

#### IV. Reference

The following reference has been placed on display in the Division of Dockets Management (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday, and is available electronically at <http://www.regulations.gov>.

1. DEN130047: De Novo Request per 513(f)(2) from Ergon Medical Ltd., dated November 21, 2013.

#### List of Subjects in 21 CFR Part 876

Medical devices.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 876 is amended as follows:

#### PART 876—GASTROENTEROLOGY—UROLOGY DEVICES

- 1. The authority citation for 21 CFR part 876 continues to read as follows:

**Authority:** 21 U.S.C. 351, 360, 360c, 360e, 360j, 360l, 371.

- 2. Add § 876.5025 to subpart F to read as follows:

#### § 876.5025 Vibrator for climax control of premature ejaculation.

(a) *Identification.* A vibrator for climax control of premature ejaculation is used for males who suffer from premature ejaculation. It is designed to increase the time between arousal and ejaculation using the stimulating vibratory effects of the device on the penis.

(b) *Classification.* Class II (special controls). The special controls for this device are:

- (1) The labeling must include specific instructions regarding the proper placement and use of the device.
- (2) The portions of the device that contact the patient must be demonstrated to be biocompatible.
- (3) Appropriate analysis/testing must demonstrate electromagnetic compatibility safety, electrical safety, and thermal safety of the device.
- (4) Mechanical safety testing must demonstrate that the device will withstand forces encountered during use.

Dated: May 21, 2015.

**Leslie Kux,**

*Associate Commissioner for Policy.*

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#### DEPARTMENT OF DEFENSE

##### Office of the Secretary

#### 32 CFR Part 243

[Docket ID: DOD-2013-OS-0130]

RIN 0790-AJ08

#### Ratemaking Procedures for Civil Reserve Air Fleet Contracts

**AGENCY:** USTRANSCOM, DoD.

**ACTION:** Final rule.

**SUMMARY:** Section 366 of the National Defense Authorization Act for Fiscal Year 2012 directs the Secretary of Defense to determine a fair and reasonable rate of payment for airlift services provided to the Department of Defense by air carriers who are participants in the Civil Reserve Air Fleet Program. The Department of Defense (the Department or DoD) is promulgating regulations to establish ratemaking procedures for civil reserve air fleet contracts as required by Section 366(a) in order to determine a fair and reasonable rate of payment.

**DATES:** This final rule is effective on June 29, 2015.

**FOR FURTHER INFORMATION CONTACT:** Mr. Richard Gates, Chief, Acquisition Law, USTRANSCOM/TCJA, (618) 220-3982 or Mr. Jeff Beyer, Chief, Business Support and Policy Division, USTRANSCOM/TCAQ, (618) 220-7021.

#### SUPPLEMENTARY INFORMATION:

##### Background

The Civil Reserve Air Fleet (CRAF) is a wartime readiness program, based on the Defense Production Act of 1950, as amended, (50 U.S.C. App. 2601 *et seq.*), and Executive Order 13603 (National Defense Resource Preparedness), March 16, 2012, to ensure quantifiable, accessible, and reliable commercial airlift capability to augment DoD airlift and to assure a mobilization base of aircraft available to the Department of Defense for use in the event of any level of national emergency or defense-orientated situations. As a readiness program, CRAF quantifies the number of passenger and cargo commercial assets required to support various levels of wartime requirements and thus allows DoD to account for their use when developing and executing contingency operations and war plans. In addition, the CRAF program identifies how DoD gains access to these commercial assets for operations by defining the authorities and procedures for CRAF activation. Finally, the program helps ensure that the DoD has reliable lines of communication and a common

understanding of procedures with the carriers.

The United States Transportation Command (USTRANSCOM) negotiates and structures award of aircraft service contracts with certificated civilian air carriers willing to participate in the CRAF program in order to ensure that a mobilization base of aircraft is capable of responding to any level of defense-orientated situations.

The ability to set rates maintains the CRAF program's great flexibility to have any air carrier in the program able to provide aircraft within 24 hours of activation to fly personnel and cargo to any location in the world at a set rate per passenger or ton mile, regardless of where the air carrier normally operates. It also provides the Secretary of Defense the ability to respond rapidly to assist in emergencies and approved humanitarian operations, both in the United States and overseas where delay could result in more than monetary losses. The Government-set rate allows contracts to any location, sometimes awarded within less than an hour, and provides substantial commercial capability on short notice.

