) A cost/benefit analysis must be accomplished in support of each warranty (see 246.770-7). The cost/benefit analysis compares all costs associated with the warranty to the expected benefits. An estimate shall be made of the likelihood of defects and the estimated cost of correcting such defects. Also, if substantive changes are required to the planned operational, maintenance, or supply concepts, any increased costs should be weighed against the expected benefits in deciding whether a warranty is cost effective.~~
  - ~~(3) The Warranty Guidebook prepared by the Defense Systems Management College, Fort Belvoir, VA 22060-5426, is a valuable reference that can assist in the development, negotiation, and administration of an effective weapon system warranty.~~
- ~~(c) Contracting officers may require warranties that provide greater coverage and remedies than specified in paragraph (a) of this subsection.~~
- ~~(d) When the contract includes an essential performance requirement warranty, the warranty must identify redesign as a remedy available to the Government.~~
- ~~(1) The period during which redesign must be available as a remedy shall not end before operational use, operational testing, or a combination of operational use and operational testing has demonstrated that the warranted item's design has satisfied the essential performance requirements.~~
  - ~~(2) When essential performance requirements are warranted in contracts with alternate source contractors, do not include redesign as a remedy available to the Government under those contracts until the alternate source has manufactured the first ten percent of the eventual total production quantity anticipated to be acquired from that contractor (see 246.770-5).~~

### **246.770-3 Tailoring warranty terms and conditions.**

- ~~(a) Since the objectives and circumstances vary considerably among weapon system acquisition programs, contracting officers must tailor the required warranties on a case-by-case basis. The purpose of tailoring is to get a cost effective warranty in light of the technical risk, or other program uncertainties, while ensuring that the Government still acquires the basic warranties described in 246.770-2. Tailoring shall not be used as a substitute for acquiring a warranty waiver.~~
- ~~(1) Tailoring may affect remedies, exclusions, limitations, and duration provided such are consistent with the specific requirements of this section (see also FAR 46.706).~~

- ~~(2) Clearly relate the duration of any warranty to the contract requirements and allow sufficient time to demonstrate achievement of the requirements after acceptance.~~
- ~~(3) Tailor the terms of the warranty, if appropriate, to exclude certain defects for specified supplies (exclusions) or to limit the contractor's liability under the terms of the warranty (limitations).~~
- ~~(4) Structure broader and more comprehensive warranties when advantageous or narrow the scope when appropriate. For example, it may be inappropriate to require warranty of all essential performance requirements for a contractor that did not design the system.~~
- (b) DoD policy is to exclude any terms that cover contractor liability for loss, damage, or injury to third parties from warranty clauses.
- (c) Ensure acquisition of subsystems and components in a manner which does not affect the validity of the weapon system warranty.

**246.770-4 Warranties on Government furnished property.**

Contracting officers shall not require contractors to provide the warranties specified in 246.770-2 on any property furnished the contractor by the Government, except for—

- (a) Defects in installation;
- (b) Installation or modification in such a manner that invalidates a warranty provided by the manufacturer of the property; or
- (c) Modifications made to the property by the contractor.

**246.770-5 Exemption for alternate source contractor(s).**

Agency heads may exempt alternate source contractor(s) from the essential performance warranty requirements of 246.770-2(a)(1)(iii) until that contractor manufactures the first ten percent of its anticipated total production quantity.

**246.770-6 Applicability to foreign military sales (FMS).**

- (a) The warranty requirements of 246.770-2 are not mandatory for FMS production contracts. DoD policy is to obtain the same warranties on conformance to design and manufacturing requirements and against defects in material and workmanship as it gets for U.S. supplies.
- (b) DoD normally will not obtain essential performance warranties for FMS purchasers. However, where contracting officer cannot separately identify the cost for the warranty of essential performance requirements, the foreign purchaser shall be given the same warranty that the United States gets.
- (c) If an FMS purchaser expressly requests a performance warranty in the letter of acceptance, the Government will exert its best efforts to obtain the same warranty obtained for U.S. equipment. Or, if specifically requested by the FMS purchaser, obtain a unique warranty.
- (d) The costs for warranties for FMS purchasers may be different from the costs for such warranties for the Government due to factors such as overseas transportation and any tailoring to reflect the unique aspects of the FMS purchaser.

