



THE FINAL RULE!

THE REWRITE OF FAR PART 45 GOVERNMENT PROPERTY AND ITS ASSOCIATED CLAUSES

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*This article is dedicated to Mr. Jim Kordes, a friend, a mentor,
and a leader who started the effort to modernize the Government Property rules.*

INTRODUCTION

THE FAR IS PUBLISHED! On May 15th, 2007, after more than a decade of efforts we finally have the new rule for Federal Acquisition Regulation (FAR) Part 45 and its associated clauses. This is the first in a series of articles that I plan and have been working on based upon the final rule.

I have held off writing, for a goodly period of time, as the proposed rule, and its final iteration, went through many manifestations. To write anything prior to this time would have been folly. Why? Because none of us really knew what the FINAL version would look like. So we would have been engaging in conjecture, wishful thinking and possibly in erroneous assumptions as to the final outcome. Well, now we know! It has finally been signed off by the plethora of individuals that sign off on these documents – and now comes the time for implementation. To help that implementation process this series of articles will engage in some careful analysis, some exegesis of the words, and some thoughts as to their meaning, interpretation and implementation. My plan is to take a systematic approach and cover the critical aspects of the new regulation as they impact both the Government and Contractor employee.

My topical plan of attack will include articles on:

- The clauses,
- The classification of Government property under the new clause,
- The life cycle processes identified under the new clause (And this one will need to cover first the gestalt – the whole of the new process orientation and will

then be broken up into the appropriate processes – acquisition through closeout – with a few sub processes thrown in for good measure),

- The Property Management System and its relationship to Voluntary Consensus Standards (VCS) and Industry Leading Practices (ILP) – with the necessary analysis of the applicable VCSs and ILPs,
- Title to Government Property,
- Liability for the loss, damage, destruction and theft of Government property,
- Disposition of Government property.

Some of these will be larger works – some lesser works. But the intent of all of them will be to serve firstly a didactic purpose and secondly an application orientation, in an effort to move our Property and Asset management profession along its journey of development. Some will be meant to challenge the status quo, some to force you to question long held beliefs, some to dispel urban legends (Those not found on www.snopes.com), as others to ask you to engage in some critical thinking. But the ultimate goal is to freely offer this intellectual property to all who desire to learn!

So, let's have at it! In this paper I will be presenting an overview of the new FAR Part 45 and the FAR Part 52 Government Property clauses. There is no way that I could cover every aspect of the document in one brief article – that is why you need to “stand by” for further articles in forthcoming issues of the *Property Professional*. Again, to reinforce, I will be handling this article from an overview perspective dealing with the technical issues surrounding the

final published FAR Part 45 rule, entitled Government Property and its associated clauses. I urge you to study the new regulations, analyze the requirements and explore their application in the multiple contracting environments within which we find Government property in the possession of contractors.

HISTORY

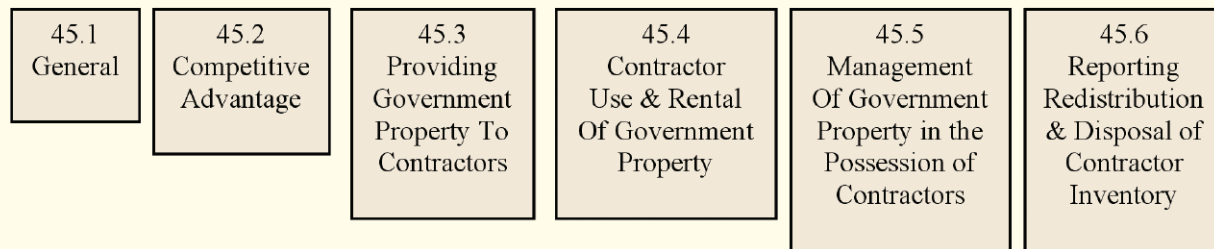
The rewrite of FAR Part 45 has been a long and arduous process. I was first involved in 1994 at the request of Ms. Eleanor Spector, then Director of Defense Procurement, to act as special counsel in the rewrite effort based upon my knowledge and expertise (alleged) in Government Property. The rewrite of FAR Part 45 was categorized as a “low hanging fruit” in regard to the FAR as a whole. Hmmm – if only they knew then what we know now, that Government property is an extraordinarily complex and far reaching technical field, career series profession and regulatory requirement within the FAR. Over the next decade there were numerous efforts to try to bring this product to fruition. These efforts really didn't fail – they just never came to their logical fruition.