During the initial CRAF program years (between 1955 and 1962), ratemaking to price DoD airlift service relied upon price competition to meet its commercial airlift needs. This procurement method resulted in predatory pricing issues and failed to provide service meeting safety and performance requirements. Congressional Subcommittee hearings held at the time determined price competition to be non-compensatory and destructive to the industry. As a result, the ratemaking process was implemented under the regulatory authority of the Civil Aeronautics Board (CAB). Ratemaking continued under the CAB until deregulation in 1980. At that time, civil air carriers and DoD's contracting agency for long-term international airlift, the Military Airlift Command (MAC), agreed by a memorandum of understanding (MOU) that CAB methodologies by which rates for DoD airlift were established produced fair and reasonable rates and furthered the objectives of the CRAF program; and therefore, the parties agreed to continue to use CAB methodologies for establishing MAC uniform negotiated rates under an MOU renewed every five years. MAC became Air Mobility Command (AMC) on June 1, 1992. Ratemaking continued under AMC until January 1, 2007, when DoD's contracting authority for long-term international airlift was transferred from AMC to USTRANSCOM. On December 31, 2011, the National Defense

Authorization Act for Fiscal Year 2012 (FY12 NDAA) (Pub. L. 112–81) was signed into law. Section 366 of the FY12 NDAA, codified at 10 U.S.C. 9511a, authorized and directed the Secretary of Defense to determine a fair and reasonable rate of payment made to participants in the CRAF program. This rule effectuates Section 366.

This rule broadly tracks the longstanding ratemaking procedures for CRAF contracts in all substantial elements and the ratemaking methodologies supporting the pricing of airlift services as described in previous and current MOUs between certificated civilian air carriers willing to participate in the CRAF program and USTRANSCOM and USTRANSCOM predecessor entities.

In addition to compliance with this rule, CRAF participants, consistent with past practice, will be expected to enter into a MOU with USTRANSCOM where they will be expected to furnish USTRANSCOM, as a condition of its continued participation in the CRAF program, with the financial and operational information required by USTRANSCOM to adequately make a determination of fairness and reasonableness of price. This rule will have no impact on air operators or certificated air carriers not participating in the CRAF program. Nor does it impact non-CRAF services provided by CRAF participants.

Section 366, Ratemaking Procedures for Civil Reserve Air Fleet, is being amended by adding a new section that authorizes the Secretary of Defense to determine a fair and reasonable rate of payment for airlift services provided to the Department of Defense by air carriers who are participants in the Civil Reserve Air Fleet program; and authority to prescribe regulations to implement rate making procedures.

USTRANSCOM published a proposed rule in the **Federal Register** on May 14, 2014 (79 FR 27516). The proposed rule effectuates Section 366 of the FY12 NDAA, codified at 10 U.S.C. 9511a, which authorized and directed the Secretary of Defense to determine a fair and reasonable rate of payment made to participants in the CRAF program.

#### Comment and Responses

In the proposed rule, which published in the **Federal Register** on May 14, 2014 (79 FR 27516–27521), USTRANSCOM provided the public a 60-day comment period which ended July 14, 2014. USTRANSCOM received one comment.

*Comment:* The comment recommends clarification to the introduction provided in § 243.8, *Application of FAR Cost Principles*. The commentor

believes the proposed rule, which states “. . . procedures differ from the following provisions . . .” is ambiguous, and recommended a clarification that portions of the cost principles identified in that section are applicable and exceptions are appropriate only when the unique ratemaking requirements of the CRAF program prohibit their application. The commentor believes this change will preserve allow-ability considerations in the cost principles not affected by the unique CRAF program requirements.

*Response:* The Rule provides that USTRANSCOM may utilize principles contained in the Federal Acquisition Regulations (FAR), as supplemented, in establishing the rate of payment for aircraft supporting CRAF. The Rule clearly notes that procedures used in establishing rates differ from the provisions of FAR Part 31 and DFARS Part 231 identified in § 243.8. This is necessary because airline accounting systems are established to report costs in accordance with the Department of Transportation requirements found at 14 CFR part 241. However, nothing in § 243.8 limits in any manner, USTRANSCOM’s use or application of the identified cost principles or portions thereof, as appropriate, in establishing fair and reasonable rates of payment. No further clarification is required.

#### Description of the Regulation, by Section

*Sections 243.1 through 243.3. Purpose, Applicability, and Definitions.* No further descriptions are provided in this section. These sections of the regulation are self explanatory.

