

List of Subjects in 48 CFR Part 201

Government procurement.

Michele P. Peterson,

Editor, Defense Acquisition Regulations System.

■ Therefore, 48 CFR part 201 is amended as follows:

PART 201—FEDERAL ACQUISITION REGULATIONS SYSTEM

■ 1. The authority citation for 48 CFR part 201 continues to read as follows:

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

■ 2. Section 201.602–2 is revised to read as follows:

201.602–2 Responsibilities.

(1) Follow the procedures at PGI 201.602–2 regarding designation of a contracting officer's representative (COR).

(2) A COR—

(i) Must be a Government employee, unless otherwise authorized in agency regulations;

(ii) Must be qualified by training and experience commensurate with the responsibilities to be delegated in accordance with department/agency guidelines;

(iii) May not be delegated responsibility to perform functions at a contractor's location that have been delegated under FAR 42.202(a) to a contract administration office;

(iv) Has no authority to make any commitments or changes that affect price, quality, quantity, delivery, or other terms and conditions of the contract; and

(v) Must be designated in writing, and a copy furnished the contractor and the contract administration office—

(A) Specifying the extent of the COR's authority to act on behalf of the contracting officer;

(B) Identifying the limitations on the COR's authority;

(C) Specifying the period covered by the designation;

(D) Stating the authority is not redelegable; and

(E) Stating that the COR may be personally liable for unauthorized acts. [FR Doc. E6–20393 Filed 11–30–06; 8:45 am]

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DEPARTMENT OF DEFENSE**Defense Acquisition Regulations System****48 CFR Part 208****Defense Federal Acquisition Regulation Supplement; Technical Amendment**

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is making a technical amendment to the Defense Federal Acquisition Regulation Supplement (DFARS) to update a reference number within the DFARS text.

DATES: *Effective Date:* December 1, 2006.

FOR FURTHER INFORMATION CONTACT: Ms. Michele Peterson, Defense Acquisition Regulations System, OUSD(AT&L)DPAP(DARS), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301–3062. Telephone (703) 602–0311; facsimile (703) 602–0350.

SUPPLEMENTARY INFORMATION: This final rule amends DFARS 208.7003–2(a) by updating a reference to a section of the Federal Acquisition Regulation.

List of Subjects in 48 CFR Part 208

Government procurement.

Michele P. Peterson,

Editor, Defense Acquisition Regulations System.

■ Therefore, 48 CFR part 208 is amended as follows:

PART 208—REQUIRED SOURCES OF SUPPLIES AND SERVICES

■ 1. The authority citation for 48 CFR part 208 continues to read as follows:

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

208.7003–2 [Amended]

■ 2. Section 208.7003–2 is amended in paragraph (a) by removing “8.001” and adding in its place “8.002”.

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DEPARTMENT OF DEFENSE**Defense Acquisition Regulations System****48 CFR Parts 212, 232, and 252**

[DFARS Case 2004–D033]

Defense Federal Acquisition Regulation Supplement; Levy on Payments to Contractors

AGENCY: Defense Acquisition Regulations System, 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 address the effect of Internal Revenue Service (IRS) levies on contract payments. The rule requires DoD contractors to promptly notify the contracting officer if a levy may result in an inability to perform a contract.

DATES: *Effective Date:* December 1, 2006.

FOR FURTHER INFORMATION CONTACT: Mr. Bill Sain, Defense Acquisition Regulations System, OUSD(AT&L)DPAP(DARS), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301–3062. Telephone (703) 602–0293; facsimile (703) 602–0350. Please cite DFARS Case 2004–D033.

SUPPLEMENTARY INFORMATION:**A. Background**

DoD published an interim rule at 70 FR 52031 on September 1, 2005, addressing policy and procedures that apply when an IRS levy may result in a contractor's inability to perform a DoD contract. DoD received comments from 6 sources in response to the interim rule. DoD considered all comments and has incorporated the following changes in the final rule:

DFARS 212.301(f)—Addition of a prescription for use of the clause at 252.232–7010, Levies on Contract Payments, in contracts for the acquisition of commercial items.

