

# Title to Government Property: Applications and Implications for Property Management, Taxation, and Unintended Consequences

Title to government property is a critical issue in the procurement and contract administration process. Unfortunately, a great deal of confusion exists concerning this issue and greater clarification is needed in order to discover what exactly “title” is, who has it, and what its contractual applications are.

BY DOUGLAS N. GOETZ

Title to government property in the possession of defense contractors is becoming an increasingly critical aspect of the government’s acquisition and contracting process. Hundreds of billions of dollars worth of government property is currently in the possession of defense contractors for use on government contracts. One contentious feature of this has been the issue of title to property charged through overhead or as an indirect cost. Numerous academic authors, attorneys, tax specialists, and even the courts have jumped into the fray to analyze and rule on the issue of who has title. However, what these entities have failed to accomplish is to analyze the natural and unintended consequences of their decisions, which could unintentionally total billions of dollars in tax avoidance or realization to various entities, as well as requirements to change property management systems.

Debated over in a multitude of professional journals and courts, this issue is enough to make one truly amazed that what many may consider to be a relatively obscure portion of the defense acquisition and procurement process has taken such a front seat in the world of academic literature. As such, there are multiple questions that need to be asked—and answered—in order to take a real-world approach and resolve this issue. The *Federal Acquisition Regulation (FAR)* possesses a number of clauses relating to title to government property. These clauses include:

- FAR 52.232-16, Progress Payments;
- 52.245-2, Government Property (Fixed-Price Contracts);
- 52.245-5, Government Property (Cost Reimbursement, Time-and-Material, or Labor-Hour Contracts); and
- 52.245-1, Property Records.

## Background

There exists extensive literature debating the issue of title to government property, as well as the distinction of property charged direct versus property charged to overhead. Ralph C. Nash and John Cibinic, two of the foremost experts in government contracting, have provided numerous analyses of this particular issue in regard to title to overhead items.

### About the Author

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*This article is dedicated to Dr. William C. Pursch, CPCM, CF, who was Mr. Goetz’s mentor for 30 years.*

Throughout their writings, there has been a consistent call for the government to clarify the title vesting issue—with their determination that the government does not have title to property acquired and charged to overhead (i.e., as an indirect expense).<sup>1</sup> Additionally, in their 2003 article published in the *Public Contract Law Journal*, R.J. Wall and R.P. Malaska provide their carefully constructed analysis focusing on the issue of taxation and the benefit afforded to both the corporate coffers and government treasuries.<sup>2</sup> In another article, written by John B. Wyatt and published in the 2006 *Journal of Contract Management*, Wyatt presents us with the conclusion that the new *FAR* rule—initially proposed as FAR Case 2004-025 and issued as a final rule in May 2007—regarding government property, finally clarifies that issue.<sup>3</sup> Much of these arguments revolve around the issue of taxation, or, more appropriately, the avoidance of taxation.

It is common sense that neither individuals nor corporations should ever pay more taxes than they are legally required to pay. However, the natural consequences of claiming title to these various forms of property—and the accompanying title issues—raise some very serious concerns that none of these authors have addressed.

The publication of the aforementioned final rule has not resolved this issue. Rather, it continues to propagate confusion and could possibly be the cause for numerous corporations and government representatives to unknowingly violate federal laws. The focus of this article is on the management implications and applications for government property. Therefore, a careful analysis of the previously mentioned *FAR* clauses in greater detail will yield some interesting conundrums, which one hopes the government will seek to correct and clarify.

The publication of the latest iteration of FAR Part 45 was a major undertaking that spanned more than a decade. This was not a simple tweaking of the procurement and management rules regarding government property in the procurement and acquisition process, but a major rethinking of the entire philosophical agenda.<sup>4</sup> Therefore, the review process—and the comments received by the professionals involved—were voluminous.

## Comments to the Proposed *FAR* Rule Regarding Title to Government Property

A considerable number of comments to the proposed *FAR* government property rule dealt with the issue of title and the concern over a change to the *FAR*'s title provisions having a deleterious effect on government contracting. Many of these comments had to do with tax issues and it is important to show the zeal and fervor with which a number of individuals

commented on the proposed rule. More specifically, their comments addressed their concerns in regard to title to property charged through overhead to a contract.