*Section 243.4(a).* In establishing fair and reasonable rate of payments for airlift service contracts in support of CRAF, USTRANSCOM may utilize the principles contained in the Federal Acquisition Regulation, as supplemented. Specific differences are as noted at § 243.8 of the regulation.

*Sections 243.4(c) and (d) Analysis and Rates.* Details for the current ratemaking cycle can be located on FedBizOps under the Proposed Uniform Rates and Rules and Final Uniform Rates and Rules, which can be located at [https://www.fbo.gov/index?s=opportunity&mode=form&id=3ae87338a903f3e6e43a2627941dbb1c&tab=core&\\_cview=1](https://www.fbo.gov/index?s=opportunity&mode=form&id=3ae87338a903f3e6e43a2627941dbb1c&tab=core&_cview=1).

*Sections 243.4(e)(1) through (e)(6) Components of the Rate.* Additional insight in this area is included in the current Memorandum of Understanding (FY13 through FY17), which can be found at <https://www.fbo.gov/index?s=opportunity&mode=form&id=3ae87338a903f>

[3e6e43a2627941dbb1c&tab=core&\\_cview=1](https://www.fbo.gov/index?s=opportunity&mode=form&id=3e6e43a2627941dbb1c&tab=core&_cview=1).

*Section 243.4(f) Contingency Rates.* Authority is reserved to the Commander, USTRANSCOM, to implement a higher temporary rate if USTRANSCOM determines that the established rate of payment is insufficient to allow successful mission operations. These temporary contingency rates are used at the Commander, USTRANSCOM’s discretion during conditions such as outbreak of war, armed conflict, insurrection, civil or military strife, emergencies, or similar conditions and are adjusted to reflect possible limited backhaul opportunities. These rates would continue until it is determined by the Commander, USTRANSCOM that such rates are no longer needed to ensure mission accomplishment or sufficient data has been obtained to establish a new rate, after which the contingency rates would cease.

*Section 243.5 Commitment of Aircraft as a Business Factor.* For the purpose of rate making, the average fleet cost of aircraft proposed by the carriers for the forecast year is used. Actual awards to CRAF carriers are based upon the aircraft accepted into the CRAF program. Aircraft are assigned to stages in a manner designed to spread the risk among all carriers proportionate to the airline total commitment and capability; as an example, all air carriers are required to have a minimum of one aircraft in Stage I but each carrier’s total aircraft in Stage I cannot exceed ~15% of the passenger or cargo requirement.

*Section 243.6 Exclusions from the uniform negotiated rate.* No further description is provided in this section. This section of the regulation is self explanatory.

*Section 243.7 Inapplicable provisions of law.* Consistent with the requirements of Section 366, this section provides that determining the rate of payment for an airlift service contract will not be subject to the provisions of Section 2306a of Title 10, United States Code, entitled *Cost or Pricing Data: Truth in Negotiations Act* or subsections (a) and (b) of Section 1502 of Title 41, United States Code, entitled *Cost Accounting Standards*.

*Section 243.8 Application of FAR cost principles.* Some FAR cost principles contained in FAR Part 31 and DFARS 231 are modified for use in the ratemaking process. There are two primary reasons for this:

First, compliance with certain principles is not possible for airline carriers. Airline accounting systems are established to report costs in accordance with the Department of Transportation

requirements found at 14 CFR part 241. These requirements generally do not allow carriers to assign costs directly to a final cost objective, or contract. Contractors who do not assign costs directly to a contract cannot comply with FAR 31.202. Additionally, 14 CFR part 241 directs an air carrier to financially account for property taxes in General and Administrative expense, whereas FAR 31.205–41(c) directs contractors to account for these taxes directly to a final cost objective. Therefore, simply by complying with requirements of 14 CFR part 241 (required by the Department of Transportation), CRAF carriers cannot be in compliance with certain principles at FAR 31 and DFARS 231.

Secondly, selected cost principles must be modified in order to maintain uniformity across the industry when developing a uniform rate of payment. An example of this can be found at FAR 31.205–11, Depreciation. This principle requires contractors limit depreciation to the amount used for financial accounting purposes and in a manner consistent with depreciation policies and procedures followed in the same segment of non-Government business. Under the Department's ratemaking process, all depreciation values are pre-established in order to maintain uniformity within the rate. These depreciation values are as indicated in the MOU. Therefore, the FAR cost principle outlining depreciation requirements cannot be applicable to the ratemaking process.

*Section 243.9 Carrier site visits.* No further description is provided in this section. This section of the regulation is self explanatory.

