

25.405 [Amended]

5. Amend section 25.405 as follows:
a. In paragraph (a) by removing "\$25,000 or less" and "\$54,372" and adding "less than \$25,000" and "\$56,190" in their place, respectively;
b. In paragraph (b) by removing "\$7,068,419" and adding "7,304,733" in its place; and
c. In paragraph (c) by removing "\$54,372" and "\$7,068,419" and adding "\$56,190" and "\$7,304,733" in their place, respectively.

25.601 [Amended]

6. Amend section 25.601 as follows:
a. In the introductory text of paragraph (a) by removing "must" and adding "shall" in its place;
b. In paragraphs (a)(1) and (a)(3)(ii) by removing "\$177,000" and adding "\$169,000" in their places; and
c. In paragraph (a)(2) by removing "\$6,806,000" and adding "\$6,481,000" in its place.
7. Amend section 25.1101 as follows:
a. Revise paragraphs (b)(1)(i)(A), (b)(1)(ii), (b)(1)(iii), (b)(2)(ii), and (b)(2)(iii); and
b. In paragraphs (c)(1) and (d) by removing "\$177,000" and adding "\$169,000" in their place.

The revised text reads as follows:

25.1101 Acquisition of supplies.

(b)(1)(i) (A) The acquisition is for supplies, or for services involving the furnishing of supplies, for use within the United States, and the acquisition value is \$25,000 or more, but is less than \$169,000; and

(ii) If the acquisition value is \$25,000 or more but is less than \$50,000, use the clause with its Alternate I.

(iii) If the acquisition value is \$50,000 or more but is less than \$56,190, use the clause with its Alternate II.

(2) (ii) If the acquisition value is \$25,000 or more but is less than \$50,000, use the provision with its Alternate I.

(iii) If the acquisition value is \$50,000 or more but is less than \$56,190, use the provision with its Alternate II.

25.1102 [Amended]

8. Amend section 25.1102 as follows:
a. In the introductory text of paragraphs (a) and (c), and paragraphs (c)(3) and (d)(3) by removing "\$6,806,000" and adding "\$6,481,000" in their place; and
b. In paragraphs (c)(3) and (d)(3) by removing "\$7,068,419" and adding "\$7,304,733" in their place.

25.1103 [Amended]

9. Amend section 25.1103 in paragraphs (c)(1)(i) and (c)(1)(ii)(B) by removing "\$177,000" and adding "\$169,000" in their place.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

10. Amend section 52.213-4 as follows:
a. Revise the date of the clause; and
b. Remove paragraph (b)(1)(vi) and redesignate paragraphs (b)(1)(i) through (b)(1)(v) as (b)(1)(ii) through (b)(1)(vi), respectively; and add a newly designated paragraph (b)(1)(i) to read as follows:

52.213-4 Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items).

Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items) (Sept 2002)

(b) * * *
(1) * * *
(i) 52.222-19, Child Labor—Cooperation with Authorities and Remedies (Sept 2002) (E.O. 13126). (Applies to contracts for supplies exceeding the micro-purchase threshold.)

52.222-19 [Amended]

11. Amend section 52.222-19 by revising the date of the clause to read (SEPT 2002); in paragraph (a)(3) by removing "\$54,372" and adding "\$56,190" in its place; and in paragraph (a)(4) by removing "\$177,000" and adding "\$169,000" in its place.

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 52

[FAC 2001-09; FAR Case 2001-012; Item V]

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: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending 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: Effective Date: September 30, 2002.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC, 20405, (202) 501-4755, for information pertaining to status or publication schedules. For clarification of content, contact Mr. Jeremy Olson at (202) 501-3221. Please cite FAC 2001-09, FAR case 2001-012.

SUPPLEMENTARY INFORMATION:

A. Background

DoD, GSA, and NASA published a proposed rule in the Federal Register at 66 FR 53050, October 18, 2001, with request for comments. Six respondents submitted public comments. The Councils considered all comments and concluded that the proposed rule should be converted to a final rule, with no changes made to the proposed rule.

