

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 4, 42, and 52**[FAR Case 2008–020; Docket 2009–0031;
Sequence 1]

RIN 9000–AL43

**Federal Acquisition Regulation; FAR
Case 2008–020, Contract Closeout****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
revise procedures for closing out
contract files. This case revises
procedures for clearing final patent
reports and quick-closeout procedure,
and sets forth a description of an
adequate final indirect cost rate
proposal and supporting data.**DATES:** Interested parties should submit
written comments to the Regulatory
Secretariat on or before October 19,
2009 to be considered in the
formulation of a final rule.**ADDRESSES:** Submit comments
identified by FAR case 2008–020 by any
of the following methods:

- Regulations.gov: <http://www.regulations.gov>.

Submit comments via the Federal eRulemaking portal by inputting “FAR Case 2008–020” into the field “Keyword”. Select the link that corresponds with FAR Case 2008–020. Follow the instructions provided to submit your comment. Please include your name, company name (if any), and “FAR Case 2008–020” on your attached document.

- Fax: 202–501–4067.

- Mail: General Services Administration, Regulatory Secretariat (VPR), 1800 F Street, NW., Room 4041, ATTN: Hada Flowers, Washington, DC 20405.

Instructions: Please submit comments only and cite FAR case 2008–020 in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Ms. Jeritta A. Parnell, Procurement Analyst, at (202) 501–4082 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755. Please cite FAR case 2008–020.

SUPPLEMENTARY INFORMATION:**A. Background**

In May 2007, the Director of Defense Procurement and Acquisition Policy (DPAP) completed an assessment of public input on systemic issues related to contract closeout (72 FR 28654, dated May 22, 2007). As a result, changes were proposed to the Defense Federal Acquisition Regulation Supplement (DFARS) and the FAR to improve contract closeout.

The Councils are proposing the following FAR revisions—

(1) Addition of language in FAR 4.804–5 setting forth the timeframe for clearing a required final patent report after receipt and procedures allowing the contracting officer to proceed with contract closeout when a required final patent report is not received;

(2) Addition of language in FAR 42.705–1 for the cognizant auditor to determine adequacy of the contractor’s proposal for audit and language referencing the clause at FAR 52.216–7(d)(2);

(3) Addition of language in FAR 42.708 increasing the dollar threshold and revising the percentage limitation in the existing quick-closeout criteria;

(4) Addition of language in FAR 52.216–7 setting forth a description of what data shall be submitted in an adequate final indirect cost rate proposal, (contractors may refer to the Model Incurred Cost Proposal in Chapter 6 of the Defense Contract Audit Agency Pamphlet No. 7641.90, Information for Contractors, available at <http://www.dcaa.mil>), what supplemental data, required for audit, may also be submitted with the proposal, and a requirement for the contractor to update cumulative costs claimed and billed within 60 days of rate settlement;

(5) Addition of language in FAR 52.216–8 for the contracting officer to withhold fixed fee to protect the Government’s interest and to encourage the timely submission of an adequate final indirect cost rate proposal;

(6) Addition of language in FAR 52.216–9 for the contracting officer to withhold fixed fee-construction to protect the Government’s interest and to encourage the timely submission of an adequate final indirect cost rate proposal; and

(7) Addition of language in FAR 52.216–10 for the contracting officer to withhold incentive fee to protect the Government’s interest and to encourage the timely submission of an adequate final indirect cost rate proposal.

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 the rule does not impose any additional requirements on small businesses. The changes to FAR Parts 4 and 42 clarify and streamline closeout procedures. The changes to the clauses at 52.216–8, 52.216–9, and 52.216–10 allow for a reserve to be set-aside to protect the Government’s interest. Contracting officers already may set aside a reserve under current FAR procedures. 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 4, 42, 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 2008–020), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does apply; however, these changes to the FAR do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Numbers 9000–0067 and 9000–0069.

**List of Subjects in 48 CFR Parts 4, 42,
and 52**

Government procurement.

Dated: August 14, 2009.

Al Matera,

Director, Office of Acquisition Policy.

Therefore, DoD, GSA, and NASA propose amending 48 CFR parts 4, 42, and 52 as set forth below:

1. The authority citation for 48 CFR parts 4, 42, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 4—ADMINISTRATIVE MATTERS

2. Amend section 4.804–5 by revising paragraph (a)(2) to read as follows:

4.804–5 Procedures for closing out contract files.

(a) * * *

(2) *Final patent report is cleared.* If a final patent report is required, the contracting officer may proceed with contract closeout in accordance with the following procedures, or as otherwise prescribed by agency procedures:

(i) Final patent reports should be cleared within 60 days of receipt.

