

§ 73.622 [Amended]

■ 2. Section 73.622(b), the Table of Digital Television Allotments under Texas, is amended by removing DTV channel 50 and adding DTV channel 13 at Corpus Christi.

Federal Communications Commission.

Barbara A. Kreisman,

Chief, Video Division, Media Bureau.

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DEPARTMENT OF DEFENSE**48 CFR Parts 232 and 252**

[DFARS Case 2002-D001]

Defense Federal Acquisition Regulation Supplement; Electronic Submission and Processing of Payment Requests

AGENCY: Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD has adopted as final, with changes, an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement Section 1008 of the National Defense Authorization Act for Fiscal Year 2001. Section 1008 requires contractors to submit, and DoD to process, payment requests in electronic form.

EFFECTIVE DATE: December 15, 2003.

FOR FURTHER INFORMATION CONTACT: Mr. Thaddeus Godlewski, Defense Acquisition Regulations Council, OUSD (AT&L) DPAP (DAR), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301-3062. Telephone (703) 602-2022; facsimile (703) 602-0350. Please cite DFARS Case 2002-D001.

SUPPLEMENTARY INFORMATION:**A. Background**

DoD published an interim rule at 68 FR 8450 on February 21, 2003, to implement Section 1008 of the National Defense Authorization Act for Fiscal Year 2001 (Public Law 106-398). Section 1008 requires contractors to submit, and DoD to process, payment requests in electronic form. Seventeen sources submitted comments on the interim rule. A discussion of the comments is provided below. Differences between the interim and final rules are discussed in the DoD response to Comment 9 below. In addition, DoD has revised the language at 232.7002(a)(6)(ii) and 252.232-7003(c) to further address the involvement of the contract administration office in decisions to permit exceptions to the rule.

1. *Comment:* The rule should permit agencies to implement procedures identifying criteria for exemptions, incorporation of the DFARS clause in existing contracts, and the method for documenting an alternate payment method between the contracting officer, the Defense Finance and Accounting Service (DFAS), and the vendor when the vendor cannot comply with the DFARS policy.

DoD Response: Concur in part. The DFARS rule does not preclude agencies from providing guidance to contracting officers to address the particular situations of the agency that may warrant an exemption from the policy. DoD believes the language at DFARS 232.7002(a)(1) through (6) provides sufficient flexibility for agencies to implement this policy without needing specific additional exemption authority.

As for existing contracts, DoD does not believe it is necessary to specify whether the clause applies retroactively. Policy on the applicability of DFARS changes is provided in DFARS 201.304(6), which states, “* * * Unless guidance accompanying a change states otherwise, contracting officers must include any new or revised clauses, provisions, or forms in solicitations issued on or after the effective date of the change.” This rule does not deviate from the policy in DFARS 201.304(6) and, therefore, requires no additional instructions regarding applicability.

2. *Comment:* The rule should provide leeway to exclude classified procurement systems from any mandated changes implemented.

DoD Response: Concur. Classified invoices are exempt from the electronic submission requirement in accordance with DFARS 232.7002(a)(3).

3. *Comment:* How will DoD know that contracting offices are fully functional? Comments were submitted in response to the proposed rule published on May 31, 2002, which expressed concerns regarding the ability of agency software to comply with the electronic submission requirements.

DoD Response: In response to a comment received on the proposed rule published at 67 FR 38057 on May 31, 2002, DFARS 232.7002(a)(6) was added to the interim rule. This paragraph permits the contracting officer to authorize a contractor to submit a payment request in other than electronic form until such time as the agency is able to process payments electronically. Knowing which contracting offices are fully functional is an internal DoD implementation issue, which is outside the scope of this case. DoD anticipates that agencies will implement internal

controls to monitor progress in complying with this policy.

4. *Comment:* One company indicated that it was not set up to send electronic invoices or accept electronic purchase orders. The company does not accept e-mail or FAX orders, and does not accept credit cards. Changing to all electronic payments would be a hardship to a small company such as itself that does limited Government business.

DoD Response: DoD believes this situation is adequately addressed at DFARS 232.7002(a)(6), which permits an exception to the policy if the contractor is unable to submit a payment request in electronic form.