The rule revises FAR 52.232-5, Payments Under Fixed-Price Construction Contracts, to clarify the certification language. The ambiguity 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 v. Gatewood, 173 F.3d 983 (6th Cir. 1999). The Court concluded that certifying that the prime contractor has made payments to subcontractors and suppliers does not explicitly include all payments due.

Of the six respondents who submitted public comments, two endorsed the proposed rule as written. The remaining respondents provided comments, which are discussed below:

1. One of the respondents asserted that some of its customers "that do not pay their invoices on time use the rationale of this FAR regulation to respond to us that it is not necessary to pay us until they themselves are paid by the Federal Government." The respondent requested that the Government close "a loophole" for billion dollar companies to avoid paying their smaller vendors.

Response: It has always been the Government's intent that subcontractors be paid all that they are due on a timely basis, in accordance with the terms of their subcontract agreements with their prime contractors. Because of the decision in *United States v. Gatewood*, it is necessary to make that point with greater clarity by inserting the word "all," thus ensuring that the prime contractor has made all payments due its subcontractors that have been included in its progress payments billings. The FAR change is designed to better ensure that subcontractors are paid on a timely basis, thus addressing the respondent's request that a "loophole" be closed. The final rule would prevent construction prime contractors from making only partial payments to subcontractors, based on a very narrow reading of the current language of FAR 52.232-5(c)(2).

2. A second respondent suggested a slight rewording of the proposed change to FAR 52.232-5(c)(2), to better address not only the requirement for the prime contractor to have made previous payments in a timely manner, but that it make current payments in a timely manner as well. The wording suggested is as follows:

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

Response: The Councils concluded that the rewording of the proposed rule recommended by respondent #2 is not necessary. The proposed rule states that "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." Consequently, if the prime contractor elects to make only a part of the payments due to subcontractors from the proceeds of the progress payment, the prime contractor would be making some of its payments on an untimely basis, and as such, the prime contractor will have made a false certification. Under the language of the clause, payments due in accordance with the terms of subcontract agreements and the law must be made on a timely basis if they are to be included in the prime contractor's payment request.

3. A third respondent suggested alternative language to paragraph (c)(2)

of the FAR clause at FAR 52.232-5. The respondent's rationale was that the clause should specifically indicate that the prime contractor's certification covers payments due for both work completed and supplies or services delivered by the subcontractors. Respondent #3 asserted that prime contractors do not have to pay their subcontractors for supplies or services delivered unless and until those supplies or services have been incorporated into the scope of work. Consequently, the respondent wanted to specifically indicate that the payments covered by the certified payment request include payments to subcontractors for materials and services that may not have been incorporated into the scope of the prime contract at the time the prime contractor's payment request is made to the Government. The wording suggested by the respondent is as follows:

"(2) All payments due to subcontractors and suppliers for work completed or materials/equipment delivered have been made from previous payments under this contract and timely payments will be made from payments due for which this certification and the attached invoice is submitted. This requirement supercedes any other payment terms that may have been included in any subcontract terms and is required by chapter 39 of Title 31, United States Code."

Response: The Councils concluded that the language suggested by respondent #3 is not needed and may lead to confusion with regard to the requirements of the entire payment clause at FAR 52.232-5. FAR 52.232-5(b)(1) requires that the prime contractor's progress payment request include a listing of the amount included for work performed by each subcontractor under the contract; a listing of the total amount of each subcontract under the contract; and a listing of amounts previously paid to each subcontractor. The clause also clearly indicates in 52.232-5(c)(1) that the contractor's certified payment request is for amounts "only for performance in accordance with the specifications, terms, and conditions of the contract."

It is not the intent of this clause to enable the billing of progress payments for materials and services that may not have been incorporated into the scope of work of the contract. It is conceivable that a construction prime contractor may have purchased building materials from a single vendor sufficient to support not only the construction project under the Government's contract, but also on other jobs as well.

However, the prime contractor can only bill for the materials used on the subject Government contract, once it has been determined what portion of those materials will be used to perform the Government contract. The fact that the prime contractor may not have paid the subcontractor for materials as yet unidentifiable to the Government contract may be a matter of general concern to the contracting officer, but it does not have a bearing on progress payment billings under a specific Government contract until after the material has been identified as part of the scope of work of that contract.

