

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 14, 32, and 52**

[FAR Case 2004-003]

RIN 9000-AJ94

**Federal Acquisition Regulation;
Payment Withholding**

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule with request for comments.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are proposing to amend the Federal Acquisition Regulation (FAR) by removing the requirement that a contracting officer withhold 5 percent of the payments due under a time-and-materials or labor-hour contract, unless otherwise prescribed in the contract Schedule. The proposed rule would permit, but not require, the contracting officer to withhold payment amounts if the contracting officer determines the withholding to be necessary to protect the Government's interests.

DATES: Interested parties should submit comments in writing on or before July 26, 2004 to be considered in the formulation of a final rule.

ADDRESSES: Submit printed comments to General Services Administration, FAR Secretariat (MVA), 1800 F Street, NW., Room 4035, ATTN: Laurie Duarte, Washington, DC 20405. Submit electronic comments via the Internet to the U.S. Government's rulemaking website at <http://www.regulations.gov>, or to GSA's e-mailbox at farcase.2004-003@gsa.gov.

Please submit comments only and cite FAR case 2004-003 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat at (202) 501-4755 for information pertaining to status or publication schedules. For clarification of content, contact Mr. Edward Loeb, Policy Advisor, at (202) 501-0650. Please cite FAR case 2004-003.

SUPPLEMENTARY INFORMATION:**A. Background**

Federal Acquisition Regulation (FAR) 52.232-7, Payments under Time-and-Materials and Labor-Hour Contracts,

currently requires the contracting officer to withhold 5 percent of the amounts due, up to a maximum of \$50,000, unless otherwise specified in the contract Schedule. The Government retains the withhold amount until the contractor executes and delivers, at the time of final payment, a release discharging the Government from all liabilities, obligations, and claims arising under the contract.

The rule proposes to add FAR 32.111(a)(7)(iii) to permit contracting officers to use their judgment regarding whether to withhold payments under time-and-materials and labor-hour contracts so that the withhold would be applied only when necessary to protect the Government's interests. The proposed rule makes it clear that, normally, there should be no need to withhold payments when dealing with contractors that typically comply with contractual release requirements in a timely manner. This is in contrast to the current requirement in time-and-materials and labor-hour contracts that contracting officers must withhold payments unless other direction is provided in the contract.

The rule also proposes to revise paragraph (a)(2) of the contract clause at FAR 52.232-7, to state that the contracting officer may (rather than shall) withhold 5 percent of the amounts due. The rule also makes several related editorial changes to improve clarity and structure.

The Councils are considering revising its policy because the current withholding provisions are administratively burdensome and may, in some situations, result in the withholding of amounts that exceed reasonable amounts needed to protect the Government's interests. In addition, the contractor is already incentivized to execute and deliver the release discharging the Government from all liabilities, obligations, and claims under the contract, since this release is a condition of final payment.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The Councils do not expect this proposed rule to 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 applies only to time and material and labor-hour contracts with small

business, representing approximately 2 percent of all contracting. In addition, the rule eases the impact of the current FAR by permitting the contracting officer to use judgment in deciding whether to withhold payments, thus the number of contracts affected is a subset of the 2 percent figure. This change is expected to have a small but beneficial impact on small businesses. An Initial Regulatory Flexibility Analysis has, therefore, not been performed. We invite comments from small businesses and other interested parties. The Councils will consider comments from small entities concerning the affected FAR parts in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (FAR case 2004-003), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 14, 32, and 52

Government procurement.

Dated: May, 19, 2004.

Ralph De Stefano,

Acting Director, Acquisition Policy Division.

Therefore, DoD, GSA, and NASA propose amending 48 CFR parts 14, 32, and 52 as set forth below:

1. The authority citation for 48 CFR parts 14, 32, and 52 is revised to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 14—SEALED BIDDING**14.408-3 [Amended]**

2. Amend section 14.408-3 in paragraph (b) by removing "See 32.111(c)(1)," and adding "See 32.111(b)(1)," in its place.

PART 32—CONTRACT FINANCING

3. Amend section 32.111 by—

- a. Removing "and" at the end of paragraph (a)(5);
- b. Removing the period at the end of paragraph (a)(6) and adding ";" and" in its place;
- c. Redesignating paragraph (b) as paragraph (a)(7);
- d. Redesignating paragraphs (c) and (d) as (b) and (c), respectively; and
- e. Revising newly designated paragraph (a)(7) to read as follows:

32.111 Contract clauses for non-commercial purchases.

(a) * * *

(7) The clause at 52.232-7, Payments under Time-and-Materials and Labor-Hour Contracts, in solicitations and contracts when a time-and-materials or labor-hour contract is contemplated.

(i) If the nature of the work to be performed requires the contractor to furnish material that is regularly sold to the general public in the normal course of business by the contractor and the price is under the limitations prescribed in 16.601(b)(3), the contracting officer shall use the clause with its Alternate I.

(ii) If a labor-hour contract is contemplated, and if no specific reimbursement for materials furnished is intended, the contracting officer may use the clause with its Alternate II.

(iii) If the contracting officer determines that it is necessary to withhold payment to protect the Government's interests, paragraph (a)(2) of the clause permits the contracting officer to withhold 5 percent of the

amounts due until a reserve is set aside in an amount the contracting officer considers to be necessary, but not to exceed \$50,000. Normally, there should be no need to withhold payment for a contractor with a record of timely submittal of the release discharging the Government from all liabilities, obligations, and claims, as required by paragraph (f) of the clause.

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PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**52.232-7 [Amended]**

4. Amend section 52.232-7 by—

a. Removing “32.111(b)” and adding “32.111(a)(7)” in its place in the introductory text of section 52.232-7.

b. Revising the date of the clause to read “(XXX 2004)”.

c. Revising paragraph (a)(2) to read as follows:

52.232-7 Payments under Time-and-Materials and Labor-Hour Contracts.

(a) * * *

(2) Unless otherwise prescribed in the Schedule, the Contracting Officer may withhold 5 percent of the amounts due under this paragraph (a), but the total amount withheld shall not exceed \$50,000. The amounts withheld shall be retained until the Contractor executes and delivers the release required by paragraph (f) of this clause.

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5. In the introductory text of section 52.232-8, remove “32.111(c)(1)” and add “32.111(b)(1)” in its place.

6. In the introductory text of section 52.232-9, remove “32.111(c)(2)” and add “32.111(b)(2)” in its place.

7. In the introductory text of section 52.232-10, remove “32.111(d)(1)” and add “32.111(c)(1)” in its place.

8. In the introductory text of section 52.232-11, remove “32.111(d)(2)” and add “32.111(c)(2)” in its place.

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