5. *Comment:* There is a concern that one DoD payment office may be implementing a policy stating that, once it begins paying under contract via Wide Area WorkFlow-Receipt and Acceptance (WAWF-RA), there shall be no invoices on that contract that will be paid manually.

DoD Response: DoD believes it should be a rare instance where manual payments are needed after payment has been made electronically under a contract. However, DoD believes this situation is adequately addressed at DFARS 232.7002(a)(6), which permits submission of a payment request in other than electronic form if the contractor is unable to submit or DoD is unable to receive a payment request in electronic form, and the parties (contracting officer, payment office, contract administration office, and contractor) agree on an alternative method. While a particular payment office may have a general policy such as the one described by the respondent, DoD anticipates that such a policy would be flexible enough to accommodate unique circumstances that may arise during contract performance.

6. *Comment:* How will vendors know what DFAS payment systems are available to accept invoicing through WAWF-RA and whether there will be staff available for testing of different payment systems for electronic invoicing? In addition, will purchasing agencies have all the required information to give vendors for electronic invoicing when orders are called in for supplies?

DoD Response: Information regarding DFAS and electronic payment is available at www.dfas.mil/ecedi. If the required information is not available on that web site, the cognizant contracting officer should be able to assist the contractor.

7. *Comment:* There should be a 6-month grace period during which paper invoices will continue to be acceptable

after a new electronic submission has been added.

DoD Response: Do not concur. DoD believes the language at DFARS 232.7002(a)(6) provides sufficient flexibility to address implementation concerns. This policy permits submission of a payment request in other than electronic form if the contractor is unable to submit or DoD is unable to receive a payment request in electronic form, and the parties agree on an alternative method.

8. *Comment:* The rule should consider that not every company or Government representative is located in an area with relatively inexpensive high-speed broadband internet access.

DoD Response: Concur in principle. DoD agrees that not every company or Government agency currently has high-speed broadband internet access. However, DoD believes this is adequately addressed at DFARS 232.7002(a)(6), which permits exceptions to the policy if the contractor is unable to submit or DoD is unable to receive a payment request in electronic form.

9. *Comment:* The second sentence of 252.232-7003(a)(2) should be revised to state that scanned documents are acceptable. Many contractors scan their data into a file and then attach it to the WAWF-RA program, which is part of the system.

DoD Response: Concur. The language at 252.232-7003(a)(2) was included in the interim rule to address a concern that scanned documents, by themselves, are not acceptable electronic forms for submission of payment requests. However, DoD recognizes that this may be misinterpreted to preclude scanning documents and then including them within the WAWF-RA program. Therefore, the language at 252.232-7003(a)(2) has been revised to state that scanned documents are not acceptable unless they are part of a submission using one of the forms of acceptable electronic transmission. Currently, neither ANSI X12 nor WInS can accept attachments. These are electronic data interchanges (EDI), so the only information flowing is data.

The language at 232.7002(b) has also been revised to specify that scanned documents are acceptable electronic forms for processing supporting documentation. DoD believes this change is necessary to clarify what constitutes electronic form for the processing of supporting documentation, and to be consistent with the language at 252.232-7003(a)(2).

10. *Comment:* Everyone should use WAWF-RA to electronically process invoices.

DoD Response: Do not concur. The rule identifies three acceptable electronic forms for transmission of payment requests, including but not limited to WAWF-RA. DoD does not believe it would be beneficial to limit transmission to WAWF-RA only.

11. *Comment:* It should be made explicit that it is the contracting officer's responsibility to approve an exemption as part of payment administration.

DoD Response: Concur in part. This responsibility is addressed at DFARS 232.7003(b), which states, "If the payment office and the contract administration office concur, the contracting officer may authorize a contractor to submit a payment request using an electronic form other than those listed. * * *"

12. *Comment:* One company stated that it was set up to receive orders/releases through EDI, but was unsure if this would be sufficient to satisfy the requirements of the new DFARS policy.

DoD Response: As stated in DFARS 252.232-7003(b), EDI format is an acceptable form of electronic submission. However, the respondent should ensure that the submission is in one of the American National Standards Institute (ANSI) formats, in accordance with the DFARS policy. If the respondent is not using an ANSI format, it may adopt one of the ANSI formats or may request that its current electronic form be authorized by the contracting officer.