DFARS 232.7101 and 252.232–7010—Clarification that the requirement for the contractor to notify the contracting officer applies in situations where the levy may result in an “inability to perform the contract.” This change eliminates the term “jeopardize contract performance,” since that term may be understood as establishing a different standard than causing an inability to perform.

DFARS 232.7102—Exclusion of micro-purchases from the requirement to use the clause at 252.232–7010.

The following is a discussion of the public comments and the issues relating to the development of the final rule:

1. *Comment:* One respondent recommended amendment of the rule at 232.7101 and 252.232–7010 to provide that the contractor must notify the procuring contracting officer (PCO) in all instances when a levy is imposed. This would ensure that the PCO is aware of potential performance problems before they occur. Once notified of the levy, the PCO could monitor the contractor's performance and perform surveillance of the contractor's financial condition.

DoD Response: DoD believes that notification should be limited to situations where the levy will be likely to cause an inability to perform the contract. To require reporting each time a levy is imposed, even when the contractor believes there will be no impact on the contract, would not provide useful data to the PCO, and could lead to unnecessary administrative effort on the part of the Government, as well as the contractor. The Paperwork Reduction Act (44 U.S.C. 3501, *et seq.*) requires that the Government minimize the reporting requirements incorporated into regulations.

2. *Comment:* Two respondents recommended amendment of the rule to require that contractors notify both the PCO and the administrative contracting officer (ACO).

DoD Response: DoD believes that the PCO is the best point of contact for this process, but has revised the rule to require that the contractor notify the PCO, in writing, with a copy to the ACO.

3. *Comment:* One respondent commented that the rule unnecessarily requires a mandatory report to the PCO by the contractor (including a report of "no effect") regarding the assessment on national security, even if the contractor concludes that the levy will not create an "inability to perform" and that the withholding will have no effect on national security. The respondent explained that it did not interpret the rule as requiring an automatic report under the first requirement unless the contractor concludes that the levy will actually jeopardize contract performance; however, the respondent believed that there is an ambiguity in the rule concerning the extent of the reporting requirement, particularly when the contract clause (at 252.232–7010(b)) requires a mandatory report only when "a levy is imposed . . . and the levy will jeopardize contract performance" because the contractor is required to report on both the jeopardy

to contract performance and whether there will be any effect on national security.

DoD Response: The contractor is required to report to the contracting officer if, and only if, the contractor believes that the levy may cause an inability to perform the contract. This reporting requirement is necessary in order to apprise the PCO of circumstances that create barriers to successful contract performance. The contractor is also required (at DFARS 252.232–7010(b)(3)) to provide advice as to whether the inability to perform may adversely affect national security, with rationale and adequate supporting documentation.

4. *Comment:* One respondent commented that the tests under the rule that apply to the two requirements are different. "Jeopardize contract performance" may have a limited impact, while "inability to perform" is more difficult for the contractor to assess.

DoD Response: The interim rule did establish two different standards, "jeopardize contract performance" and causing an "inability to perform." The Government's interest is in knowing when the levy may cause an inability to perform, not necessarily in knowing of each impediment that may jeopardize operations and that can be overcome in the normal course of business. To clarify this requirement, the final rule now consistently refers to situations where the levy may result in an "inability to perform."

5. *Comment:* One respondent commented that, while DFARS 232.7101(b) requires the contracting officer to notify the Director, Defense Procurement and Acquisition Policy, when the contractor's inability to perform may adversely affect national security or may result in significant increased costs to the Government, neither the policy description nor the clause requests information from the contractor as to whether the levy will have any impact on Government costs.

DoD Response: The assessment as to whether an inability to perform on a contract will lead to significantly increased costs is an internal one for the buying activity. The PCO and the PCO's customer would be able to assess, based on such factors as cost/price analysis of the affected contract, alternative sources of supply, or existing inventories, whether a probability exists for significantly increased costs to the Government. Therefore, the final rule does not include a requirement for contractor information on this factor.