In a 2005 letter to the *FAR* Secretariat, R.C. Johnson stated:

Under *FAR* provisions that have been in place since the end of World War II, the government acquires title to property acquired by contractors and accounted for in indirect cost (overhead) in two different ways. For fixed-price contracts containing the Progress Payments clause (FAR 52.232-16), title to overhead property passes pursuant to paragraph (d)(2). Under cost-type contracts, title to overhead property passes under FAR 52.245-5(c)(3).<sup>5</sup>

Another substantive contribution to the argument that the government has title to both direct charged property and indirect charged property comes from a sworn affidavit by Carol Covey in 2002. Covey, representing the Department of Defense (DOD) and being authorized to state DOD's official position, stated: "The title vesting provisions of these three *FAR* clauses [FAR 52.232-216, 52.245-2, and 52.245-5] allow the government to acquire title to all property directly charged to the contract and to the allocable share of all property indirectly charged to the contract."<sup>6</sup> A second sworn affidavit by M. Merritt in 2004 echoes the Covey position that the government has title to property charged direct and indirect. Merritt was another government official who was designated by DOD to provide the government's official position. In the affidavit, Merritt states:

Under FAR 52.245-5(c), if the contractor is entitled to be reimbursed for property purchased from a vendor as a direct item of cost under the defense contract, title to that property vests in the government upon the vendor's delivery of that property to the defense contractor. The second type of property identified in FAR 52.245-5(c) includes property that is charged indirectly to the contract, such as when the cost of the property is included in an overhead rate applicable to performance of the contract.<sup>7</sup>

In 2005, in another letter to the *FAR* secretariat, Susan N. Shafi, writing as a state and local tax specialist for the General Atomics Corporation, stated:

Case law has firmly established that state sales and uses taxes do not apply to indirectly charged property when the appropriate title clause is present in a government contract.... The proposed change to eliminate FAR 52.245-5 in its entirety, and specifically FAR 52.245-5(c), and replace it with

a new government property clause, FAR 52.245-1, would eliminate the passage of title to the government of indirectly charged property under cost-type and time-and-material type U.S. government contracts.<sup>8</sup>

In yet another 2005 letter, Steven Gruenwald and Jean Marie Faris presented their opinion to the *FAR* Secretariat on behalf of the Defense Contract Management Agency. Their concern was that:

The major change would be to vest title in the government only to property acquired by the contractor and charged as an item of direct cost. . . . We have never seen any reason to distinguish, for these purposes, between materials purchased under a contractor accounting system that accounts for them as overhead materials and one that accounts for them as direct cost items. . . . In short, "title" in a contract means "title." If the United States government provides funding to a contractor pursuant to a contract term which says title passes (such as the Progress Payments clause), title must pass or the contract funding payment is not "authorized by law."<sup>9</sup>

Though there were many voices decrying the government's action in this regard (i.e., changing the title language in the government property clause to reflect a government property application), two voices said just the opposite. Ralph Nash reiterated his position that DOD has never claimed title to overhead property.<sup>10</sup> I myself have also presented a lengthy argument against the government taking title to property charged to overhead by a clear reading of the *FAR*'s government property clauses at 52.245-2 and 52.245-5.<sup>11</sup>

## The 2007 FAR Property Clause Outcome

Due to the comments received, the proposed *FAR* government property clause, 52.245-1, was changed by the *FAR* Secretariat to revert to the exact language contained in the old government property clauses (52.245-2 and 52.245-5) with some minor editorial tweaking made to update certain aspects that needed to be changed to ensure consistency and readability. In other words, by leaving the language to read as before, the confusion as to the application of property management concerns are left behind to bewilder the contracting and property professionals, but made to appeal to the tax specialists.

## Unintended Consequences

One of the premises of this article was the lack of attention paid by the commenters to the whole of the *FAR* clauses in

question. Rather than reading only one paragraph from a clause, it is necessary to read the clause in its entirety to see the implications of the title provisions. Taking clauses out of context can lead to problems. Such is the case with the assertions made regarding title. This is an area where unintended consequences come into play.