13. *Comment:* The clause at DFARS 252.232-7003 should be clarified, because some DoD officials and contractors believe the clause requires the contractor to electronically submit receiving reports.

DoD Response: Do not concur. DFARS 252.232-7003 requires contractors to submit payment requests electronically. Unless a contractor submits a receiving report as a payment request, the requirements of DFARS 252.232-7003 do not apply. DoD believes that the clause clearly limits the electronic submission requirement to payment requests.

14. *Comment:* DFARS 252.246-7000, Material Inspection and Receiving Report, should be clarified if contractors are required to distribute material inspection and receiving reports submitted in WAWF-RA to non-active WAWF-RA users by some other means.

DoD Response: Concur in part. DoD agrees that, if contractors were required to distribute these documents to non-active WAWF-RA users, the rule would need to specifically state this requirement. However, DoD does not believe the rule should have such a requirement, because such additional

distribution would be redundant and costly to both DoD and industry. The policy does not require contractors to otherwise distribute material inspection and receiving reports submitted in WAWF-RA, because the distribution recipients have access to WAWF-RA.

15. *Comment:* There is not adequate training for vendors as to the type of invoicing document they are required to submit for payment. In the paper world, payment offices pay off of any type of document, e.g., commercial invoice, public voucher, 2-in-1.

DoD Response: Do not concur. Whether submitting an invoice electronically or by paper, the vendor must submit the proper document. For example, a commercial invoice submitted under a contract that requires submission of public vouchers will not constitute an acceptable submission, regardless of whether that submission is made electronically or non-electronically.

Training is readily available for contractors and DoD personnel from numerous Internet sources, including the WAWF-RA site at <http://www.wawftraining.com>; for DCMA at www.dcmamil.com (click on Electronic Invoicing); for DFAS at www.dfas.mil/ecedi; and for DISA at www.disa.mil/acq/wawf/index.html and <https://wawf-ra.slidell.disa.mil>.

16. *Comment:* Detailed guidance and training should be provided to all DoD payment staff regarding the payment request types for which payment invoicing is permitted.

DoD Response: Concur in principle. DoD believes adequate training is available, as discussed in the response to Comment 15 above.

17. *Comment:* While the training information is available on the Internet and by the military departments and defense agencies, there remains an urgent need to inform the contracting community about the requirement to invoice electronically.

DoD Response: Concur. To ensure the widest dissemination possible, an information release will be issued informing the public when the final rule is published.

18. *Comment:* The final rule should be clear with regard to the applicability date for the policy.

DoD Response: The interim rule became effective on March 1, 2003, and the final rule will become effective on the date of publication in the **Federal Register**. The DFARS changes in these rules apply to solicitations issued on or after the effective date of the change. (Also see the DoD response to Comment 1 above.)

19. *Comment:* One respondent was interested in the outcome of interfaces from the WAWF-RA Program Office referred to in Comment #36 of the February 21, 2003, **Federal Register** publication.

DoD Response: This comment is outside the scope of this case.

20. *Comment:* WAWF-RA does not currently accommodate third parties providing DD Form 250 processing as a service to contractors. An interface with a third party should be built into the WAWF-RA application.

DoD Response: While this recommendation is outside the scope of this case, the WAWF-RA Program Office has indicated that a future version of WAWF-RA will accommodate third parties providing DD Form 250 processing.

21. *Comment:* All options for electronic submission should include both the FTP and EDI batch solution to accommodate contractors that have high transaction counts and a simple web solution for contractors with low transaction counts.

DoD Response: While this recommendation is outside the scope of this case, the WAWF-RA Program

Office has indicated that WAWF-RA does allow electronic submission in both FTP and EDI batch solution.

22. *Comment:* DoD should maintain a detailed schedule of electronic solutions available. The schedule should include a list of available solutions by invoice type, payment system, and payment office. The schedule should also show all system limitations, invoice types for which paper submission is acceptable, and the date when compliance with electronic submission for newly deployed solutions is required.

DoD Response: This comment is outside the scope of this case.

23. *Comment:* In migrating to one common electronic commerce system, existing electronic commerce solutions permitted by statute should be remapped into the specification required by the common system rather than requiring contractors to incur the significant cost of remapping.

DoD Response: This comment is outside the scope of this case.