6. *Comment:* One respondent recommended that the contract clause

be revised to specify, consistent with DFARS 232.7101(c), that the contracting officer will provide the notification described in DFARS 252.232–7010(c). The clause currently provides only that DoD will provide a notification to the contractor.

DoD Response: DFARS 252.232–7010(c) has been revised to require that the PCO notify the contractor, in writing, of the DoD decision.

7. *Comment:* One respondent recommended that DFARS Procedures, Guidance, and Information (PGI) be expanded to require notification by the PCO to the procuring agency's senior procurement executive, concurrent with the notification to the Director, Defense Procurement and Acquisition Policy, that is prescribed in the rule.

DoD Response: DoD agrees that senior agency procurement leadership, possibly including the senior procurement executive, should be included in the notification process. Corresponding PGI coverage provides that the contracting officer will notify the Director, Defense Procurement and Acquisition Policy, in accordance with agency procedures. DoD believes that the individual DoD components should determine the specific routing of such notifications in their internal guidance.

8. *Comment:* One respondent stated that DFARS 232.7100, Scope of subpart, should cite Internal Revenue Code 6331 and 6332, since those sections established the Federal Payment Levy Program.

DoD Response: The coverage in DFARS Subpart 232.71, Levies on Contract Payments, addresses a narrow part of levies against payments, specifically, the process for dealing with collections against contract payments that may cause an inability to perform. Therefore, DoD believes that the current citation is appropriately precise.

9. *Comment:* One respondent stated that the rule should indicate when the clause needs to be included in contracts, e.g., greater than \$100,000. Similarly, another respondent recommended that contracts below the simplified acquisition threshold be excluded.

DoD Response: While DoD understands that contracts below the simplified acquisition threshold have a reduced likelihood of impacting national security, the possibility exists that, in a critical situation, a levy could lead to such a circumstance. Therefore, DoD believes that the clause prescription should apply to contracts below the simplified acquisition threshold, with the exception of micro-purchases. DFARS 232.7102 has been revised to exclude micro-purchases from the clause prescription.

10. *Comment:* Two respondents requested clarification as to whether the clause applies to contracts for the acquisition of commercial items.

DoD Response: While DoD understands that contracts for the acquisition of commercial items have a reduced likelihood of impacting national security, the scope of commercial items is very broad, and such contracts can be very large, even including critical items. Therefore, the possibility exists that, in a given situation, a levy could impact contract performance that, in a certain circumstance, could impact national security. DoD believes that the clause should be used in contracts for commercial items above the micro-purchase threshold. DFARS 212.301(f) has been amended to incorporate a prescription for inclusion of the clause at 252.232-7010 in contracts for the acquisition of commercial items.

11. *Comment:* One respondent recommended that the clause prescription permit the contracting officer to waive (without significant procedural requirements) the inclusion of the clause in solicitations and contracts when the contracting officer believes the risk of a levy having an adverse impact on performance is low.

DoD Response: While there may be contracts that have a reduced likelihood of impacting national security or leading to significantly higher costs to the Government in the event of an inability to perform, the possibility exists that, in a critical situation, a levy could lead to such a circumstance. Therefore, DoD did not make the suggested change.

12. *Comment:* One respondent commented that the vast majority of DoD contracts contain the clause at FAR 52.232-23, Assignment of Claims, with Alternate I, which provides for a no-setoff commitment, and asked how DFARS 252.232-7010, Levies on Contract Payments, would interact with FAR 52.232-23, with Alternate I.

DoD Response: Levies cannot be applied against payments for contracts that have been assigned in accordance with the clause at FAR 52.232-23, Assignment of Claims, with Alternate I, unless the agency or the contracting officer has excluded the no-setoff commitment in accordance with DFARS 232.803(d).

13. *Comment:* Two respondents had comments regarding the requirement for assessing the impact of an inability to perform on national security. One indicated that this should be a judgment for the Government, since contractors cannot possibly know such things. The other respondent indicated that this

may be beyond the contractor's knowledge and capability.