Title under the Progress Payments clause, FAR 52.232-16(d), is defined as follows:

1. Title to the property described in this paragraph (d) shall vest in the government. Vestiture shall be made immediately upon the date of this contract, for property acquired or produced before that date. Otherwise, vestiture shall occur when the property is or should have been allocable or properly chargeable to this contract.
2. "Property," as used in this clause, includes all of the below-described items acquired or produced by the contractor that are or should be allocable or properly chargeable to this contract under sound and generally accepted accounting principles and practices—
  - i. Parts, materials, inventories, and work in process;
  - ii. Special tooling and special test equipment to which the government is to acquire title under any other clause of this contract;
  - iii. Nondurable (i.e., noncapital) tools, jigs, dies, fixtures, molds, patterns, taps, gauges, test equipment, and other similar manufacturing aids, title to which would not be obtained as special tooling under subparagraph (ii) above; and
  - iv. Drawings and technical data, to the extent the contractor or subcontractors are required to deliver them to the government by other clauses of this contract.

From a government property perspective, the government does not require the contractor to manage or control indirect property charged to a fixed-price contract containing the progress payments clause as "government property." The old FAR Part 45 provided three explicit statements to this effect:

1. FAR 45.000 (Pre-June 14, 2007 editions) stated, "[This section] does not apply. . . to property to which the government has acquired a lien or title solely because of partial advance or progress payments."

2. FAR 45.502(c)(2) (Pre-June 14, 2007 editions) stated, “Property to which the government has acquired a lien or title solely as a result of advance, progress, or partial payment is not subject to the requirements of this subpart.”
3. Lastly, FAR 45.600 (Pre-June 14, 2007 editions) stated, “This subpart does not apply to the disposal of... property for which the government has a lien or title solely as a result of advance or progress payments that have been liquidated.”

In the recently published *FAR* government property rule, dated June 14, 2007, we see two regulatory statements:

1. FAR 45.000 states, “It does not apply to...property to which the government has acquired a lien or title solely because of partial, advance, progress, or performance-based payments; to disposal of real property; or to software and intellectual property.” This is an exact echo of the previous *FAR* language.
1. FAR 45.600 states, “This subpart does not apply to the disposal of real property or to property for which the government has a lien or title solely as a result of advance, progress, or performance-based payments that have been liquidated.” Again, this is a nearly exact echo of the old *FAR*.

Government property professionals, in their day-to-day professional application of these rules, have long distinguished this type of property as “progress payments inventory”—differentiating it from government property for both government and industry property management purposes. The reason for this is because the property management controls exerted by these two different classes of property were different. For progress payments inventory, the level of control was sound industrial practice while, for government property, the requirements of FAR 45.5 were required to be applied by the *FAR* government property clauses (52.245-2 and 52.245-5).

How then is the contractor to manage property titled under the *FAR*’s progress payments clause? Paragraph (f) of FAR 52.232-16 states: “The contractor shall maintain an accounting system and controls adequate for the proper administration of this clause.” The property community has applied this concept as sound industrial practice.

The progress payments clause places the risk of loss, damage, or destruction of progress payments inventory firmly on the shoulders of the contractor. Paragraph (e) of FAR 52.232-16 states:

Before delivery to and acceptance by the government, the contractor shall bear the risk of loss for property, the title to which vests in the government under this clause, except to the extent the government expressly assumes the risk. The contractor shall repay the government an amount equal to the unliquidated progress payments that are based on costs allocable to property that is damaged, lost, stolen, or destroyed.

The government, in this instance, wants to protect its financial investment. As such, the contractor bears the risk of loss for progress payments inventory. When the contract reaches physical completion and all deliverable end items (deliverables) have been delivered to the government, what happens to anything left over to which the government has claimed title? Remembering that progress payments are a form of financing used only with fixed-price contracts, the government has received all that it is entitled to (i.e., the deliverable line items in the contract). For the remaining property, paragraph (d) of FAR 52.232-16 states:

When the contractor completes all of the obligations under this contract, including liquidation of all progress payments, title shall vest in the contractor for all property (or the proceeds thereof) not—

- i. Delivered to, and accepted by, the government under this contract; or
- ii. Incorporated in supplies delivered to, and accepted by, the government under this contract and to which title is vested in the government under this clause.

