

Revoking the Government's Assumption of Risk

Office of Primary Responsibility: **Aircraft Operations Executive Director**

Effective: October 1, 2024

Approved by: CAPT Brian McElwain, USN, Executive Director, Aircraft Operations

INTRODUCTION.

This job aid was written to provide background and clarifying guidance on removing the liability provisions from the clause, DFARS 252.228-7001, Ground and Flight Risk (GFRC). This process should not be taken lightly. It should only be accomplished after consultation with the assigned ACO, regional DAO, assigned Office of Counsel, DCMA-AO, PCO, and the Program Manager.

GFRC AND GOVERNMENT ASSUMPTION OF RISK (LIABILITY).

There are now two versions of the GFRC that are on current contracts. Some locations may have both versions in effect. While the conditions and coordination requirements that lead to removing the Government's Assumption of Risk remain the same, the processes are slightly different. The 2010 GFRC requires a "15-day Letter" whereas the 2023 GFRC requires both a "Preliminary Notice of Revocation" and a "Notice of Revocation" if the conditions cited in the preliminary notice are not addressed.

The 2010 GFRC paragraph (c) states, "Subject to the conditions in paragraph (d) of this clause [paragraph (b) binds the contractors to DCMA INST 8210.1], 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 [Sections A- H of the contract] 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."

The conditions for Government self-insurance are found in the 2010 GFRC paragraph (d) of the clause. There are only two conditions listed. The first being that coverage shall continue unless the contracting officer finds that the Contractor has failed to comply with paragraph (b) [again referring to 8210.1] of the clause. Note that when the term contracting officer is used in FAR and DFARS, it usually refers to PCOs. However, in this case, it is generally accepted that ACOs are responsible for the execution of the GFRC and are authorized to act for the PCO per their delegation. Note also that not all contractor employees can be said to have "failed to comply with paragraph (b)." The Clause here is referring to later text found in paragraph (e)(1) "...failure of the Contractor, due to willful misconduct or lack of good faith of any of the Contractor's managerial personnel..." So towing an aircraft into a hangar door by failing to follow the towing procedures is not necessarily grounds for removal of the Government's assumption of risk, or for determining not to cover the contractor for damage costs above the deductible amounts described in the clause. However, if the contractor's senior managerial personnel were directly supervising the tug operation and not following the approved towing procedure, then that might constitute a case. That is, a foreman on the floor is not senior management personnel, but a plant manager may be.

The second condition from paragraph (d) is that coverage shall continue unless the aircraft is "in the open" under unreasonable conditions, and the Contractor fails to take prompt corrective action. It is this part of the GFRC that goes to the heart of the liability removal process.

Before continuing it should be noted that exceptions to the Government self-insurance are found in the 2010 GFRC at paragraph (e). This is an important paragraph in the GFRC but not relevant to removal liability because the exclusions listed in paragraph (e) describe conditions where liability coverage does not exist regardless of ACO actions.

The 2023 GFRC cleans this up and combines the basic premise of the old (c) and (d) into the new paragraph (c). The old paragraph (e) is now the new paragraph (d), which are the list of exceptions.

REMOVING LIABILITY WITHIN THE GFRC.

In addition to listing the two conditions for Government liability, both the 2010 GFRC paragraph (d) and the 2023 GFRC paragraph (e) describe what happens when the Contracting Officer determines those conditions are not being met. This is where the differences in process are defined. For 2010 GFRC, it states the Contracting Officer shall notify the contractor in writing and shall require the contractor to make corrections within a reasonable time. A reasonable time refers to 12:01 a.m. on the fifteenth day following the day the written notice is received by the contractor, see paragraph (d)(3). After which time the Contracting Officer may terminate the Government's assumption of risk for any aircraft in the open under the cited conditions. For the 2023 GFRC, the directions include the two-step process as noted above. This process is also described for the contracting officer in DFARS 228.370-2 paragraph (h).

LIABILITY REMOVAL PROCESS.

Unreasonable conditions identified through APT surveillance are brought to the attention of the ACO. Examples include but are not limited to: Procedures not submitted prior to work commencing, firefighting/fire suppression shortfalls with no approved waiver or plan to fix, and systemic Procedures non-compliance.

