

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

[FAR Case 2000-007]

RIN 9000-A192

**Federal Acquisition Regulation;
Financing Policies**

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 permit the use of performance-based payments type of financing on fixed-price contracts prior to definitization, and to establish a standard time period of 30 days that contractors have to pay their vendors after the contractors have billed the Government for incurred vendor costs.

DATES: Interested parties should submit comments in writing on or before November 17, 2000 to be considered in the formulation of a final rule.

ADDRESSES: Submit written comments to: General Services Administration, FAR Secretariat (MVR), 1800 F Street, NW, Room 4035, ATTN: Laurie Duarte, Washington, DC 20405.

Submit electronic comments via the Internet to: farcase.2000-007@gsa.gov.

Please submit comments only and cite FAR case 2000-007 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 Mr. Jeremy Olson, at (202) 501-0692. Please cite FAR case 2000-007.

SUPPLEMENTARY INFORMATION:**A. Background**

The Councils published a final rule in the **Federal Register** at 65 FR 16276, March 27, 2000, under FAR Case 1998-400, Progress Payments and Related Financing Policies. The rule revised the policies and procedures related to contract financing to make them easier to understand and to minimize the burdens imposed on contractors and

contracting officers. This proposed FAR rule supplements the final rule.

The proposed rule—

(1) Revises the requirement at FAR 32.1003(b) to permit performance-based payments type of financing on fixed-price contracts prior to definitization;

(2) Completely removes the “paid cost rule” restriction from the payment clauses at FAR 52.216-26, Payments of Allowable Costs Before Definitization, and FAR 52.232-7, Payments under Time-and-Materials and Labor-Hour Contracts. The “paid cost rule” is the requirement that a large business must actually pay (not just incur) costs for supplies and services purchased directly for the contract and financing payments to subcontractors before including the payments in its billings to the Government. The intent of the final rule under FAR case 1998-400 was to remove this restriction from all the payments clauses if contractors met certain conditions. Inadvertently, this restriction was not removed in its entirety from FAR 52.216-26(d)(2) and FAR 52.232-7(b)(3). The proposed rule corrects for this oversight;

(3) Establishes a standard time period that contractors have to pay their vendors after the contractors have billed the Government for incurred vendor costs. As indicated in paragraph (2) above, the final rule under FAR case 1998-400 revised the FAR to permit a large business to include, in its billings, certain costs that it had incurred but not actually paid, if the following conditions are met: the unpaid amounts are paid (1) in accordance with the terms and conditions of a subcontract or invoice; and (2) ordinarily prior to the submission of the contractor’s next payment request to the Government.

A large business prime contractor is allowed to submit cost vouchers on a cost-reimbursement contract every 14 days, but can bill no more frequently than every 30 days when billing progress payments on a fixed-price contract. Therefore, contractors may need to maintain several systems and procedures to accommodate the timing differences for payments to vendors, depending on whether the costs are billed on a cost-reimbursement or fixed-price type prime contract. To eliminate the timing differences, the proposed FAR rule revises the second condition to establish a single standard time period of 30 days; and

(4) It makes several editorial changes.

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 or performance-based payment type of financing. In addition, the “paid cost rule” restriction does not apply to small entities. 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 32 and 52 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 2000-007), 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 32 and 52

Government procurement.

Dated: September 12, 2000.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.

Therefore, DoD, GSA, and NASA propose that 48 CFR parts 32 and 52 be amended as set forth below:

1. The authority citation for 48 CFR part 32 and 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).

PART 32—CONTRACT FINANCING

2. Revise paragraph (b)(2) of section 32.504 to read as follows:

32.504 Subcontracts under prime contracts providing progress payments.

* * * * *

(b) * * *

(2) Not later than 30 days after the submission of the contractor’s progress payment request to the Government.

* * * * *

3. Revise the introductory text and paragraph (b) of section 32.1003 to read as follows:

32.1003 Criteria for use.

The contracting officer may only use performance-based payments if the following conditions are met:

* * * * *

(b) The contract is a fixed-price type contract; and

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

4. Revise the date of the clause, the introductory text of paragraph (b)(1)(ii), and paragraph (b)(1)(ii)(A) of section 52.216-7 to read as follows:

52.216-7 Allowable Cost and Payment.

* * * * *

Allowable Cost and Payment (Date)

* * * * *

(b) *Reimbursing costs.* (1) * * *

* * * * *

(ii) When the Contractor is not delinquent in paying costs of contract performance in the ordinary course of business, costs incurred, but not necessarily paid, for—

(A) Supplies and services purchased directly for the contract and associated financing payments to subcontractors, provided payments will be made—

(1) In accordance with the terms and conditions of a subcontract or invoice; and

(2) Not later than 30 days after the submission of the Contractor's payment request to the Government;

* * * * *

5. Revise the date of the clause, the introductory text of paragraphs (d) and (d)(2), and paragraph (d)(2)(i) of section 52.216-26 to read as follows:

52.216-26 Payments of Allowable Costs Before Definitization.

* * * * *

Payments of Allowable Costs Before Definitization (Date)

* * * * *

(d) *Allowable costs.* For the purpose of determining allowable costs, the term "costs" includes—

(1) * * *

(2) When the Contractor is not delinquent in payment of costs of contract performance in the ordinary course of business, costs incurred, but not necessarily paid, for—

(i) Supplies and services purchased directly for the contract and associated financing payments to subcontractors, provided payments will be made—

(A) In accordance with the terms and conditions of a subcontract or invoice; and

(B) Not later than 30 days after the submission of the Contractor's payment request to the Government;

* * * * *

6. In section 52.232-7 revise the date of the clause and paragraphs (b)(3), (b)(4)(ii), and (b)(4)(ii)(B) to read as follows:

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

* * * * *

Payments Under Time-and-Materials and Labor-Hour Contracts (Date)

* * * * *

(b) * * *

(3) The Government will reimburse the Contractor for supplies and services purchased directly for the contract when the Contractor—

(i) Has made payments of cash, checks, or other forms of payment for such purchased supplies or services; or

(ii) Will make such payments—

(A) In accordance with the terms and conditions of a subcontract or invoice; and

(B) Not later than 30 days after the submission of the Contractor's payment request to the Government.

(4) * * *

* * * * *

(ii) The Government will limit reimbursable costs in connection with subcontracts to the amounts paid for supplies and services purchased directly for the contract when the Contractor has made or will make payments of cash, checks, or other forms of payment to the subcontractor—

* * * * *

(B) Not later than 30 days after the submission of the Contractor's payment request to the Government.

* * * * *

7. Revise the date of the clause and paragraph (a)(2) of section 52.232-16 to read as follows:

52.232-16 Progress Payments.

* * * * *

Progress Payments (Date)

* * * * *

(a) * * *

(2) The amount of financing and other payments for supplies and services purchased directly for the contract are limited to the amounts that have been paid by cash, check, or other forms of payment, or that will be paid to subcontractors—

(i) In accordance with the terms and conditions of a subcontract or invoice, and

(ii) Not later than 30 days after the submission of the Contractor's payment request to the Government.

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