There were many people involved with the proposed rule over that period of time. But this final rule was really created through the collaborative efforts of an individual. His modesty is to be applauded, but without the efforts of Mr. Tom Ruckdaschel, Property Accountability Specialist, from OUSD(AT&L)/ARA, Property and Equipment Policy Office, it would have never happened. It is to Tom's credit that he was able to bring the multiple diverse communities together and bring this effort to fruition.



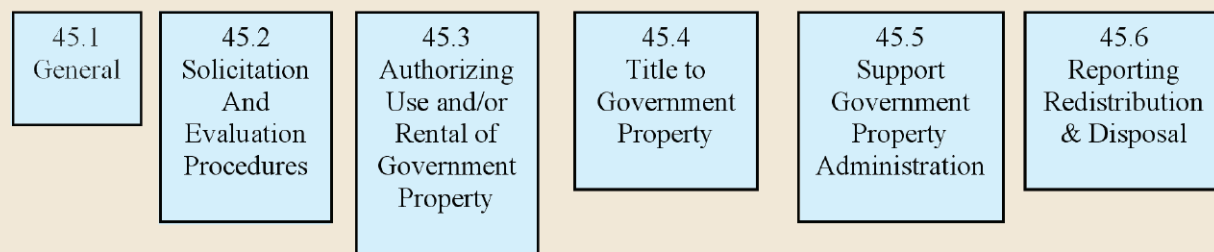
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Old FAR Part 45 Structure



Note: I have deliberately omitted the pictorial representation of FAR Subpart 45.000, Scope of subpart in this graphic – though I will discuss it in this article.

New FAR Part 45 Structure



Okay. So what about FAR Part 45 Government Property rewrite? This presentation is broken down into two sections. In the first section I will discuss FAR Part 45, and in the second, the Government Property Clauses.

FAR PART 45

FAR Part 45 has been totally revamped! The most significant change – where before we had a mix of both Government and contractor requirements embedded and spread throughout FAR Part 45, now FAR Part 45 is only applicable to the Government. This is in concert with FAR protocol in that all requirements contractually imposed upon the contractor shall be in a clause. The FAR rewrite has fixed this problem.

Here is a comparative view of the old FAR Part 45 and the new FAR Part 45. (See chart above.)

All of these subparts are now direction provided solely to the Government. Where previously FAR 45.5 was an incorporation by reference that provided all of the contractor requirements for property management – things like record keeping and basic information – these have now been moved

to their rightful location – the clauses. Though contractors should read these government requirements, they are not contractually binding on the contractor. They are policy and direction to the Government. The Government representatives must follow them (Note: That's right, all Government representatives must follow these rules – procuring contracting officers, administrative contracting officers, property administrators, quality assurance representatives, etc., must follow these regulations) – unless authorized to do otherwise through a deviation (See FAR 1.4 entitled Deviations from the FAR)

Let's look at this new FAR part's structure for a moment:

FAR 45.000

This is a general Scope of Part statement. It basically says to the Government employee, "Look, here are the policies of the Government – follow them! Oh, and here are things that are not covered by this FAR Part." Though the directions contained in the "Scope" part are basically duplicative of what we had under the "old" FAR – there is one new addendum, a tag right at the very end of the paragraph –

that has monumental import. I am paraphrasing, "It (This FAR Part) does NOT apply ... to software and intellectual property." WOW! After some twenty odd years we finally have clarification that the requirements of FAR Part 45 and the associated Government property clauses do not apply to the management of software. This is a debate that has raged for decades, and the only guidance that was ever promulgated was a policy letter from the Defense Contract Management Command (DCMC), the predecessor of the modern day Defense Contract Management Agency (DCMA) signed by Mr. Robert Bonner back on 11 March 1991.¹

FAR 45.1

This subpart is a "General" section. It is subdivided into seven sections – 45.101 through 45.107. The sections cover definitions (45.101)², the Government's official policy on providing Government property (45.102), a General section covering the use of voluntary consensus standards and industry leading practices (45.103), policy on responsibility and liability for Government property (45.104), Contractor's property management systems and compliance (45.105), Transferring accountability of

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Government property (45.106), and lastly the application and use of the Government property clauses (45.107). Each of these subsections could have an article written about them as individual requirements. But remember, this is only an overview.