DoD Response: The contractor generally is not in a position to determine the impact on national security, and the rule assigns that responsibility to DoD. However, the policy at 232.7101, and the clause at 252.232-7010, call for advice from the contractor as to whether national security might be impacted. The advice may be helpful to the buying activity in developing a decision as to the impact on national security. No change in the rule is necessary.

14. *Comment:* One respondent commented that the Background section of the **Federal Register** notice should be changed to make it consistent with DFARS 232.7101, Policy and Procedures. Specifically, that section should be revised to indicate that the contractor will notify the contracting officer when the contractor believes a levy imposed on a DoD contract payment will "jeopardize contract performance." The respondent also recommended that the Paperwork Reduction Act section of the **Federal Register** notice be revised for consistency with DFARS 232.7101, to indicate that the rule requires contractors to provide certain information to the Government when levies "jeopardizing contract performance and adversely affecting national security" are imposed on DoD contract payments.

DoD Response: As discussed in the response to Comment 4 above, to avoid confusion, the final rule eliminates use of the term "jeopardize contract performance" and now consistently refers to requirements for the contractor to notify the contracting officer when a levy may result in an "inability to perform."

15. *Comment:* One respondent recommended that DoD initiate actions to draft proposed legislation that will require all Federal agencies to provide notice by e-mail for all potential offsets at least 30 days in advance of the target offset date to certain contractor points of contact established in the Central Contractor Registration system. The respondent maintains that Federal agencies, and the Internal Revenue Service in particular, have not been compliant with the intent and spirit of the Debt Collection Improvement Act of 1996, in making the offsets to recover levies related to contract overpayment and tax underpayments.

DoD Response: The comment is beyond the scope of this DFARS case. However, DoD notes that the Internal Revenue Service issues a Collection Due Process notice 30 days before collection

action, such as a levy. Therefore, the contractor is already aware of the debt, and DoD believes that further notice should not be necessary.

16. *Comment:* One respondent strongly encouraged DoD to review the interaction between DoD and the Federal Payment Levy Program and the Treasury Offset Program, with a particular focus on the procedural requirements to notify the contractor, to the maximum extent practicable, before DoD notifies the Treasury Department of a contract debt.

DoD Response: FAR 32.610, Demand for Payment of Contract Debt, already provides for issuance of a demand for payment, and specifies that the contractor has 30 days to make payment without interest. DoD considers that the existing FAR requirements provide adequate notice to a contractor of a contract debt.

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 the rule applies to only those contractors that have a delinquent tax debt. The number of contractors that fall into this category is expected to be less than 10 per year.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply, because the rule does not impose any information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.* Although the rule requires contractors to provide certain information to the Government when an IRS levy may result in an inability to perform a contract, the number of contractors subject to this requirement is expected to be less than 10 per year.

List of Subjects in 48 CFR Parts 212, 232, and 252

Government procurement.

Michele P. Peterson,

Editor, Defense Acquisition Regulations System.

■ Accordingly, the interim rule amending 48 CFR parts 232 and 252, which was published at 70 FR 52031 on September 1, 2005, is adopted as a final rule with the following changes:

■ 1. The authority citation for 48 CFR Parts 212, 232, and 252 continues to read as follows:

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

PART 212—ACQUISITION OF COMMERCIAL ITEMS

■ 2. Section 212.301 is amended by adding paragraph (f)(xi) to read as follows:

212.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

(f) * * *

(xi) Use the clause at 252.232–7010, Levies on Contract Payments, as prescribed in 232.7102.

PART 232—CONTRACT FINANCING

■ 3. Sections 232.7101 and 232.7102 are revised to read as follows:

232.7101 Policy and procedures.

(a) The contracting officer shall require the contractor to—

(1) Promptly notify the contracting officer when a levy may result in an inability to perform the contract; and

(2) Advise the contracting officer whether the inability to perform may adversely affect national security.

(b) The contracting officer shall promptly notify the Director, Defense Procurement and Acquisition Policy (DPAP), when the contractor's inability to perform will adversely affect national security or will result in significant additional costs to the Government. Follow the procedures at PGI 232.7101(b) for reviewing the contractor's rationale and submitting the required notification.