*Sections 243.10 and 243.11 Disputes and Appeals of USTRANSCOM Contracting Officer Decisions regarding rates.* The disputes and appeals provision of the proposed ratemaking procedures follows long established protocol that was previously reflected in MOUs executed between CRAF air carrier participants and the government. In sum, carriers with ratemaking concerns are required to first present their concerns to the ratemaking team for resolution. If the matter is not resolved by the ratemaking team, the carrier can in turn request resolution by the USTRANSCOM contracting officer. If satisfactory resolution is still absent, the carrier should address their matter to the USTRANSCOM Ombudsman who is appointed to hear and facilitate resolution of such issues. If needed, the Director of Acquisition, USTRANSCOM, issues a final agency decision in unresolved matters presented by any

carrier still seeking satisfactory resolution of a ratemaking issue.

### Statutory Certification

*Executive Order 12866 “Regulatory Planning and Review” and Executive Order 13563 “Improving Regulation and Regulatory Review”*

Executive Orders (E.O.s) 12866 and 13563 directs agencies to assess all costs and benefits of available regulatory alternatives, and if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E. O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. It has been determined that 32 CFR part 243 is not an economically significant regulatory action and is also not a major rule under 5 U.S.C. 804, nor is it a significant rule that requires review by OMB. The rule does not:

- (1) Have an annual affect to the economy in excess of \$100 million or more or adversely affect in a material way the economy; a section of the economy; productivity; competition; jobs; the environment; public health or safety; or State, local or tribal governments or communities;
- (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another Agency;
- (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or
- (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in these Executive Orders.

Additionally, participation in the CRAF program is voluntary. All willing carriers meeting the technical requirements of CRAF will receive a contract. The final rule does not add additional requirements to those that have been historically required by the CRAF contract and ratemaking process. The final rule clarifies existing and historical procedures utilized by USTRANSCOM for carriers participating in the CRAF program.

*Unfunded Mandates Reform Act of 1995 (Sec. 202, Pub. L. 104–4)*

It has been certified that this rule does not contain a Federal mandate that may result in the expenditure by State, local and tribal governments, in aggregate, or by the private sector, of \$100 million or more in any one year.

*Public Law 96–354, “Regulatory Flexibility Act” (5 U.S.C. 601 et seq.)*

DoD certifies this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule does not change or add any policies or procedures. This rule merely implements Section 366 of the National Defense Authorization Act for Fiscal Year 2012 (Pub. L. 112–81) using historically established ratemaking methodologies and procedures. According to the most recent records, there are 28 certified civilian air carriers willing to participate in the CRAF program for FY2013, of which 12 qualify as small businesses. Because the rule does not change or add any policies or procedures there is not a significant economic impact on a substantial number of small entities and a regulatory flexibility analysis was not performed. Furthermore, any airline meeting the CRAF technical requirements, regardless of business size, will be awarded a contract with rates of payment prescribed by this rule.

*Public Law 96–511, “Paperwork Reduction Act” (44 U.S.C. Chapter 35)*

The rule does not impose any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act, 44 U.S.C. Chapter 35.

*Executive Order 13132 Federalism*

Executive Order 13132 requires that Executive departments and agencies identify regulatory actions that have significant federalism implications. A regulation has federalism implications if it has substantial direct effects on the States, on the relationship or distribution of power between the Federal Government and the States, or on the distribution of power and responsibilities among various levels of government.

The provisions of this part, as required by 10 U.S.C. 9511a, have no substantial direct effect on the States, on the relationship or distribution of power between the Federal Government and the States, or on the distribution of power and responsibilities among various levels of government. Therefore, the Department has determined that the proposed part has no federalism implications that warrant the preparation of a Federalism Assessment in accordance with Executive Order 13132.

**List of Subjects in 32 CFR Part 243**

Air fleet, Armed forces reserves, Contracts.

For the reasons set forth in the preamble, Title 32, Code of Federal Regulations is amended by adding part 243 to read as follows:

**PART 243—DEPARTMENT OF DEFENSE RATEMAKING PROCEDURES FOR CIVIL RESERVE AIR FLEET CONTRACTS**

Sec.