In other words, for any property left over, the government says, quite simply, that title reverts back to the contractor. This is because the government has received everything it had contracted and paid for—in most cases, the contractually specified deliverable end items. The critical aspect here is that there is an extinguishment of the title vesting provision. The government clearly relinquishes its ownership of said progress payments inventory. In other words, what was government property is, in the blink of an eye, now contractor property.

### The Cost Reimbursement Government Property Clause, FAR 52.245-5

It is critical that we analyze the government property clause *in toto*, providing a more thorough analysis of multiple perspectives of application brought about by the clause. It is inappropriate to read only a small part of the clause, make a

decision, and then walk away without being intellectually honest and addressing all of the natural consequences.

More focus is required on the cost reimbursement government property clause found at FAR 52.245-5 since the commenters who addressed the title issue cited this clause in their argument to retain the old title language. The cost reimbursement government property clause calls out the title provisions outlined as follows in paragraph (c):

1. The government shall retain title to all government-furnished property.
2. Title to all property purchased by the contractor for which the contractor is entitled to be reimbursed as a direct item of cost under this contract shall pass to and vest in the government upon the vendor's delivery of such property.
3. Title to all other property, the cost of which is reimbursable to the contractor, shall pass to and vest in the government upon—
  - i. Issuance of the property for use in contract performance;
  - ii. Commencement of processing of the property for use in contract performance; or
  - iii. Reimbursement of the cost of the property by the government, whichever occurs first.

There are a number of key issues that need to be addressed here, including discussion of property management, identification, use, and disposition. The clause uses the word “all,” as in the government has title to “all property.” Yes, it must meet the FAR Part 31 criteria of being reasonable, allocable, and allowable, and, in addition, must be charged in accordance with the contractor's disclosure statement in compliance with the cost accounting standards where applicable. But the focus here is that the government uses the words “all property.” This verbiage is applied in both paragraphs (c)(2) and (c)(3). If we follow the logic of the *FAR* commenters, then this applies to all direct charged property and all indirect charged property. All the commenters cite this provision of the cost reimbursement government property clause as providing the government title to property charged both direct and indirect. These commenters' opinions are of sufficient magnitude to cause a goodly amount of concern.

Wall and Malaska provided examples of the types of property that, in their opinion, were applicable under the title

provisions of this clause. Items listed included “pencils, paper clips, (or award ribbons, half-eaten sandwiches, and funeral flowers).”<sup>12</sup> The use of hyperbole quite certainly can be used to make a point. In this case, it trivializes the potential impact to a contractor and the government since there are far larger and more significant items charged to overhead or through indirect charging. Items such as tooling, test equipment, and multiple capital assets may all have their costs accumulated and then placed into a cost pool that is charged to an overhead account. The title applications of the clause cannot be discounted and ignored for those larger items just because they were not used as examples or because they were inconvenient in the making of one's point.

This title application and its implications are critical because of its unintended consequences. The *FAR*'s cost reimbursement government property clause (52.245-5) continues in paragraph (c)(4) with the following statement: “All government-furnished property and all property acquired by the contractor, title to which vests in the government under this paragraph (collectively referred to as ‘government property’), are subject to the provisions of this clause.” In the cost reimbursement government property clause, we see that all of this property—both direct and indirect charged property—fall under the heading of “government property.” Again, it is critical to note that these aforementioned commenters all claimed in their comments to the *FAR* Secretariat that this clause included property charged indirect; as such we cannot change horses in midstream and say that it doesn't. Rather, if the statements found in paragraphs (c)(2) and (c)(3) give us title, then paragraph (c)(4) tells us how to define it and what to call it (i.e., “government property”).

The **FIGURE** on page 68 provides a visual representation of the natural flow of the cost reimbursement government property clause. When read in context, the implications of the government claiming title are far reaching. It should also be noted that these terms and conditions have existed for decades without significant change, first under the *Armed Services Procurement Regulation*, then the *Defense Acquisition Regulation*, then under the *FAR*. Which leads one to ask—were they wrong then or are they wrong now? Or might it be that the entire spectrum of title ramifications to indirect charged property were never fully realized, defined, discussed, and/or vetted?

