

DEPARTMENT OF DEFENSE

GENERAL SERVICES
ADMINISTRATIONNATIONAL AERONAUTICS AND
SPACE ADMINISTRATION

48 CFR Part 52

[FAR Case 2001-012]

RIN 9000-AJ22

Federal Acquisition Regulation;
Payments Under Fixed-Price
Construction Contracts

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

ACTION: Proposed rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are proposing to amend the Federal Acquisition Regulation (FAR) to clarify in the certification language of the clause entitled Payments under Fixed-Price Construction Contracts that all payments due to subcontractors and suppliers have been made by the prime contractor from previous progress payments received from the Government.

DATES: Interested parties should submit comments in writing on or before December 17, 2001 to be considered in the formulation of a final rule.

ADDRESSES: Submit written comments to: General Services Administration, FAR Secretariat (MVP), 1800 F Street, NW., Room 4035, ATTN: Laurie Duarte, Washington, DC 20405. Submit electronic comments via the Internet to: farcase.2001-012@gsa.gov.

Please submit comments only and cite FAR case 2001-012 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC, 20405, at (202) 501-4755 for information pertaining to status or publication schedules. For clarification of content, contact Jeremy Olson, Procurement Analyst, at (202) 501-3221. Please cite FAR case 2001-012.

SUPPLEMENTARY INFORMATION

A. Background

In 1988, Congress passed the Prompt Payment Act Amendments, in part to ensure that subcontractors and suppliers were being promptly paid by the prime contractors. 31 U.S.C. 3903(b)(1)(B)(ii) requires the contractor to certify, with each progress payment request, that payments to subcontractors and suppliers have been made from previous payments received under the contracts. This certification language is reflected in paragraph (c) of FAR 52.232-5, Payments under Fixed-Price Construction Contracts.

An ambiguity in FAR 52.232-5 surfaced as a result of a decision issued on April 2, 1999, by the United States Court of Appeals for the Sixth Circuit in *United States vs. Gatewood*, 173 F.3d 983 (6th Cir. 1999). The Court concluded that certifying that the prime contractor has made payments to subcontractors and suppliers is not the same as certifying that the prime contractor has made all payments due to subcontractors and suppliers.

The Government's intention has always been that all payments due to subcontractors and suppliers be covered by this certification. Accordingly, the rule amends FAR 52.232-5 to clarify the Government's intent.

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 most contracts awarded to small entities have a dollar value less than the simplified acquisition threshold, and, therefore, do not have the progress payment type of financing. In addition, this change is a clarification of existing policy, rather than the addition of new policy. 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 Part 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 2001-012), 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 Part 52

Government procurement.

Dated: October 10, 2001.

Al Matera,

Director, Acquisition Policy Division.

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

PART 52—SOLICITATION PROVISIONS
AND CONTRACT CLAUSES

1. The authority citation for 48 CFR part 52 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

2. Amend section 52.232-5 by revising the date of the clause and paragraph (c)(2) to read as follows:

52.232-5 Payments under Fixed-Price
Construction Contracts.

* * * * *

Payments Under Fixed-Price
Construction Contracts (Date)

* * * * *

(c) * * *

(2) All payments due to subcontractors and suppliers from previous payments received under the contract have been made, and timely payments will be made from the proceeds of the payment covered by this certification, in accordance with subcontract agreements and the requirements of chapter 39 of Title 31, United States Code;

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