APTs should attempt to resolve issues with the contractor through corrective action requests, open discussions, goal setting, and other conflict resolution tools. Thoroughly document all steps taken (including timelines) to resolve the cited issues.

Once it is determined that ACO intervention is needed, the 2010 GFRC paragraph (d) and 2023 paragraph (e) describe the process requirements. It does not require internal CMO/program office discussions, but this is not something that should be accomplished in a vacuum. Recommend the following:

- a. Review the GFRC.
- b. Gather pertinent documentation concerning the cited issues, including the timeline for attempted resolution.
- c. Discuss plan to have 15-day letter (or Preliminary Notice of Revocation) issued with ACO, PCO, CMO commander, Legal Counsel office and the Regional DAO. If both 2010 and 2023 versions are active at this site, issue the Preliminary Notice of Revocation with a 15-day suspense which will satisfy both versions. DCMA-AO may also be consulted.
- d. Prior to issuing the letter, the CMO commander should send a SITREP to the DCMA Director, since removing the Government's assumption of risk is equivalent to issuing a Level IV CAR.

- e. Either the ACO or PCO may issue the letter but consider having Legal Counsel either create the first draft, or at a minimum review the final prior to sending to the contractor. (Note: for the purposes of further discussion and examples this job aid will assume the ACO will issue the letter.)
- f. When drafting the 15-day letter or Preliminary Notice of Revocation, consider tying it to a Level III CAR as a way of preparing exit criteria (for eventually revoking the letter). This way, the letter can be rescinded after the containment portion of the CAR is completed, but the Level III CAR can still carry-on corrective action plans long after the liability abeyance letter goes away. This would be a recommended approach if completing all corrective actions is not feasible within 15 days, or the time specified in the Preliminary Notice of Revocation. The contractor will be wanting to know what will be required to rescind the letter, so APTs should be ready to address their queries. If going down this path, it is unlikely that the issue will be resolved in 15 days or the allotted time. Therefore, recommend identifying those conditions that will allow the Government to resume the assumption of risk while the final solution to the issue is being achieved.
- g. Per the 2010 GFRC paragraph (d)(3), the termination will be effective at 12:01 a.m. on the 15th day following the day the written notice is received by the contractor. Recommend hand carrying the notice or requesting a delivery receipt so that a termination date can be included in the text of the notice. If using a Preliminary Notice of Revocation, the next step is to issue the Notice of Revocation at the end of the allotted time. Again, if both versions of GFRC are active at the site, use 15 days as the allotted time in the Preliminary Notice.

After receiving either notice from the contracting officer, the contractor is expected to promptly correct the cited conditions regardless of whether they agree with those conditions.

If the reason for the notice is due to having no approved Procedures, the GFR is prohibited from approving crewmembers or flights. Any previously approved flights (via approval of monthly/weekly flight schedules) must be rescinded.

Continue working with the contractor to resolve the issues that led to the 15-day notice.

The contractor must promptly notify the ACO once the issues have been resolved. Per paragraph (d)(5)(i), if the issues are resolved after the 15 days have elapsed (or a Notice of Revocation has been issued) and 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 assumption of risk.

The notification resuming the Government's assumption of risk must be done through a letter. One such resumption letter contained the following text as a way of ensuring the contractor understands that the Government's position on resuming liability coverage is trust but verify and stands as a benchmark statement:

"While your containment efforts to mitigate the immediate risk to the aircraft are sufficient grounds to allow the Government to resume Assumption of Risk of Loss under GFRC, this letter establishes the requirement for bi-weekly updates of your progress on corrective actions to eradicate the root causes of your failure to comply with the requirements of GFRC. If your continued progress is found to be insufficient at any of these bi-weekly

reviews, the Government reserves the right to withdraw assumption of risk of loss at midnight on the 15th day after formal notification to the contractor of insufficient progress."

ADDITIONAL INFORMATION.

Per the 2010 GFRC paragraph (d)(6) and the 2023 GFRC Paragraph (e)(6), the Government's revocation 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."

Per the 2010 GFRC paragraph (h) or 2023 GFRC paragraph (f), any costs the contractor incurs for insurance are expressly unallowable costs. This includes insurance to cover the contractor's share of loss under the clause or when Government liability has been terminated via the provisions of paragraph (d). Make sure the assigned ACO is aware of these restrictions.