If this property is now government property, then how must it be managed? Notice the use of the same sequential analysis in the cost reimbursement government property clause as was done for the progress payments clause. The reason for this is that the commenters did not bring their line of logic and reasoning to a natural conclusion. Their analysis, if correct, triggers application of unintended consequences.

**The Natural Flow of the Cost Reimbursement Government Property Clause**

**FAR 52.24-5(c) Title.**

(1) The government shall retain title to all government-furnished property.  
 (2) Title to all property purchased by the contractor for which the contractor is entitled to be reimbursed as a direct item of cost under this contract shall pass to and vest in the government upon the vendor's delivery of such property.  
 (3) Title to all other property, the cost of which is reimbursable to the contractor, shall pass to and vest in the government upon:  
 (i) Issuance of the property for use in contract performance;  
 (ii) Commencement of processing of the property for use in contract performance; or  
 (iii) Reimbursement of the cost of the property by the government, whichever occurs first.

**Defined as government property and, as stated by numerous legal opinions, includes both property charged direct and indirect**

**Naturally flows to...**

FAR 52.245-5(c)(4): All government-furnished property and all property acquired by the contractor, title to which vests in the government under this paragraph (collectively referred to as "government property"), are subject to the provisions of this clause.

**Naturally flows to...**

(d) *Use of government property.* The government property shall be used only for performing this contract, unless otherwise provided in this contract or approved by the contracting officer.

**Naturally flows to...**

(e) *Property administration.* The contractor shall be responsible and accountable for all government property provided under the contract and shall comply with FAR Subpart 45.5, as in effect on the date of this contract.

**Naturally flows to...**

(g) *Limited risk of loss.* The contractor shall not be liable for loss or destruction of, or damage to, the government property provided under this contract or for expenses incidental to such loss, destruction, or damage, except as provided in subparagraphs (2) and (3) below.

**Naturally flows to...**

(i) *Government property disposal.* Except as provided in paragraphs (i)(1)(i), (i)(2), and (i)(8)(i) of this clause, the contractor shall not dispose of government property until authorized to do so by the plant clearance officer.  
 (3) *Inventory disposal schedules.* (i) The contractor shall use Standard Form 1428, Inventory Disposal Schedule, to identify:  
 (A) Government-furnished property that is no longer required for performance of this contract, provided the terms of another government contract do not require the government to furnish that property for performance of that contract; and  
 (B) property acquired or produced by the contractor, to which the government has obtained title under paragraph (c) of this clause, that is no longer required for performance of that contract.

Under FAR 52.245-5(e), Property Administration, the government clearly directs that the contractor “shall comply with FAR Subpart 45.5, as in effect on the date of this contract.” If the commenters are correct, then the unintended consequence will have a significant impact upon contractors—specifically, virtually every contractor is in violation of their contract terms and conditions and is in breach.

## Identification of Government Property

Some of the commenters pointed out that there is no “indicia” of ownership placed upon this property.<sup>13</sup> That is quite true. The world of contract property management has not previously aligned itself with the numerous commenters that say the government has title to overhead property under cost reimbursement contracts. Property managers in both government and industry, when questioned, will tell you that they do not consider indirect charged property as government property. But if the aforementioned legal opinions all agree that the government does have title to both direct and indirect charged property, then, again, the contractors are in violation of the government property clause at FAR 52.245-5(c) and the incorporated provision at 45.506. If title to this property is vested in the government, then government property administrators have been remiss in their official government duties by not enforcing the rules regarding government property. Since the government has title, the *FAR* government property regulations require the contractor to identify, mark, and record the property in its property control records. Though this property may, in some cases, be material that does not require individual marking, it is expected that the box, bag, or bin that contains the material be marked in accordance with sound business practice. More importantly, tooling, test equipment, or general purpose equipment charged indirect now becomes subject to this requirement (i.e., 45.506) because the government has title and these items would need to be marked with an indication of government ownership and a serial number.

## Use of Government Property Governed by Regulation and Statute

The allowance for the use of government property is bound by regulation, but its unauthorized use is governed by statute. FAR 45.509 sets forth the allowance for use of government property. FAR 45.509-2(a) states that “the contractor’s procedures shall be in writing and adequate...[t]o assure that government property will be used for those purposes authorized in the contract and that any required approvals will be obtained.”