FAR 45.2

This subpart deals with the “Solicitation and Evaluation Procedures” when potentially providing Government property under a contract. It is broken down into only two subsections:

45.201 – provides solicitation requirements, i.e., what the Government contracting officer is required to insert into the solicitation. Things like the name of the asset, part number, description, etc. A discussion as to whether the item is being furnished with or without warranty. Who bears the cost of shipping the item? How Government property already in the contractor's possession will be viewed from a competitive standpoint. And any information disclosure requirements that the prospective contractor needs to provide to the Government in its proposal.

45.202 – provides guidance to the Government contracting officer regarding the “Evaluation procedures” to be used in determining any offset for competitive advantage

as well as the adequacy of the contractor's property management plans, methods, practices and procedures for property management. Once again – this one subsection is worthy of careful analysis and exposition. Please take note that opportunities abound for writing articles on this new regulation!

FAR 45.3

This subpart deals with authorizing the use of Government property and rental of Government property. It is broken down into three subsections:

45.301 – Use and Rental, where contracting officers are provided guidance as to when and how Government property will be provided on a rent free basis versus a rental basis – and the factors that apply in making that decision.

45.302 – Contracts with foreign Governments or international organizations, and

45.303 – Use of Government property on independent research and development programs.

FAR 45.4

This subpart explains the concept of title to Government property and it is broken down into two subsections:

45.401 – deals with title to Government-furnished property while

45.402 – deals with title to Contractor Acquired property (CAP). This section on CAP is further broken down into subparagraphs on title to CAP under Fixed Price Contracts and title to CAP under Cost reimbursement type contracts.³

FAR 45.5

This subpart deals with the Support Government Property Administration delegation process and is broken down into three subsections:

45.501 dealing with Prime contractor alternate locations. Though this heading implies that this subsection deals only with “alternate” locations of the Prime contractor embedded within the paragraph there is a reference to “subcontractors.” This issue will have to be discussed in future articles.⁴

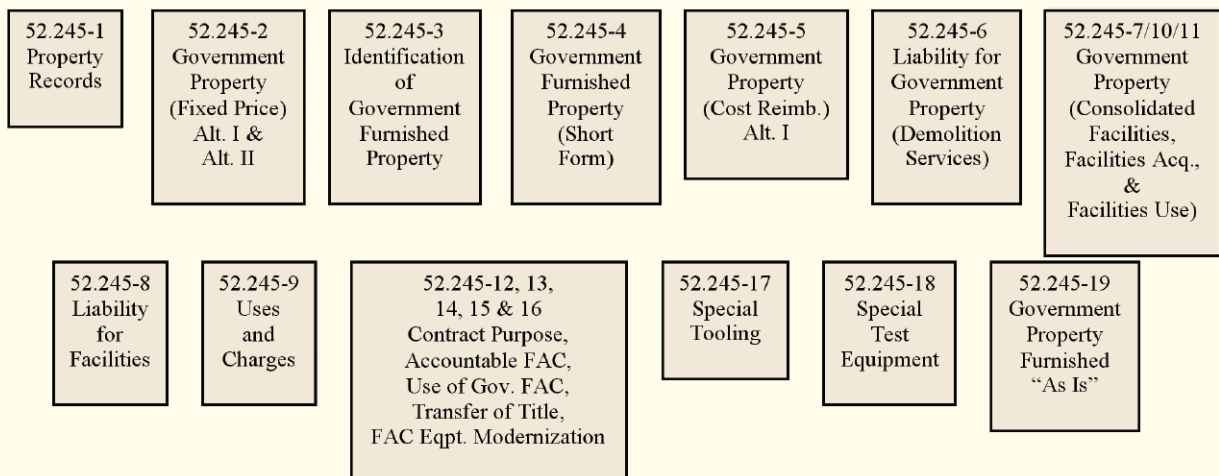
45.502 deals with Subcontractor locations and

45.503 deals with Support property administrator findings.

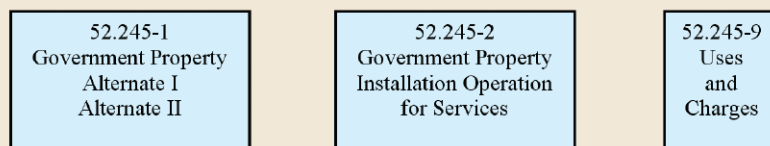
FAR 45.6

Lastly, this subpart deals with the disposition and disposal of Government property. Since this section has not changed since the May 2004 publication, we will not be discussing this subpart in this article – I'll save that for the future.