- 243.1 Purpose.
- 243.2 Applicability.
- 243.3 Definitions.
- 243.4 Ratemaking procedures for Civil Reserve Air Fleet contracts.
- 243.5 Commitment of aircraft as a business factor.
- 243.6 Exclusions from the uniform negotiated rate.
- 243.7 Inapplicable provisions of law.
- 243.8 Application of FAR cost principles.
- 243.9 Carrier site visits.
- 243.10 Disputes.
- 243.11 Appeals of USTRANSCOM Contracting Officer Decisions regarding rates.
- 243.12 Required records retention.

**Authority:** Section 366 National Defense Authorization Act for FY12 (Pub. L. 112–81) 10 U.S.C. Chap 931, Section 9511a.

**§ 243.1 Purpose.**

The Secretary of Defense (Secretary) is required to determine a fair and reasonable rate of payment for airlift services provided to the Department of Defense (DoD) by civil air carriers and operators (hereinafter collectively referred to as “air carriers”) who are participants in the Civil Reserve Air Fleet program (CRAF). This regulation provides the authority and methodology for such ratemaking and designates the United States Transportation Command (USTRANSCOM) as the rate setter for negotiated uniform rates for DoD airlift service contracts in support of the CRAF. This methodology supports a viable CRAF mobilization base that ensures sufficient capacity in time of war, contingency and humanitarian relief efforts.

**§ 243.2 Applicability.**

This section governs all contracts with the Department of Defense where awards to the air carriers, either through individual contracts or teaming arrangements, are commensurate with the relative amount of airlift capability committed to the Civil Reserve Air Fleet (CRAF).

**§ 243.3 Definitions.**

*Air carrier.* “Air carrier” is defined in 49 U.S.C. 40102(a)(2) as “a citizen of the United States undertaking by any

means, directly or indirectly, to provide air transportation.” Specifically to this ratemaking procedure, individuals or entities that operate commercial fixed and rotary wing aircraft in accordance with the Federal Aviation Regulations (14 CFR chapter I) or equivalent regulations issued by a country’s Civil Aviation Authority (CAA) and which provide air transportation services are included. Commercial air carriers under contract with, or operating on behalf of, the DoD shall have a Federal Aviation Administration (FAA) or CAA certificate. The policy contained in this directive applies only to air carriers operating fixed wing aircraft under CRAF international airlift services.

*Aircraft class.* Distinct categories of aircraft with similar broad characteristics established for ratemaking purposes. These categories include aircraft such as large passenger, medium passenger, large cargo, etc. They are determined by USTRANSCOM and identified in Published Uniform Rates and Rules for International Service Appendix A (Published in FedBizOps).

*Civil Reserve Air Fleet International Airlift Services.* Those services provided in support of the Civil Reserve Air Fleet contract, whereby contractors provide personnel, training, supervision, equipment, facilities, supplies and any items and services necessary to perform international long-range and short-range airlift services during peacetime and during CRAF activation in support of the Department of Defense (DoD). Implements the Fly CRAF Act. See 49 U.S.C. 41106.

*Civil Reserve Air Fleet (CRAF) Assured Business Guarantees.* See 10 U.S.C. 9515.

*Civil Reserve Air Fleet (CRAF) Program.* The Civil Reserve Air Fleet (CRAF) is a wartime readiness program, based on the Defense Production Act of 1950, as amended, (50 U.S.C. App. 2601 *et seq.*), and Executive Order 13603 (National Defense Resource Preparedness), March 16, 2012, to ensure quantifiable, accessible, and reliable commercial airlift capability to augment DoD airlift and to assure a mobilization base of aircraft available to the Department of Defense for use in the event of any level of national emergency or defense-orientated situations. As a readiness program, CRAF quantifies the number of passenger and cargo commercial assets required to support various levels of wartime requirements and thus allows DoD to account for their use when developing and executing contingency operations/war plans. The CRAF is composed of U.S. registered aircraft owned or controlled by U.S. air

carriers specifically allocated (by FAA registration number) for this purpose by the Department of Transportation. As used herein, CRAF aircraft are those allocated aircraft, which the carrier owning or otherwise controlling them, has contractually committed to the DoD, under stated conditions, to meet varying emergency needs for civil airlift augmentation of the military airlift capability. The contractual commitment of the aircraft includes the supporting resources required to provide the contract airlift. In return for a commitment to the CRAF program, airlines are afforded access to day-to-day business under various DoD contracts.

*Historical Costs.* Those allowable costs for airlift services for a 12 month period, gathered from Department of Transportation (DOT) Uniform System of Accounts and Reports (USAR) (hereinafter referred to as “Form 41”) reporting (required by 14 CFR parts 217 and 241).