- (e) ~~Ensure that FMS purchasers bear all of the acquisition and administrative costs of any warranties.~~

**~~246.770-7 Cost benefit analysis.~~**

- (a) ~~In assessing the cost effectiveness of a proposed warranty, perform an analysis which considers both the quantitative and qualitative costs and benefits of the warranty. Consider—~~
  - (1) ~~Costs of warranty acquisition, administration, enforcement, and user costs, and any costs resulting from limitations imposed by the warranty provisions;~~
  - (2) ~~Costs incurred during development specifically for the purpose of reducing production warranty risks;~~
  - (3) ~~Logistical and operational benefits as a result of the warranty as well as the impact of the additional contractor motivation provided by the warranty.~~
- (b) ~~Where possible, make a comparison with the costs of obtaining and enforcing similar warranties on similar systems.~~
- (c) ~~Document the analysis in the contract file. If the warranty is not cost effective, initiate a waiver request under 246.770-8.~~

**~~246.770-8 Waiver and notification procedures.~~**

- (a) ~~The Secretary of Defense has delegated waiver authority within the limits specified in 10 U.S.C. 2403. The waiving authority for the defense agencies is the Under Secretary of Defense (Acquisition and Technology). Submit defense agency waiver requests to the Director, Defense Procurement, for processing. The waiving authority for the military departments is the Secretary of the department with authority to redelegate no lower than an Assistant Secretary. The waiving authority may waive one or more of the weapon system warranties required by 246.770-2 if—~~
  - (1) ~~The waiver is in the interests of national defense; or~~
  - (2) ~~The warranty would not be cost effective.~~
- (b) ~~Waiving authorities must make the following notifications or reports to the Senate and House Committees on Armed Services and Appropriations for all waivers—~~
  - (1) ~~*Major Weapon Systems.*~~  
~~For a weapon system that is a major defense acquisition program for the purpose of 10 U.S.C. 2432, the waiving official must notify the Committees in writing of an intention to waive one or more of the required warranties. Include an explanation of the reasons for the waiver in the notice. Ordinarily provide the notice 30 days before granting a waiver.~~
  - (2) ~~*Weapon System Not in Mature Full Scale Production.*~~  
~~Although a waiver is not required, if a production contract for a major weapon system not yet in mature full scale production will not include a warranty on essential performance requirements, the waiving officials must comply with the notice requirements for major weapon systems.~~

~~(c) Departments and agencies shall issue procedures for processing waivers and notifications to Congress.~~

~~(1) Requests for waiver shall include —~~

- ~~(i) A brief description of the weapon system and its stage of production, e.g., the number of units delivered and anticipated to be delivered during the life of the program;~~
- ~~(ii) Identification of the specific warranty or warranties required by 246.770-2(a)(1) for which the waiver is requested;~~
- ~~(iii) The duration of the waiver if it is to go beyond the contract;~~
- ~~(iv) The rationale for the waiver (if the waiver request is based on cost-effectiveness, include the results of the cost-benefit analysis);~~
- ~~(v) A description of the warranties or other techniques used to ensure acceptable field performance of the weapon system, e.g., warranties, commercial or other guarantees obtained on individual components; and~~
- ~~(vi) Exercise date of the warranty option, if applicable.~~

~~(2) Notifications shall include —~~

- ~~(i) A brief description of the weapon system and its stage of production; and~~
- ~~(ii) Rationale for not obtaining a warranty.~~

~~(3) Keep a written record of each waiver granted and notification and report made, together with supporting documentation such as a cost-benefit analysis, for use in answering inquiries.~~