

and discussion at the public meeting focused on the audit policy and are addressed in this final rule. The following summarizes the comments regarding audit policy and the disposition.

The following is a summary of the public input and the DoD response thereto (the source of the input is annotated after each comment):

#### A. General

1. *Public Comment:* The policy will discourage nontraditional Defense contractors from doing business with DoD (written public comments—five commenters).

*DoD Response:* A key concept of our form of government is accountability for its resources. DoD recognizes the balance that must be achieved between encouraging nontraditional contractors to do business with the DoD and the key concept of accountability for public funds. DoD believes there are certain instances when the government, either through use of an Independent Public Accountant (IPA) or a government employee, must have access to the awardee's books and records. However, in response to this and other comments, a number of revisions have been made to the proposed rule to reduce the potential for discouraging nontraditional Defense contractors. These revisions include raising the mandatory applicability requirements to \$5 million per cost-type agreement, providing for a deviation from the mandatory applicability requirements for agreements in excess of \$5 million, specifying instances in which the government could have no direct access to the contractor's books and records, and specifying that the government will make copies of IPA work papers when there is evidence that the audit has not been properly performed.

2. *Public Comment:* The value of the expanded policy and oversight is questionable (written public comment—one commenter).

*DoD Response:* DoD believes there is value in having an access to records policy that properly balances the need to encourage contractor participation with the need to obtain access to records necessary to ensure compliance with the terms of the agreement. However, DoD recognizes that the proposed rule needed to be revised to provide more flexibility towards achieving this balance.

3. *Public Comment:* Balance the need for audit access with the possible loss of access to technology (public meeting).

*DoD Response:* DoD agrees there must be an appropriate balance between the need to access new technologies and the

level of access required to assure compliance with the terms of the agreement. DoD believes the final rule achieves this appropriate balance.

4. *Public Comment:* Review the language throughout the rule to ensure consistency of terms (public meeting).

*DoD Response:* DoD has reviewed the terms in the final rule to ensure consistency.

5. *Public Comment:* Revise the tone and verbiage of the proposed rule to reduce the perception of intrusion (public meeting).

*DoD Response:* DoD believes the final rule reduces the perception of intrusion noted at the public meeting. For example, the final rule states that the purpose of the government's review of an IPA's work papers is to verify compliance with Generally Accepted Government Auditing Standards (GAGAS). The rule also states that the government has no direct access to awardee records for nontraditional Defense contractors that refuse to accept government access. Another example is the language that provides for the government to make copies of audit work papers only if the audit has not been performed in accordance with GAGAS. Finally, the length and extent of audit access language specifies that access should be provided only to the extent needed to verify the actual costs or statutory cost share.

#### B. Definitions

1. *Public Comment:* Definition of "Key Participant" should be clarified for applicability to subawardees and their segments (written public comments—two commenters).

*DoD Response:* Revisions to the proposed rule have eliminated the need for the term "key participant" in the final rule.

2. *Public Comment:* Delete or define terms "subordinate element" and "awardee" (written public comments—two commenters).

*DoD Response:* Revisions to the proposed rule have eliminated the need for the term "subordinate" in the final rule. The term "awardee" was defined in the final rule issued on August 27, 2002 (67 FR 54955), regarding conditions for use.

3. *Public Comment:* Define "Qualified Independent Public Accountant" (written public comment—one commenter).

*DoD Response:* The final rule provides a definition of a "Qualified Independent Public Accountant."

#### C. Statutory Basis

*Public Comment:* Withdraw audit policy and clauses in their entirety

because they are not required or implied by statute, rule, or regulation. The audit policy is not supported by legislative direction and not tailored to implement changes in 2000 or 2001 DoD Authorization Acts. The audit policy should incorporate only those provisions in section 803 of the FY 2000 DoD Authorization Act (written public comments—two commenters).

*DoD Response:* DoD does not believe the policy should be withdrawn. DoD believes that issuance of this final rule is consistent with the statutory requirements for the use of other transactions. The statutory authority for other transactions specifically requires, at 10 U.S.C. 2371, that the Secretary of Defense " \* \* \* shall prescribe regulations to carry out this section." DoD believes that this access to records policy is consistent with that statutory requirement.

#### D. Flexibility

1. *Public Comment:* Replace audit policy with a general statement such as "If the Agreements Officer determines that an audit right is required, the coverage, length and extent shall be mutually agreed to by the parties. The audit shall be performed by an independent auditor that is mutually acceptable to the parties, and all audit expenses shall be reimbursed by the government" (written public comment—one commenter).

*DoD Response:* For agreements that are less than \$5 million, DoD agrees that general language providing the Contracting Officer with flexibility in negotiating the coverage, length, and extent of access is appropriate. DoD believes that, for cost-type agreements in excess of \$5 million, more specific policy is necessary. However, the final rule provides flexibility to deviate from the specific policy when supported by the particular facts and circumstances.

2. *Public Comment:* Rely on awardee's internal auditors, certification of accounting procedures and documentation, and if necessary a tailored audit clause providing limited access for independent auditor (written public comment—one commenter).

*DoD Response:* DoD does not believe it is sufficient to rely on an awardee's internal auditors when cost-type agreements provide for government payments that exceed \$5 million. DoD agrees that access is limited to those records that are needed to verify the established cost-share, actual costs or reporting used as the basis for payments.

3. *Public Comment:* Limit audits to post-verification of cost sharing only. Costs incurred should not be subject to