*Long-range aircraft.* Aircraft equipped with navigation, communication, and life support systems/emergency equipment required to operate in transoceanic airspace, and on international routes, for a minimum distance of 3,500 nautical miles, while carrying a productive payload (75 percent of the maximum payload it is capable of carrying.) Additionally aircraft must be equipped and able to operate worldwide (e.g. in EUROCONTROL and North Atlantic Minimum Navigation Performance Specification airspace and possess the applicable VHF, Mode-S, RNP, and RVSM communication and navigation capabilities.)

*Memorandum of Understanding with attachment (MOU).* A written agreement between certificated air carriers willing to participate in the CRAF program and USTRANSCOM with the purpose of establishing guidelines to facilitate establishment of rates for airlift services (e.g. passenger, cargo, combi, and aeromedical evacuation.)

*Operational data.* Those statistics that are gathered from DOT Form 41 reporting, USTRANSCOM reported monthly round trip (S–1) and one-way (S–2) mileage reports, monthly fuel reports or other data deemed necessary by the USTRANSCOM contracting officer.

*Participating carriers.* Any properly certified and DoD approved air carrier in the CRAF program which complies with the conditions of the MOU and executes a USTRANSCOM contract.

*Projected rates.* The estimated rates proposed by carriers based upon historical cost and operational data as

further described in § 243.4(a) through (g).

*Rate-making methodologies.* The methodologies agreed to by USTRANSCOM and air carriers in the MOU for the treatment of certain cost elements to determine the estimated price for the DoD for airlift services.

*Short-range aircraft.* Aircraft equipped for extended over-water operations and capable of flying a minimum distance of 1,500 nautical miles while carrying a productive payload (75 percent of the maximum payload it is capable of carrying).

#### § 243.4 Rate-making procedures for Civil Reserve Air Fleet contracts.

The ratemaking procedures contained within this section apply only to Airlift Service contracts awarded based on CRAF commitment. Competitively awarded contracts may be used by the Department of Defense when it considers such contracts to be in the best interest of the government. See §§ 243.5(b) and 243.6 for exclusions to ratemaking.

(a) *Rates of payment for airlift services.* USTRANSCOM may utilize the principles contained in the Federal Acquisition Regulation (FAR), as supplemented, in establishing fair and reasonable rate of payments for airlift service contracts in support of CRAF. Specific exceptions to FAR are noted in § 243.8 of this rule. To facilitate uniformity within the ratemaking process, USTRANSCOM will execute a MOU with air carriers to institute the basis for methods upon which the rates will be established. An updated MOU will be executed as warranted and published for public comment on FedBizOps. Under the MOU, air carriers agree to furnish historical cost and operational data, as well as their projected rates for the ensuing fiscal year. USTRANSCOM will conduct a review of air carriers' historical and projected costs and negotiate with the carriers to establish rates using ratemaking methodologies contained in the attachment to the MOU.

(b) *Obtaining data from participating carriers.* USTRANSCOM will annually notify those participating carriers to provide data using the USTRANSCOM cost package and related instructions. The data provided includes pricing data, cost data, and judgmental information necessary for the USTRANSCOM contracting officer to determine a fair and reasonable price or to determine cost realism. Carriers will be provided 60 calendar days to act upon the request.

(c) *Analysis.* (1) USTRANSCOM will consider carrier reported DOT Form 41

costs as well as other applicable costs directly assigned to performance in USTRANSCOM service. These costs will be reviewed and analyzed by USTRANSCOM for allowability, allocability, and reasonableness. Costs may also be audited by the Defense Contract Audit Agency (DCAA), as necessary, in accordance with the DCAA Contract Audit Manual 7640.01.

(2) To determine allocation of these costs to USTRANSCOM service, USTRANSCOM considers carrier reported DOT Form 41 operational data, as well as USTRANSCOM S-1, S-2 mileage reports, fuel reports, and other relevant information requested by the contracting officer.

(d) *Rates.* Rates will be determined by aircraft class (e.g. large passenger, medium passenger, large cargo, etc.) based on the average efficiency of all participating carriers within the specified class. Application of these rates, under varying conditions (e.g. ferry, one-way, etc), are addressed in the Final Rates published in accordance with § 243.4(h).

(e) *Components of the rate—(1) Return on Investment (ROI).* ROI for USTRANSCOM service is intended to adequately compensate carriers for cost of capital. USTRANSCOM will apply a minimum return applied to the carrier's total operating costs. If a full return on investment applied to a carrier's capital investment base is provided in the MOU, the carrier will receive whichever is greater.