(ii) If the final patent report is not received, the contracting officer shall notify the contractor of the contractor's obligations and the Government's rights under the applicable patent rights clause. If the contractor fails to respond to this notification, the contracting officer may proceed with contract closeout upon consultation with the agency legal counsel responsible for patent matters regarding the contractor's failure to respond.

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PART 42—CONTRACT ADMINISTRATION AND AUDIT SERVICES

3. Amend section 42.705–1 by revising paragraph (b)(1) to read as follows:

42.705–1 Contracting officer determination procedure.

* * * * *

(b) *Procedures.* (1) In accordance with the Allowable Cost and Payment clause at 52.216–7, the contractor shall submit to the contracting officer (or cognizant Federal agency official) and to the cognizant auditor an adequate final indirect cost rate proposal.

(i) The required content of the proposal and supporting data will vary depending on such factors as business type, size, and accounting system capabilities. The contractor, contracting officer, and auditor must work together to make the proposal, audit, and negotiation process as efficient as possible. Accordingly, each contractor shall submit an adequate proposal to the contracting officer (or cognizant Federal agency official) and auditor within the 6-month period following the expiration of each of its fiscal years. The contracting officer may grant reasonable extensions, for exceptional circumstances only, if requested in writing by the contractor.

(ii) The cognizant auditor will make a written determination on the adequacy of the contractor's proposal for audit.

(iii) The proposal must be supported with adequate supporting data, which may be required subsequent to proposal submission.

(iv) See the clause at FAR 52.216–7(d)(2) for the description of an adequate final indirect cost rate proposal and supporting data).

* * * * *

4. Amend section 42.708 by revising the introductory text of paragraph (a), (a)(1), and (a)(2) to read as follows:

42.708 Quick-closeout procedure.

(a) The contracting officer responsible for contract closeout shall negotiate the settlement of indirect and direct costs for a specific contract, task order, or delivery order to be closed, in advance of the determination of final direct costs and indirect rates, if—

(1) The contract, task order, or delivery order is physically complete;

(2) The amount of unsettled costs to be allocated to the contract, task order, or delivery order is relatively insignificant. Cost amounts will be considered relatively insignificant when—

(i) The total unsettled indirect and direct costs to be allocated to any one contract do not exceed \$4,000,000 and do not exceed 20 percent of the total contract, task order, or delivery order amount; and

(ii) The contracting officer performs a risk assessment and determines that the use of the quick-closeout procedure is appropriate. The risk assessment shall include consideration of the contractor's accounting, estimating, and purchasing systems; direct and indirect costs; other concerns of the cognizant contract auditors; and any other pertinent information.

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

5. Amend section 52.216–7 by revising the date of the clause; adding a sentence to the end of paragraph (d)(2)(i); adding paragraphs (d)(2)(iii) through (d)(2)(v); and adding two sentences to the end of paragraph (d)(5) to read as follows:

52.216–7 Allowable Cost and Payment.

* * * * *

ALLOWABLE COST AND PAYMENT (DATE)

* * * * *

(d) * * *

(2)(i) * * * See 42.705–1(b)(1).

* * * * *

(iii) An adequate indirect cost rate proposal shall include the following data unless otherwise specified by the cognizant Federal agency official (CFAO):

(A) Summary of claimed indirect expense rates.

(B) General and Administrative (G&A) expenses (final indirect cost pool).

(C) Overhead expenses (final indirect cost pool).

(D) Occupancy expenses (intermediate indirect cost pool).

(E) Claimed allocation bases.

(F) Facilities capital cost of money factors computation.

(G) Reconciliation of books of account and claimed direct costs.

(H) Schedule of direct costs by contract/subcontract and indirect expense applied at claimed rates, as well as Schedule H–1, Government participation percentages.

(I) Schedule of cumulative direct and indirect costs claimed and billed.

(J) Subcontract information.

(K) Summary of hours and amounts on T&M/labor hour contracts.

(L) Reconciliation of total payroll to total labor distribution.

(M) Listing of decisions/agreements/approvals and description of accounting/organizational changes.

(N) Certificate of final indirect costs.

(O) Contract closing information for contracts completed in this fiscal year.

(iv) The following supplemental information, which will be required during the audit process, may also be submitted with the contractor's final indirect cost rate proposal:

(A) Comparative analysis of indirect expense pools detailed by account with prior fiscal year and budgetary data.

(B) General Organization and Executive compensation information for top five executives.

(C) List of ACOs and PCOs for each flexibly priced contract.

(D) Identification of and information on prime contracts under which the contractor performs flexibly priced effort as a subcontractor.

(E) List of work sites and the number of employees assigned to each site (identify the number of direct and indirect employees).

(F) Description of accounting system.

(G) Procedures for identifying and handling unallowable costs.

(H) Certified financial statements or other financial data (e.g., trial balance, compilation, review, etc.).

(I) Management letter from outside CPAs concerning any internal control weaknesses.