Per the 2010 GFRC paragraph (d)(4)(iii) or the 2023 GFRC (e)(4)(iii), the liability provisions of the Government Property clause do not apply to GFRC aircraft even when Government liability has been removed. Make sure the assigned ACO and Property Administrator (PA) are aware of this restriction.

Per DCMA-INST 8210.1C, Change 1, paragraph 3 and DCMA-INST 8210-1D paragraph 3.1, contractors shall not begin flight or ground operations until the Procedures have been approved in writing by the GFR. If the Procedures are not approved during the 15-day notice period, it does not require the contractor to stop performing any or all contract work. It also has no effect on the Government's liability or contractor's share of loss per the 2010 GFRC paragraph (f)(5) and the 2023 GFRC paragraph (h)(4). Further, GFRs cannot issue stop work orders. ACOs, however, can issue such orders. Without a stop work order in place, should the contractor continue to operate without approved procedures or while the cited unreasonable conditions exist, it would constitute a contract deficiency and possible breach because it violates 8210-1 paragraph 3. Consider issuing an appropriate level CAR to address the deficiency.

It may be possible to cite willful misconduct as a reason for not providing liability coverage should the aircraft be damaged while under the unreasonable conditions cited by the ACO. This is something that should be discussed between the Contracting Officers and assigned Counsel.

Recommend not removing liability coverage for just one operation. That is, removing the Government's assumption of risk for when they tow an aircraft but continue liability coverage for all other operations while the towing deficiency that led to the 15-day letter is being resolved. This all or nothing approach is in line with the requirement to have a full set of Procedures prior to approving crewmembers and flights.

EXAMPLE 15 DAY LETTER.

[Letterhead]

Mr. Joe Contractor
Acme North America
1234 Eye of Newt St. NW
Spotsylvania, VA 22551

[date]

SUBJECT: Ground and Flight Risk Liability Termination Notice

Reference: (a) DFARS 252.228-7001
(b) DCMA Instruction 8210.1C, Change 1
(c) Government Flight Representative (GFR) Surveillance Summary Report
(d) Contract FA1234-20-C-0001-0002

Dear Mr. Contractor:

[Systemic issues discovered during surveillance example.]

Upon reviewing the safety issues described in reference (c), I have determined that the aircraft under the reference (d) contract are in the open and under unreasonable conditions. Acme is directed to take prompt corrective actions to correct the conditions described in the report, regardless of whether the company agrees that the conditions are unreasonable.

Later, should it be determined that Acme failed to act promptly to correct the conditions described in reference (c), or failed to correct the conditions within a reasonable time, the Government shall terminate its assumption of risk provided by reference (a) for any and all aircraft in the open and under the cited conditions. The termination will be effective at 12:01 a.m. on [date] [The fifteenth day following the day the written notice is received by the Contractor. Consider hand carrying the letter to the contractor to set a specific date.]

[Deficiencies in Procedures example]

Reference (b) pertains to the responsibility of the contractor to develop and maintain specific Procedures for all flight and ground operations at all operating facilities and/or locations. Based on the information described in reference (c), the Government has not received all required Procedures for the Spotsylvania, VA operating facility, and the Government is on notice that Acme has not and does not intend to provide these required Procedures for the test flights to be accomplished in Aruba under order 0002 of the reference (d) contract.

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In accordance with reference (b), unless the required Procedures are submitted by Acme and approved by the GFR, effective 12:01 a.m. on [date] [The fifteenth day following the day the written notice is received by the Contractor. Consider hand carrying the letter to the contractor to set a specific date.], I will terminate the Government's risk acceptance of all Ground and Flight Operations of U.S. Government aircraft in conjunction with the reference (d) contract.

Per references (a) and (b), no crewmembers or flights may be approved by the GFR prior to GFR approval of the required Procedures. The Government assumes no liability for any flights performed under contract without GFR approval.

Upon withdrawal of the Government's assumption of risk, Acme shall thereafter assume the entire risk for damage, loss, or destruction of, the affected aircraft.

Direct questions and concerns to [ACO] at mary.b.aco.civ@mail.mil, or 804-123-4567, or to [GFR] Major Joe Pilot, joseph.b.pilot.mil@mail.mil, or 804-765-4321.