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

B. Regulatory Flexibility Act

DoD certifies 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 any start-up costs that contractors will incur to comply with the rule are expected to be minimal, and should be offset by the reduced administrative costs that are expected to result from the electronic submission and processing of invoices. In addition, the rule provides for exceptions to electronic submission requirements in cases where the contractor is unable to submit a payment request in electronic form.

C. Paperwork Reduction Act

This rule does not impose any additional information collection requirements that require approval of the Office of Management and Budget (OMB) under 44 U.S.C. 3501, *et seq.* The information collection requirements for contractors to provide non-electronic payment requests already have been approved by OMB as indicated below:

FAR clause number	FAR clause title	OMB control number	Expiration date
52.216-7	Allowable cost and payment	9000-0069	12/31/2005
52.232-7	Payments under time-and-materials and labor-hour contracts	9000-0070	7/31/2005
52.232-12	Advance payments	9000-0073	7/31/2005
52.232-16	Progress payments	9000-0010	9/30/2005
52.232-29	Terms for financing of purchases of commercial items	9000-0138	9/30/2004
52.232-30	Installment payments for commercial items	9000-0138	9/30/2004
52.232-32	Performance-based payments	9000-0138	9/30/2004

List of Subjects in 48 CFR Parts 232 and 252

Government procurement.

Michele P. Peterson,

Executive Editor, Defense Acquisition Regulations Council.

■ Accordingly, the interim rule amending 48 CFR parts 232 and 252 which was published at 68 FR 8450 on February 21, 2003, is adopted as a final rule with the following changes:

■ 1. The authority citation for 48 CFR parts 232 and 252 continues to read as follows:

Authority: 41 U.S.C. 421 and 48 CFR Chapter 1.

PART 232—CONTRACT FINANCING

■ 2. Section 232.7002 is amended by revising paragraphs (a)(6)(ii) and (b) to read as follows:

232.7002 Policy.

(a) * * *

(6) * * *

(ii) The contracting officer, the payment office, the contract administration office, and the contractor mutually agree to an alternative method.

(b) DoD officials receiving payment requests in electronic form shall process the payment requests in electronic form. Any supporting documentation necessary for payment, such as receiving reports, contracts, contract modifications, and required certifications, also shall be processed in electronic form. Scanned documents are acceptable forms for processing supporting documentation.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

252.212-7001 [Amended]

■ 3. Section 252.212-7001 is amended as follows:

■ a. By revising the clause date to read “(DEC 2003)”;

■ b. In entry “252.232-7003”, by removing “(MAR 2003)” and adding in its place “(DEC 2003)”.

■ 4. Section 252.232-7003 is amended by revising the clause date and paragraphs (a)(2) and (c) to read as follows:

252.232-7003 Electronic Submission of Payment Requests.

* * * * *

ELECTRONIC SUBMISSION OF PAYMENT REQUESTS (DEC 2003)

(a) * * *

(2) *Electronic form* means any automated system that transmits information electronically from the initiating system to all affected systems. Facsimile, e-mail, and scanned documents are not acceptable electronic forms for submission of payment requests. However, scanned documents are acceptable when they are part of a submission of a payment request made using one of the electronic forms provided for in paragraph (b) of this clause.

* * * * *

(c) If the Contractor is unable to submit a payment request in electronic form, or DoD is unable to receive a payment request in electronic form, the Contractor shall submit the payment request using a method mutually agreed to by the Contractor, the Contracting Officer, the contract administration office, and the payment office.

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[FR Doc. 03-30764 Filed 12-12-03; 8:45 am]

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DEPARTMENT OF DEFENSE

48 CFR Parts 232 and 252

[DFARS Case 2002-D017]

Defense Federal Acquisition Regulation Supplement; Payment Withholding

AGENCY: Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD has issued a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to provide additional flexibility when determining the need to withhold payments under time-and-materials and labor-hour contracts. The rule clarifies that normally there should be no need to withhold payment for a contractor with a record of timely submittal of a release discharging the Government from all liabilities, obligations, and claims under a contract.

EFFECTIVE DATE: December 15, 2003.

FOR FURTHER INFORMATION CONTACT: Mr. Thaddeus Godlewski, Defense Acquisition Regulations Council, OUSD(AT&L)DPAP(DAR), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301-3062. Telephone (703) 602-2022; facsimile (703) 602-0350. Please cite DFARS Case 2002-D017.