4. The fourth respondent asserted that, because the payments made under construction prime contracts are almost always covered by payment bonds or alternate payment procedures, the Government should not be involved in payment disputes between prime contractors and subcontractors. Consequently, respondent #4 concluded that the prime contractor's certification that payments have been made to its subcontractors was redundant and unnecessary, and that the certification should be eliminated. Respondent #4 also indicated that contracting officer inquiries as to whether a subcontractor has been paid on time were usually a reflection of a situation where the subcontractor has not been paid because of a dispute over subcontractor performance. Consequently, respondent #4 believed the following language was sufficient:

"(2) All past and future payments due to subcontractors and suppliers will be or have been made as required by chapter 39 of Title 31, United States Code."

Response: The Councils concluded that adopting respondent #4's proposed alternative language could be seen as a significant weakening of the payment protections afforded to construction subcontractors by Government contracts. The certification requirement questioned by respondent #4 is provided for in chapter 39 of Title 31 of the U.S.C. The certification is needed in the event the prime contractor has fraudulently billed the Government for progress payments that the prime contractor has represented will be used to pay its subcontractors; as such, this certification supports the possibility that the Government may need to prosecute the prime contractor under laws relating to defrauding the Government. Absent a certification, and employing only the words proposed by respondent #4, the Government could assert that the prime contractor had breached its contract if it failed to pay its subcontractors with the proceeds

from progress payments paid to the prime contractor for that purpose. But that is well short of the enforcement action potentially available under the fraud statute.

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 Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that 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 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.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the 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: August 21, 2002

Al Matera,

Director, Acquisition Policy Division.

Therefore, DoD, GSA, and NASA amend 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 (Sept. 2002)

* * * * *

(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;

* * * * *

[FR Doc. 02–21871 Filed 8–29–02; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 22, 36, and 52

[FAC 2001–09; Item VI]

Federal Acquisition Regulation; Technical Amendments

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

ACTION: Final rule.

SUMMARY: This document makes amendments to the Federal Acquisition Regulation in order to update references and make editorial changes.

DATES: Effective Date: September 30, 2002.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC, 20405, (202) 501–4755. Please cite FAC 2001–09, Technical Amendments.

List of Subjects in 48 CFR Parts 22 and 52

Government procurement.

Dated: August 21, 2002.

Al Matera,

Director, Acquisition Policy Division.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 22, 36, and 52 as set forth below:

1. The authority citation for 48 CFR parts 22, 36, 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 22—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

22.1503 [Amended]

2. Amend section 22.1503 in the first sentence of paragraph (a) by removing “(www.dol.gov/dol/ilab)” and adding “(www.dol.gov/ilab/)” in its place.

PART 36—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

36.606 [Amended]

3. Amend section 36.606 in the last sentence of paragraph (a) by removing from the parenthetical the words “and the determination and findings requirement at 16.306(c)(2) for a cost-plus-fixed-fee contract”.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

4. Amend section 52.232–16 by correcting Alternate III of the clause to read as follows:

52.232–16 Progress Payments.

* * * * *

Alternate III (Feb 2002). As prescribed in 32.502–4(d), add the following paragraph (m) to the basic clause. If Alternate II is also being used, redesignate the following paragraph as paragraph (o):

(m) The provisions of this clause will not be applicable to individual orders at or below the simplified acquisition threshold.

[FR Doc. 02–21872 Filed 8–29–02; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

Federal Acquisition Regulation; Small Entity Compliance Guide

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

ACTION: Small Entity Compliance Guide.

SUMMARY: This document is issued under the joint authority of the Secretary of Defense, the Administrator of General Services and the Administrator for the National Aeronautics and Space Administration. This *Small Entity Compliance Guide* has been prepared in accordance with Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121). It consists of a summary of rules appearing in Federal Acquisition Circular (FAC) 2001–09 which amend the FAR. An asterisk (*) next to a rule indicates that a regulatory flexibility analysis has been prepared in accordance with 5 U.S.C. 604. Interested parties may obtain further information regarding these rules by referring to FAC 2001–09 which precedes this document.