Old FAR GP Clause Structure (19 Clauses)



New FAR GP Clause Structure (3 Clauses)



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THE GOVERNMENT PROPERTY CLAUSES

Our next section deals with the Government Property Clauses. The Government Property Clauses have in some ways changed drastically, while in other ways they have remained the same. From a formatting standpoint – there has been a major deletion of property clauses that have outlived their usefulness – they no longer had applicability in today's contracting environment and therefore, justifiably, were removed. The new clauses are a distillation, a refinement of the "old" Government property clauses – providing Government and Industry the greatest degree of flexibility possible for the proper management of Government property while still meeting and balancing the need to protect the taxpayers "mite."⁵

The Old Clauses consisted of FAR 52.245-1 through 52.245-19. Essentially, all of these clauses, save for one, have been eliminated.⁶

There are now two new clauses – and one carry over. These clauses are:

- The new FAR 52.245-1, the primary Government property clause used in all contracts where there is Government property either furnished or acquired,
- The new FAR 52.245-2 for use concurrently with FAR 52.245-1 but only in a base or installation level service contract and
- FAR 52.245-9, the Uses and Charges Clause – carried over from the current FAR, and also applicable to any contract where Government property is provided.⁷

It is important to note that even though all other clauses have been eliminated – they are still applicable where incorporated in current contracts unless deleted or replaced through a contract modification or block change process.

Technical Analysis of the Government Property Clauses

FAR 52.245-1 – Government Property, with its two Alternates (Alternate I and Alternate II)

How and where is this used? – This clause is to be used with all contracts where GP is provided – either furnished as Government-furnished Property (GFP) or acquired by the contractor as Contractor Acquired Property (CAP) – regardless of

the contract's pricing arrangement (Fixed price, cost reimbursement, Time and Materials, etc.) or purpose (Research and Development, supply, services, overhaul and maintenance, etc.). In the simplest of terms – wherever Government property is provided under a contract – this is a mandatory clause – with only one exception found at FAR 45.107(d), i.e., where a contract for repair is awarded and the dollar value of the Government property to be furnished does not exceed the simplified acquisition threshold. Note: If other Government property is to be provided under this repair contract then a Government property clause IS required.

Analysis of the Government Property Clause Structure

I would like to analyze the structure and requirements of the GP Clause. And in point of fact I will! The overarching structure of the Government property clause, FAR 52.245-1, looks like this:

- (a) Definitions
- (b) Property Management
- (c) Use of Government Property
- (d) Government Furnished Property
- (e) Title to Government Property
- (f) Contractor Plans and Systems
- (g) Systems Analysis
- (h) Contractor Liability for Government Property
- (i) Equitable Adjustment
- (j) Contractor Inventory disposal
- (k) Abandonment of Government Property
- (l) Communication
- (m) Contracts Outside the United States

Analysis of the Government Property Clause, FAR 52.245-1

It is at this point that we need to provide some analysis of the clause.

(a) Definitions

Many of the definitions contained within the clause should be familiar to you, if you have dealt with Government property (GP) in the past. They have not changed. Definitions such as Contractor Acquired Property (CAP) and Government Furnished Property (GFP) and Property and Material have remained the same. There are a number of new definitions in the clause that need to be brought to your attention. These new words and their definitions include:

Cannibalize – means to remove serv-

iceable parts from one item of equipment in order to install them on another item of equipment. Though this term was often used in the Government property arena it did not have a concrete definition.

Demilitarization – A term familiar to those involved with Department of Defense contracting is now found in the FAR. It is defined as "rendering a product unusable for, and not restorable to the purpose for which it was designed or is customarily used."

Equipment – Where in old version of FAR Part 45 we had the term facilities which was subdivided into real property and plant equipment and plant equipment further subdivided by the Department of Defense (DoD) into Industrial Plant Equipment and Other Plant Equipment – we now have just plain "equipment." Yet, this definition is much more applicable to today's world of understanding than the multi-tiered definition of the old FAR.

Sensitive Property – Though this term has been around for decades in locations such as the DoD Manual for the Performance of Contract Property Administration DoD 4161.2-M, this is the first time we see it used within a Federal Regulation. The definition should be very familiar to all DoD Property employees.

Many of the definitions that you see in the new FAR Part 45 and the Government property clause are the same ones that the Property community has been working with for years.