SUPPLEMENTARY INFORMATION:

A. Background

Federal Acquisition Regulation (FAR) 52.232-7, Payments under Time-and-Materials and Labor-Hour Contracts, 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 withheld 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. This rule adds DFARS 232.111(b) and DFARS 252.232-7006, Alternate A, to specify that, normally, there should be no need to withhold payment for a contractor with a record of timely submittal of such a release.

DoD published a proposed rule at 68 FR 9627 on February 28, 2003. Five sources submitted comments on the proposed rule. A discussion of the comments is provided below. Differences between the proposed and final rules are addressed in the DoD Response to Comments 5, 6, 7, and 8 below.

1. *Comment:* The rule should specify whether the clause applies retroactively or from a specific date forward to all time-and-materials and labor-hour contracts.

DoD Response: Do not concur. Policy on the applicability of DFARS changes is provided in DFARS 201.304(6), which states, “* * * Unless guidance accompanying a change states otherwise, contracting officers must include any new or revised clauses, provisions, or forms in solicitations issued on or after the effective date of the change.” This rule does not deviate from the policy in DFARS 201.304(6) and, therefore, requires no additional instructions regarding applicability.

2. *Comment:* FAR 52.232-7(a)(2) should be eliminated. If it is not eliminated, there should be a graduated scale for the rate of withholding and the total to be withheld. For instance, the ceiling amount for very small businesses should be reduced to \$5,000 and the withholding rate should be reduced to 2 percent so that the effects are spread over a longer time.

DoD Response: Do not concur. DoD believes the withhold is an important tool for the Government to use when the contractor does not have a record of timely submittal of the release discharging the Government from all liabilities, obligations, and claims. The withhold protects the Government in these circumstances while also providing the contractor with an incentive to submit the discharges in a timely manner.

3. *Comment:* In addition to continuing forward with this DFARS revision, the FAR should be revised at the earliest possible date to make withholding optional.

DoD Response: The Defense Acquisition Regulations Council is presently working with the Civilian Agency Acquisition Council to incorporate similar policy into the FAR.

4. *Comment:* The language at 232.111(b)(ii) should be revised to indicate that timely submittal of release is only one example where there is no need to withhold payment. There are other circumstances when the withholding may not be necessary, such as when the contractor has demonstrated a satisfactory accounting and billing system and is determined to

be eligible for direct billings by the Defense Contract Audit Agency.

DoD Response: Do not concur. A satisfactory accounting and billing system and eligibility for direct billings indicate that the contractor has the necessary internal controls to address periodic billings during contract performance. However, they are not determinative as to whether the contractor submits timely releases discharging the Government from all liabilities, obligations, and claims upon completion of the contract. If the contractor does not have a record of submitting these discharge documents in a timely manner, the fact that the accounting and billing systems are adequate is not sufficient to warrant removing the withhold requirement.

5. *Comment:* The language at 232.111(b)(iii) should be revised to refer to the withholding as “five percent up to a maximum of \$50,000” of the amounts due until a sufficient reserve is established. This maximum amount of coverage is addressed properly in the contract clause. In addition, 232.111(b)(iii) should be amended to authorize the ACO to establish an administrative mechanism for holding contractor funds that does not require the withholding of funds on each invoice so as to reduce the administrative burden on both the Government and the contractor.

DoD Response: Partially concur. DoD agrees that the \$50,000 maximum withhold amount should be stated in 232.111(b)(iii) and, accordingly, has replaced “until a sufficient reserve is set aside” with “up to a maximum of \$50,000.”

As to the suggestion to provide for alternative mechanisms, DoD believes that determining whether alternative administrative mechanisms are feasible and/or practical is beyond the scope of this case.

6. *Comment:* The rule should instruct the contractor to forward all vouchers to the Defense Finance and Accounting Service (DFAS) through the ACO for approval, until such time that the ACO considers sufficient reserves to be set aside to adequately protect the Government interests. The ACO must inform DFAS when funds will be withheld from a contract, and there must be a process to link the modification with the vouchers being submitted to DFAS for payment. The modification should specify the percentage of the amounts due up to a maximum dollar amount.

DoD Response: Partially concur. DoD recognizes the need for coordination among all parties in the payment process to ensure that withholds are