(J) Actions that have been and/or will be implemented to correct the weaknesses described in paragraph (d)(2)(iv)(I) of this section.

(K) List of internal audit reports issued in this fiscal year.

(L) Annual internal audit plan of scheduled audits to be performed in this fiscal year.

(M) Federal and state income tax returns.

(N) Securities and Exchange Commission 10–K annual report.

(O) Minutes from board of directors meetings.

(P) Listing of delay and disruptions and termination claims submitted which contain costs relating to the subject fiscal year.

(Q) *Contract briefings.* Contract briefings generally include a synopsis of all pertinent

contract provisions, such as: contract type, contract amount, product or service(s) to be provided, applicable Cost Principles, contract performance period, rate ceilings, advance approval requirements, pre-contract cost allowability limitations, and billing limitations. A typical format for the briefings is shown at the end of this model. A contractor need not use the example form if the information is already generated and available within its automated accounting or billing systems.

(v) The Contractor shall update the schedule of cumulative direct and indirect costs claimed and billed, as required in paragraph (d) above, within 60 days after settlement of final indirect cost rates.

* * * * *
(5) * * * The completion invoice or voucher shall include settled subcontract amounts and rates. The prime contractor is responsible for settling subcontractor amounts and rates included in the completion invoice or voucher and providing status of subcontractor audits to the contracting officer upon request.

* * * * *
6. Amend section 52.216-8 by revising the introductory paragraph, the date of the clause, and paragraph (b) to read as follows:

52.216-8 Fixed Fee.

As prescribed in 16.307(b), insert the following clause:

FIXED FEE (DATE)

* * * * *

(b) Payment of the fixed fee shall be made as specified in the Schedule; provided that the Contracting Officer withholds a reserve not to exceed 15 percent of the total fixed fee or \$100,000, whichever is less, to protect the Government's interest. The Contracting Officer shall release 75 percent of all fee withholds under this contract after receipt of an adequate certified final indirect cost rate proposal covering the year of physical

completion of this contract, provided the Contractor has satisfied all other contract terms and conditions, including the submission of the final patent and royalty reports, and is not delinquent in submitting final vouchers on prior years' settlements. The Contracting Officer may release up to 90 percent of the fee withholds under this contract based on the Contractor's past performance related to the submission and settlement of final indirect cost rate proposals.

(End of clause)

7. Amend section 52.216-9 by revising the introductory paragraph, the date of the clause, and paragraph (c) to read as follows:

52.216-9 Fixed Fee—Construction.

As prescribed in 16.307(c), insert the following clause:

FIXED FEE—CONSTRUCTION (DATE)

* * * * *

(c) The Contracting Officer shall withhold a reserve not to exceed 15 percent of the total fixed fee or \$100,000, whichever is less, to protect the Government's interest. The Contracting Officer shall release 75 percent of all fee withholds under this contract after receipt of an adequate certified final indirect cost rate proposal covering the year of physical completion of this contract, provided the Contractor has satisfied all other contract terms and conditions, including the submission of the final patent and royalty reports, and is not delinquent in submitting final vouchers on prior years' settlements. The Contracting Officer may release up to 90 percent of the fee withholds under this contract based on the Contractor's past performance related to the submission and settlement of final indirect cost rate proposals.

(End of clause)

8. Amend section 52.216-10 by revising the introductory paragraph, the

date of the clause, and paragraph (c) to read as follows:

52.216-10 Incentive Fee.

As prescribed in 16.307(d), insert the following clause:

INCENTIVE FEE (DATE)

* * * * *

(c) *Withholding of payment.* (1) Normally, the Government shall pay the fee to the Contractor as specified in the Schedule. However, when the Contracting Officer considers that performance or cost indicates that the Contractor will not achieve target, the Government shall pay on the basis of an appropriate lesser fee. When the Contractor demonstrates that performance or cost clearly indicates that the Contractor will earn a fee significantly above the target fee, the Government may, at the sole discretion of the Contracting Officer, pay on the basis of an appropriate higher fee.

(2) Payment of the incentive fee shall be made as specified in the Schedule; provided that the Contracting Officer withholds a reserve not to exceed 15 percent of the total incentive fee or \$100,000, whichever is less, to protect the Government's interest. The Contracting Officer shall release 75 percent of all fee withholds under this contract after receipt of an adequate certified final indirect cost rate proposal covering the year of physical completion of this contract, provided the Contractor has satisfied all other contract terms and conditions, including the submission of the final patent and royalty reports, and is not delinquent in submitting final vouchers on prior years' settlements. The Contracting Officer may release up to 90 percent of the fee withholds under this contract based on the Contractor's past performance related to the submission and settlement of final indirect cost rate proposals.

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[FR Doc. E9-19937 Filed 8-19-09; 8:45 am]

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