Government-owned material cannot be used for anything

other than the contract for which it was acquired. Some commenters cite the use of a multicontract cost and material control system (MCCMCS), as authorized under FAR 45.505-3, as allowing contractors to use material charged direct and indirect without individual government approvals.<sup>14</sup> However, MCCMCS is an outdated concept no longer in use, and which the FAR rewrite committee knew must be deleted. DOD’s *Defense Federal Acquisition Regulation Supplement (DFARS)* has set in place the Material Management Accounting System, but this system only applies to material and ignores the other implications for tooling, test equipment, and general purpose equipment.

One would need to ask about the use of tooling, test equipment, and other equipment that was charged to this contract through indirect charging. Where we could argue that it would be impossible to segregate the use of bathroom soap to a specific contract or commercial work, we quite clearly know when we are using a tool or a piece of test equipment—and on which project it is being used. If the government truly has title—and if that tooling, test equipment, or general purpose equipment was used on a commercial contract without proper government authorization—then the contractor is in violation of the provisions of United States Code (USC) at 18 U.S.C. 641, which can make them liable for fines, imprisonment, or both for the unauthorized use or conversion of government property in accordance with FAR 52.245-9. Therefore, the issue of title and use become inexorably linked if we are to agree that the government has title to property charged direct and indirect under cost reimbursement type contracts. One cannot read the title provisions of the clause, use it to make a point, and then ignore the other requirements of the clause.

Students of government property recognize one of the most critical aspects of this field is liability for the loss, damage, or destruction of government property while in the possession of the contractor. For government property (not progress payments inventory) there are two forms of liability applied through the *FAR*’s government property clauses: (1) the full risk of loss (ROL) provisions under paragraph (g) of 52.245-2, and (2) the limited ROL found under 52.245-2 (Alt. I) and 52.245-5(g). Since our discussion has focused on the cost reimbursement government property clause, that clause contains the limited ROL provisions where the government generally assumes the ROL. Therefore, if the government takes title to property charged indirect, and that material becomes government property, then, by the provisions of this clause, the government bears the ROL.

There are multiple iterations of the disposal section of the cost reimbursement government property clause. Prior to *Federal Acquisition Circular (FAC)* 2001-22, the direction for

disposition of government property under the cost reimbursement government property clause read as follows,

Upon completing this contract, or at such earlier dates as may be fixed by the contracting officer, the contractor shall submit, in a form acceptable to the contracting officer, inventory schedules covering all items of government property not consumed in performing this contract or delivered to the government. The contractor shall prepare for shipment, deliver f.o.b. origin, or dispose of the government property as may be directed or authorized by the contracting officer.

The clause requires the contractor to submit “inventory schedules”—generally a number of standard forms including Standard Form 1428 (or an electronic equivalent)—for all items of government property not consumed in performing a contract. It should be noted that the clause defined “government property” and the commenters all agreed that this definition—through the operation of the title paragraphs in the clause—included property charged both direct and indirect. If we look at the significant change to the disposal section of the cost reimbursement government property clause made in *FAC* 2001-22, we see even further instructions are provided to the contractor. Paragraph (i) reads:

The contractor shall not dispose of government property until authorized to do so by the plant clearance officer.... When the contractor determines that a property item acquired or produced by the contractor, to which the government has obtained title under paragraph (c) of this clause, is no longer needed for performance of this contract, the contractor, in the following order of priority:

- i. May purchase the property at the acquisition cost;
- ii. Shall make reasonable efforts to return unused property to the appropriate supplier at fair market value (less, if applicable, a reasonable restocking fee that is consistent with the supplier’s customary practices); and
- iii. Shall list, on Standard Form 1428, inventory disposal schedule, property that was not purchased under paragraph (i)(2)(i) of this clause, could not be returned to a supplier, or could not be used in the performance of other government contracts.