(c) The Director, DPAP, will promptly evaluate the contractor's rationale and will notify the IRS, the contracting officer, and the payment office, as appropriate, in accordance with the procedures at PGI 232.7101(c).

(d) The contracting officer shall then notify the contractor in accordance with paragraph (c) of the clause at 252.232–7010 and in accordance with the procedures at PGI 232.7101(d).

232.7102 Contract clause.

Use the clause at 252.232–7010, Levies on Contract Payments, in all solicitations and contracts other than those for micro-purchases.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 4. Section 252.232–7010 is amended by revising the clause date and paragraphs (b) and (c) to read as follows:

252.232–7010 Levies on Contract Payments.

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LEVIES ON CONTRACT PAYMENTS (DEC 2006)

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(b) When a levy is imposed on a payment under this contract and the Contractor believes that the levy may result in an inability to perform the contract, the Contractor shall promptly notify the Procuring Contracting Officer in writing, with a copy to the Administrative Contracting Officer, and shall provide—

(1) The total dollar amount of the levy;

(2) A statement that the Contractor believes that the levy may result in an inability to perform the contract, including rationale and adequate supporting documentation; and

(3) Advice as to whether the inability to perform may adversely affect national security, including rationale and adequate supporting documentation.

(c) DoD shall promptly review the Contractor's assessment, and the Procuring Contracting Officer shall provide a written notification to the Contractor including—

(1) A statement as to whether DoD agrees that the levy may result in an inability to perform the contract; and

(2)(i) If the levy may result in an inability to perform the contract and the lack of performance will adversely affect national security, the total amount of the monies collected that should be returned to the Contractor; or

(ii) If the levy may result in an inability to perform the contract but will not impact national security, a recommendation that the Contractor promptly notify the IRS to attempt to resolve the tax situation.

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[FR Doc. E6–20394 Filed 11–30–06; 8:45 am]

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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 215, 230, 252, and 253

[DFARS Case 2003–D014]

Defense Federal Acquisition Regulation Supplement; Contract Pricing and Cost Accounting Standards

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD has issued a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to update text addressing contract pricing matters and cost accounting standards administration. The rule implements statutory provisions regarding exceptions to cost or pricing data requirements and waiver of cost accounting standards, and relocates internal DoD procedures relating to pricing considerations and cost accounting standards to the DFARS companion resource, Procedures, Guidance, and Information.

DATES: *Effective Date:* December 1, 2006.

FOR FURTHER INFORMATION CONTACT: Mr. Bill Sain, Defense Acquisition Regulations System, OUSD (AT&L) DPAP (DARS), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301–3062. Telephone (703) 602–0293; facsimile (703) 602–0350. Please cite DFARS Case 2003–D014.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule updates DFARS text addressing contract pricing matters and cost accounting standards administration. The DFARS changes include—

- Addition of text at 215.403–1 and 230.201–5 to implement Section 817 of the National Defense Authorization Act for Fiscal Year 2003 (Pub. L. 107–314) regarding exceptions to cost or pricing data requirements and waiver of cost accounting standards.

- Deletion of 215.404–1(d), Cost realism analysis, because FAR 15.404–1 contains sufficient policy on this subject.

- Deletion of unnecessary introductory text at redesignated 215.404–71–4(f), Facilities capital employed, Values: Normal and designated ranges.

- Relocation of the definition of “Acceptable estimating system” from 215.407–5–70(a)(1) to the contract clause at 252.215–7002, Cost Estimating System Requirements; elimination of 215.407–5–70(b)(1)(iii) and (iv) and relocation of the language to the new definition at 252.215–7002(a); and deletion of duplicative language at 252.215–7002(b).

- Removal of 230.7000, Contract facilities capital estimates; 230.7001, Use of DD Form 1861; and 230.7002, Preaward facilities capital applications; and relocation of text on these subjects to 215.404–71–4, Weighted guidelines method—Facilities capital employed, since these sections pertain to the