Now, there is a small point of discussion here in that the Government property clause is not the only location for definitions. Yes, they are in the clause – but you will also find definitions in FAR 2.101 as well as FAR 45.101. Why, you ask, are definitions found in these other locations? Well, the definitions found in FAR Part 2 are applicable to the entire FAR. In other words, they have utility in other FAR parts. The definitions in FAR Part 45 have applicability in and to FAR Part 45 and therefore need defining for the Government. The definitions in the Government property clause have applicability to both the Government and the contractor – but for them to be contractually binding on the contractor they must be in the clause. Even though they read word for word the same between 45.101 and 52.245-1 – we need to follow the FAR protocol of contractual applicability – Guidance, policy and direc-

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tion to the Government to be found in the FAR Parts, Direction and requirements to the contractor to be placed in the clauses.

(b) Property management

This paragraph of the clause directs and requires contractors to establish and maintain a system, including processes, systems, procedures, records and methodologies to manage Government property while under their stewardship. This is a long standing standard requirement that has existed in all previous GP clauses. The difference under this new clause is the inclusion of the new requirement or really the new allowance to use Voluntary Consensus Standards (VCS) and/or industry leading practices (ILP).⁸ This is a quantum leap forward for our profession! There are many professional associations and standards bodies that have promulgated property and property related standards. These bodies include but are not limited to the American Society for Testing and Materials International (ASTM International), American National Standards Institute (ANSI) National Institute of Standards and Technology (NIST), and the Institute of Electrical and Electronics Engineers (IEEE). ASTM International in concert with the National Property Management Association (NPMA) has led the way in the creation of property related standards. As such the VCSs promulgated by ASTM have the greatest applicability to our environment. But it should be noted that the Government does not require the use of any one VCS body nor mandate any one specific VCS. Contractors will be expected to research and apply, as applicable, the VCSs to the management of GP in their stewardship. In addition, rather than regu-

latory prescription as to the type and amount of control applied to GP in the contractor's possession another option available to the contractor is the use of industry leading practices. As part of a Contractor's Property Management System (PMS) industry leading practices will also have to be researched by the contractor as to their applicability and efficiency in the anticipated context or environment of use.

(c) Use of Government property

This paragraph within the clause should not present any new requirements to the contractor, working Property Administrator or contracting officer. It also sets forth requirements that have previously existed limiting the use of GP to the instant contract, and those contracts with authorization to use the GP. There is one point of clarification within this portion of the clause. The contractor is not allowed to modify, cannibalize or alter the GP without the contract or CO's approval. This last requirement has been added to clarify the issue of cannibalization.

(d) Government furnished property

This paragraph is the combination of a number of other, old Government property clause paragraphs – including the original GFP paragraph, and the changes to GFP paragraph and even a portion from the title paragraph, and lastly from another clause the “as is” concept.

- It provides the contractor with the warranties that the GFP will be suitable for use, and delivered on a timely basis – and that if the Government fails in this action, the contractor has recourse through an equitable adjustment.

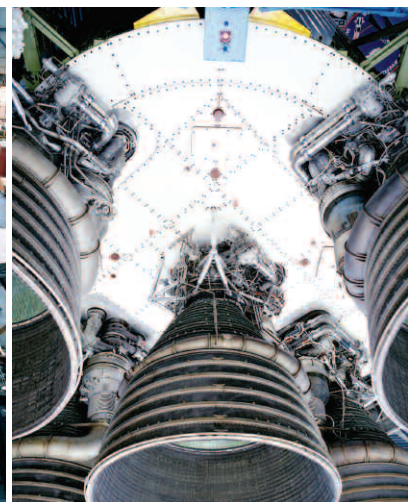
- The clause stipulates that certain GP

may be furnished in an “as is” condition versus a suitable for use condition. It is important to note that any GFP furnished in an “as is” condition must be called out as such in the contract to avoid any confusion and to afford the prospective contractor the opportunity to inspect such property.

- Lastly, the Government continues to have the unilateral right to decrease or substitute other GFP for the promised GFP – with the contractor entitled to requesting an equitable adjustment. There is a new addition to this paragraph where the Government now also has the right to unilaterally increase the amount of GFP provided to the contractor – with the commensurate right of the contractor to request an equitable adjustment as well as the potential for the Government to request an equitable adjustment in its favor.