As far as inventory disposal schedules go, the *FAR* goes on to say:

The contractor shall use Standard Form 1428, Inventory Disposal Schedule, to identify...government-furnished property that is no longer required for performance of this contract, provided the terms of another government contract do not require the government to furnish that property for performance of that contract; and...property acquired or produced by the contractor, to which the government has obtained title under paragraph (c) of this clause, that is no longer required for performance of that contract.

Considering these facts, and the points made by the commenters, this leads us to another application of unintended consequences. Contractors and the government would again be in violation of the terms and conditions of their contracts, and, even worse, would also be in violation of law. The Federal Property and Administrative Services Act of 1949 (Property Act), as revised, set forth the statutory requirements for the proper disposal of government property and, in this instance, the law expands the definition of “government property” into “contractor inventory.” “Contractor inventory” is defined in the Property Act as:

1. Any property acquired by and in the possession of a contractor or subcontractor under a contract for which title is vested in the government and which exceeds the amounts needed to complete full performance under the entire contract;
2. Any property that the government is obligated or has the option to take over under any type of contract, e.g., as a result either of any changes in the specifications or plans thereunder or of the termination of the contract (or subcontract thereunder), before completion of the work, for the convenience or at the option of the government; and
3. Government-furnished property that exceeds the amounts needed to complete full performance under the entire contract.

The most critical point in this disposal process under the cost reimbursement government property clause, comparing the issue of disposal under the progress payments clause, is that there is no extinguishment of title under the cost reimbursement government property clause. Where there was a clear statement under the progress payments clause—stating that for anything left over, title is vested in the contractor—here, under the cost reimbursement government property clause, there is no return of title to the contractor. The government does not automatically relinquish its title after

contract completion or after determinations of excess or surplus. For the government to relinquish title to government property, very specific actions must be applied by an authorized government plant clearance officer in accordance with the priorities established under the Property Act.

## Conclusions and Recommendations

It would be disingenuous and intellectually dishonest to say that government property includes property charged direct and indirect under the progress payments clause and the cost reimbursement government property clause, and with the next breath say that the rules of property management do not apply to said property. The commenters make the case that statute requires this protection of title.<sup>15</sup> If we are to agree with that, then the government, in order to protect its financial investment, needs to claim title. If we agree that this benefits both the federal government and industry from a taxation viewpoint, we should understand. But, with that determination, the natural consequences of the government property clauses kick in.

Since FAR 52.245-5 has, for all intents and purposes, been eliminated, and the new government property clause of 52.245-1 has been installed, action is clearly warranted to resolve the property management issues that have been discussed in this article. FAR 52.245-1 was published on May 14, 2007, with the revised title language, bringing it back to the same verbiage that existed in the FAR since its original publication on April 1, 1984. Unfortunately, it did not solve the issue of title to indirect charged property and still allows for confusion. If this material is truly “government property,” as defined in 45.101, then a course of action and clarification in the FAR is needed in regard to the direction for property management in Part 45 and the government property clauses for:

- The management of indirect charged property;
- The identification of indirect charged property;
- The use of indirect charged property;
- The liability for loss, damage, or destruction of indirect charged property; and
- The disposition of indirect charged property.

For the mass amounts of government property in the possession of contractors, it is imperative for the FAR Council to resolve and clarify these issues before more lawsuits erupt and the waters become even muddier in regard to title. *JCM*

## ENDNOTES

1. See Nash, R. and J. Cibinic, “Progress Payments Inventory: Fighting Over the Bones,” *Nash and Cibinic Report*, 2 January 1988; “Progress Payments Inventory: Another Government Win,” *Nash and Cibinic Report*, 4 January 1990; and, “Title to Overhead Items: Confusion Between Accounting Rules and Ownership of Property,” *Nash and Cibinic Report*, 13, October 1999.
2. Wall, R.J. and R.P. Malayska, “Government’s Title to Pencils, Paper Clips, and other Overhead Items,” *Public Contract Law Journal*, 32, 563, 2003.
3. Wyatt, J.B., “The Issue of Title: A Government Merry-Go-Round that Has Finally Stopped?” *Journal of Contract Management*, 4 (1), 2006.
4. FAR Case 2004-025 solicited comments on the proposed FAR rule regarding government property. These comments may be found at: <http://acquisition.gov/comp/far/PublicComments/2004-025.PDF>.
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