(i) *Full ROI.* The full ROI will be computed using an optimal capital structure of 45 percent debt and 55 percent equity. The cost-of-debt and cost-of-equity are calculated from revenues of major carriers as reported to the Department of Transportation.

(A) *Cost-of-Debt (COD).* COD will be calculated considering the Risk Free Rate (RFR) plus the weighted debt spread, with the formula as agreed upon in the MOU.

(B) *Cost-of-Equity (COE).* COE will be determined by a formula agreed upon in the MOU, which considers RFR, weighted betas, annualized equity risk premium and a future expected return premium.

(C) *Owned/Capital/Long-Term Leased Aircraft.* New airframes and related support parts will receive full ROI on the net book value of equipment at mid-point of forecast year. USTRANSCOM will apply the economic service life standards to aircraft as indicated in paragraph (e)(2) of this section.

(D) *Short-term leased aircraft.* As a return on annual lease payments, short-term leased equipment will receive the Full ROI less the cost of money rate per

the Secretary of the Treasury under Public Law 92-41 (85 Stat. 97), as provided by the Office of Management and Budget, in accordance with the MOU.

(E) *Working capital.* Working capital will be provided in the investment base at an established number of days provided in the MOU. The investment base will be computed on total operating cash less non cash expenses (depreciation) as calculated by USTRANSCOM.

(ii) *Minimum Return.* USTRANSCOM will determine minimum return utilizing the Weighted Guidelines methodology as set forth in DFARS Subpart 215.4, Contract Pricing, or successor and as provided in the MOU.

(2) *Depreciation.* USTRANSCOM will apply economic life standards for new aircraft at 14 years, 2 percent residual (narrowbody) and 16 years and 10 percent residual (widebody) aircraft. USTRANSCOM will apply economic life standards for used aircraft as indicated in the MOU.

(3) *Utilization.* Utilization considers the number of airborne hours flown per aircraft per day. USTRANSCOM will calculate aircraft utilization in accordance with the DOT Form 41 reporting and the MOU.

(4) *Cost escalation.* Escalation is the percentage increase or decrease applied to the historical base year costs to reliably estimate the cost of performance in the contract period. Yearly cost escalation will be calculated in accordance with the MOU.

(5) *Weighting of rate.* Rates will be weighted based upon the direct relationship between contract performance and cost incurred in execution of the contract. The specific weighting will be as defined in the MOU.

(6) *Obtaining data from participating carriers.* Carriers participating in USTRANSCOM acquisitions subject to ratemaking shall provide, other than certified cost and pricing data for USTRANSCOM, rate reviews as required in the MOU.

(f) *Contingency rate.* Authority is reserved to the Commander, USTRANSCOM, at his discretion, during conditions such as outbreak of war, armed conflict, insurrection, civil or military strife, emergency, or similar conditions, to use a temporary contingency rate in order to ensure mission accomplishment. Any such temporary rate would terminate at the Commander's discretion upon his determination that such rate is no longer needed.

(g) *Proposed rate.* Once the data is analyzed and audit findings considered,

USTRANSCOM will prepare a package setting forth proposed airlift rates and supporting data. The proposed rates will be approved by the USTRANSCOM contracting officer and posted publicly on FedBizOps for comment. The comment period will be as specified in the proposed rate package.

(h) *Final rate.* Upon closing of the comment period, comments and supporting rationale will be addressed and individual negotiations conducted between USTRANSCOM and the air carriers. After negotiations have concluded, USTRANSCOM will prepare a rate package setting forth final airlift rates for each aircraft class, along with supporting data consisting of individual carrier cost elements. Comments and disposition of those comments will be included in the final rate package. The final rates will be approved by the USTRANSCOM contracting officer and publicly posted on FedBizOps for use in the ensuing contract.

**§ 243.5 Commitment of aircraft as a business factor.**

For the purpose of rate making, the average fleet cost of aircraft proposed by the carriers for the forecast year is used. Actual awards to CRAF carriers are based upon the aircraft accepted into the CRAF program. The Secretary may, in determining the quantity of business to be received under an airlift services contract for which the rate of payment is determined in accordance with subsection (a) of 10 U.S.C. 9511a, use as a factor the relative amount of airlift capability committed by each air carrier to the CRAF.