(e) Title to Government property

This is a really simple one to discuss. The title provisions have been extracted verbatim from the old clauses – FAR 52.245-2 and 52.245-5. There have been a few minor “tweaks” to them in regard to the terms used – where before we have “facilities” in the title paragraph we now have “equipment.” And now this paragraph (e) is broken down into three subparagraphs – one dealing with title to Government-furnished property, one dealing with title under Fixed Price contracts, and one dealing with title under Cost reimbursement contracts. But if you were to align these paragraphs with their old counterparts you will discover that they have carried over the same themes as the old clauses.⁹



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(f) Contractor plans and systems

This section of the clause calls out the actual processes that the Government expects to see in a contractor's Property management and control system. These processes include Acquisition, Receipt of Government property, Records, Physical Inventories, Subcontractor Control, Reports, Relief of Stewardship Responsibility, Utilizing Government property, Maintenance, and Property Closeout. Though there appear to be eleven processes we need to be aware that there are other processes subsumed under these eleven. For example under Receipt of Government property there is also a requirement to have a process to identify the Government property, under Utilizing Government property there is also the requirement to properly utilize, consume, move and store – echoing the processes from the DoD property Manual 4161.2-M, numerous National Property Management Association's training and education materials, as well as the ASTM International Standard number E2279-03, on property management systems, albeit embedded within the standard's structure. Hmmm, seems like for once we are all on the same sheet of music!

A new requirement that parallels industry leading practice is the requirement for the contractor to establish internal reviews and audits. Though both a statutory and regulatory requirement in other applications, for example Sarbanes-Oxley (SOX for short) and ISO 9000, as well as many contractors previously doing this on a voluntarily basis, this is the first time that this requirement has been explicitly called out as a contract requirement for Government property.

A significant change is created here more by its omission than any specific language. Government Property Administrators (PA) will no longer approve the contractor's property management and control systems. Rather the clause calls out that these systems will be deemed to be adequate or inadequate, compliant or non-compliant by the Property Administrator. The reasoning behind the elimination of the previous "Approval" requirement is that these systems are expected to be dynamic systems versus static systems, i.e., that they are constantly improving and refining the processes and outcomes embedded within them. Yes, Government Property Adminis-

trators will still send their contractors a letter but now instead of a letter of "approval" of the Property Management or Property Control system it will be a letter informing the contractor that their system is deemed adequate and compliant. It should be noted that Government Property Administrators do not have the contractual Government authority to notify the contractor that their system is inadequate or non-compliant. That authority is reserved for the contracting officer (CO) – generally the administrative contracting officer.

(g) Systems analysis

As with the previous Government property clauses, there is the contractual allowance for the Government to audit the contractor's process and procedures for Government property and the application of these procedures, and they shall be allowed access to the records relating to the Government property.

(h) Contractor Liability for Government Property

A very significant change has taken place with the application of the liability protocol – but not its underlying concept. The standard language in the clause now specifies the limited risk of loss, versus the full risk of loss. The full risk of loss concept is now found under Alternate I to this clause. Therefore, it is critical that COs in incorporating this clause and PAs in administering this clause understand this "swapping" of locations. Let me repeat and rephrase this action. We have moved the full risk to the alternate, and we have moved the limited risk to the body of the

standard Government property clause.

Other than that change the same long standing, legally sound concepts of willful misconduct, and lack of good faith on the part of managerial personnel are carried over into this new clause as well as the full risk of loss concept in Alternate I.

Remembering that the contractor's Property Management System is no longer approved but rather determined to be adequate or compliant, the clause also addresses the linkage between this status of the Property Management System and the contractor's liability. If it has been determined that the contractor's Property Management System is inadequate and/or presents an undue risk to the Government the CO shall withdraw the Government's assumption of risk for any loss, damage or destruction of Government property making the contractor liable for any loss, damage or destruction. There are two exceptions in the clause where even if the CO has withdrawn the Government's assumption of risk the contractor may not be liable if they can prove that the loss, damage or destruction of GP occurred prior to the withdrawal, or if the loss, damage, destruction or theft had no relationship to the cause of the withdrawal, i.e., nexus.

(i) Equitable Adjustment

The equitable adjustment provisions of the clause remain essentially the same from the old GP clause to this new clause – with the exception of the addition of one entitlement on the part of the contractor when the Government increases the amount of GFP in concert with paragraph (d) of the clause.

RISK OF LOSS PROVISIONS

• OLD

- **52.245-2**
 - Paragraph (g)
 - **FULL RISK OF LOSS**

- **52.245-2**
 - Alternate I
- **52.245-5**
 - **LIMITED RISK OF LOSS**

• NEW

- **52.245-1**
 - Paragraph (h)
 - **LIMITED RISK OF LOSS**

- **52.245-1**
 - Alternate I
 - **FULL RISK OF LOSS**

• **FLIPPED THE TWO PROVISIONS**