Sincerely,

MARY B. ACO
Administrative Contracting Officer

Attachment:
GFR Surveillance Summary Report

cc:
Program Manager
PCO
Region Commander
CMO Commander
GFR
Region DAO
DCMA AO

EXAMPLE PRELIMINARY NOTICE OF REVOCATION

[Letterhead]

Mr. Joe Contractor
Acme North America
1234 Eye of Newt St. NW
Spotsylvania, VA 22551

[date]

SUBJECT: Preliminary Notice of Revocation of the Government's Assumption of Risk

Reference: (a) DFARS 252.228-7001
(b) DCMA Instruction 8210-1D
(c) Government Flight Representative (GFR) Surveillance Summary Report
(d) Contract FA1234-20-C-0001-0002

Dear Mr. Contractor:

[Systemic issues discovered during surveillance example.]

Upon reviewing the safety issues described in reference (c), I have determined that the aircraft under the reference (d) contract are in the open and under unreasonable conditions. Acme is directed to take prompt corrective actions to correct the conditions described in the report, regardless of whether the company agrees that the conditions are unreasonable.

Later, should it be determined that Acme failed to act promptly to correct the conditions described in reference (c), or failed to correct the conditions within a reasonable time, the Government shall withdrawal its assumption of risk provided by reference (a) for any and all covered aircraft under the cited conditions. If the cited conditions are not corrected, or adequate mitigation measures instituted, in [XX] days, a formal Notice of Revocation will be issued.

[Deficiencies in Procedures example]

Reference (b) pertains to the responsibility of the contractor to develop and maintain specific Procedures for all flight and ground operations at all operating facilities and/or locations. Based on the information described in reference (c), the Government has not received all required Procedures for the Spotsylvania, VA operating facility, and the Government is on notice that Acme has not and does not intend to provide these required Procedures for the test flights to be accomplished in Aruba under order 0002 of the reference (d) contract.

In accordance with reference (b), unless the required Procedures are submitted by Acme and approved by the GFR by [date], I will issue a Notice of Revocation of the Government's assumption of risk of all Ground and Flight Operations of U.S. Government aircraft in

conjunction with the reference (d) contract.

Per references (a) and (b), no crewmembers or flights may be approved by the GFR prior to GFR approval of the required Procedures. The Government assumes no liability for any flights performed under contract without GFR approval.

Upon termination of the Government's assumption of risk, Acme shall thereafter assume the entire risk for damage, loss, or destruction of, the affected aircraft.

Direct questions and concerns to [ACO] at mary.b.aco.civ@mail.mil, or 804-123-4567, or to [GFR] Major Joe Pilot, joseph.b.pilot.mil@mail.mil, or 804-765-4321.

Sincerely,

MARY B. ACO
Administrative Contracting Officer

Attachment:
GFR Surveillance Summary Report

cc:
Program Manager
PCO
Region Commander
CMO Commander
GFR
Region DAO
DCMA-AO

EXAMPLE NOTICE OF REVOCATION

[Letterhead]

Mr. Joe Contractor
Acme North America
1234 Eye of Newt St. NW
Spotsylvania, VA 22551

[date]

SUBJECT: Notice of Revocation of the Government's Assumption of Risk

Reference: (a) DFARS 252.228-7001
(b) DCMA Instruction 8210-1D
(c) Government Flight Representative (GFR) Surveillance Summary Report
(d) Contract FA1234-20-C-0001-0002
(e) Preliminary Notice of Revocation dtd [date]

Dear Mr. Contractor:

[Systemic issues discovered during surveillance example.]

In accordance with reference (e), I have determined that Acme failed to act promptly to correct the conditions described in reference (c) and failed to correct the conditions within the allotted time. Therefore, the Government formally withdraws its assumption of risk provided by reference (a) for any and all covered aircraft under the cited conditions.

With this revocation of the Government's assumption of risk, Acme shall thereafter assume the entire risk for damage, loss, or destruction of, the affected aircraft.

Direct questions and concerns to [ACO] at mary.b.aco.civ@mail.mil, or 804-123-4567, or to [GFR] Major Joe Pilot, joseph.b.pilot.mil@mail.mil, or 804-765-4321.

Sincerely,

cc:
Program Manager PCO
Region Commander
CMO Commander
GFR
Region DAO
DCMA-AO