(a) *Adjustments in commitment to target specific needs of the contract period.* The amount of business awarded in return for commitment to the program under a CRAF contract may be adjusted prior to the award of the contract to reflect increased importance of identified aircraft categories (e.g., Aeromedical Evacuation) or performance factors (e.g., flyer's bonus, superior on-time performers, etc.). These adjustments will be identified in the solicitation.

(b) *Exclusions of categories of business from commitment based awards.* Where adequate competition is available and USTRANSCOM determines some part of the business is more appropriate for award under competitive procedures, the rate-making will not apply. Changes to areas of business will be reflected in the solicitation.

**§ 243.6 Exclusions from the uniform negotiated rate.**

Domestic CRAF is handled differently than international CRAF in that aircraft committed does not factor into the amount of business awarded during peacetime. If domestic CRAF is activated, carriers will be paid in accordance with pre-negotiated prices that have been determined fair and reasonable, not a uniform rate.

**§ 243.7 Inapplicable provisions of law.**

An airlift services contract for which the rate of payment is determined in accordance with subsection (a) of 10 U.S.C. 9511a shall not be subject to the provisions of 10 U.S.C. 2306a, or to the provisions of subsections (a) and (b) of 41 U.S.C. 1502. Specifically, contracts establishing rates for services provided by air carriers who are participants in the CRAF program are not subject to the cost or pricing data provision of the Truth in Negotiations Act (10 U.S.C. 2306a) or the Cost Accounting Standards (41 U.S.C. 1502). CRAF carriers will, however, continue to submit data in accordance with the MOU and the DOT, Form 41.

**§ 243.8 Application of FAR cost principles.**

In establishing fair and reasonable rate of payments for airlift service contracts in support of CRAF, USTRANSCOM, in accordance with 10 U.S.C. 9511a, procedures differ from the following provisions of FAR Part 31 and DFARS Part 231, as supplemented:

- FAR 31.202, Direct Costs
- FAR 31.203, Indirect Costs
- FAR 31.205–6, Compensation for Personal Services, subparagraphs (g), (j), and (k)
- FAR 31.205–10, Cost of Money
- FAR 31.205–11, Depreciation
- FAR 31.205–18, Independent Research and Development and Bid and Proposal Costs
- FAR 31.205–19, Insurance and Indemnification
- FAR 31.205–26, Material Costs
- FAR 31.205–40, Special Tooling and Special Test Equipment Costs
- FAR 31.205–41, Taxes
- DFARS 231.205–18, Independent research and development and bid and proposal costs

**§ 243.9 Carrier site visits.**

USTRANSCOM may participate in carrier site visits, as required to determine the reasonableness or verification of cost and pricing data.

**§ 243.10 Disputes.**

Carriers should first address concerns to the ratemaking team for resolution. Ratemaking issues that are not resolved

to the carrier's satisfaction through discussions with the ratemaking team may be directed to the USTRANSCOM contracting officer.

**§ 243.11 Appeals of USTRANSCOM Contracting Officer Decisions regarding rates.**

If resolution of ratemaking issues cannot be made by the USTRANSCOM contracting officer, concerned parties shall contact the USTRANSCOM Ombudsman appointed to hear and facilitate the resolution of such concerns. In the event a ratemaking issue is not resolved through the ombudsman process, the carrier may request a final agency decision from the Director of Acquisition, USTRANSCOM.

**§ 243.12 Required records retention.**

The air carrier is required to retain copies of data submitted to support rate determination for a period identified in Subpart 4.7 of the Federal Acquisition Regulation, Contractor Records Retention.

Dated: May 21, 2015.

**Aaron Siegel,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

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**DEPARTMENT OF HOMELAND SECURITY**

**Coast Guard**

**33 CFR Part 117**

[USCG–2015–0448]

**Drawbridge Operation Regulations; Gulf Intracoastal Waterway, Harvey, LA**

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of deviation from regulation.

**SUMMARY:** The Coast Guard has issued a temporary deviation from the operating schedule that governs the Harvey Canal Railroad Bascule Bridge across Gulf Intracoastal Waterway, mile 0.2 west of Harvey Lock (Harvey Canal), at Harvey, Jefferson Parish, Louisiana. This deviation provides for the bridge to remain closed to navigation for 175 consecutive hours to replace the north side bronze pinion bearing bushing to the drawbridge.

**DATES:** This deviation is effective from noon on Friday, June 19, 2015 until 7 p.m. on Friday, June 26, 2015.

**ADDRESSES:** The docket for this deviation, [USCG–2015–0448] is available at <http://www.regulations.gov>.