prerecorded programming completed well in advance of its distribution on television.

(xi) For better coordination for ensuring high quality captions and for addressing problems as they arise, understand the roles and responsibilities of other stakeholders in the closed-captioning process, including video program distributors, video programmers, producers, equipment manufacturers, regulators, and viewers, and keep abreast of issues and developments in those sectors.

[FR Doc. 2014–06754 Filed 3–28–14; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 219

Small Business Programs

CFR Correction

■ In Title 48 of the Code of Federal Regulations, Chapter 2 (Parts 201 to 299), revised as of October 1, 2013, on page 136, before subpart 219.12, subpart 219.11 is reinstated to read as follows:

Subpart 219.11—Price Evaluation Adjustment for Small Disadvantaged Business Concerns

219.1101 General.

The determination to use or suspend the price evaluation adjustment for DoD acquisitions can be found at *http://www.acq.osd.mil/dpap/dars/classdev/index.htm.*

[72 FR 20763, Apr. 26, 2007]

219.1102 Applicability.

(b) The price evaluation adjustment also shall not be used in acquisitions that are for commissary or exchange resale.

(c) Also, do not use the price evaluation adjustment in acquisitions that use tiered evaluation of offers, until a tier is reached that considers offers from other than small business concerns.

[63 FR 41974, Aug. 6, 1998, as amended at 71 FR 53043, Sept. 8, 2006]

[FR Doc. 2014–07201 Filed 3–28–14; 8:45 am]

BILLING CODE 1505–01–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 232 and 252

RIN 0750–AH54

Defense Federal Acquisition Regulation Supplement; Performance-Based Payments (DFARS Case 2011–D045)

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

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to provide detailed guidance and instructions on the use of the performance-based payments analysis tool.

DATES: Effective March 31, 2014.

FOR FURTHER INFORMATION CONTACT: Mr. Mark Gomersall, 571–372–6099.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule at 77 FR 4638 on January 30, 2012, to provide requirements for the use of the performance-based payments (PBP) analysis tool. The PBP analysis tool is a cash-flow model for evaluating alternative financing arrangements, and is required to be used by all contracting officers contemplating the use of performance-based payments on new fixed-price type contract awards.

II. Discussion and Analysis

DoD reviewed the public comments in the development of the final rule. A discussion of the comments and the changes made to the rule as a result of those comments is provided as follows:

A. Adequate Accounting System

Comment: One respondent requested clarification on whether the proposed rule requires an accounting system deemed adequate by the Government.

DoD Response: FAR 32.1007(c) requires the contracting officer to determine the adequacy of controls established by the contractor for the administration of performance-based payments. Since the contractor will be required to report total cost incurred to date based on its existing accounting system, the contracting officer must consider the adequacy of the contractor's accounting system for providing reliable cost data. DFARS 232.1003–70, Criteria for use, is added to require contracting officers to consider the adequacy of an offeror's or contractor's accounting system prior to agreeing to use performance-based payments.

B. Administratively Burdensome and Costly

Comment: One respondent stated that the proposed rule is administratively burdensome, and that implementation will surpass the one hour average burden per response.

DoD Response: Performance-based payments will be paid for completed events, but not more frequently than monthly. Each request for a PBP will require the contractor to provide two dollar values: Cumulative value of PBP events completed to date and total cost incurred to date. The rule is, therefore, not administratively burdensome since it requires the contractor to provide information that should be readily available in the contractor's accounting system in the ordinary course of business. Accordingly, DoD estimates, on average, it will not take more than one hour per response.

Comment: One respondent requested clarification regarding in what manner contractors will be required to verify, or otherwise state, total costs incurred.

DoD Response: Each request for a PBP will require the contractor to provide two dollar values: Cumulative value of PBPs completed to date and total cost incurred to date. For DoD verification purposes, the final rule includes the requirement for the contractor to provide access, upon request of the contracting officer, to the contractor's books and records, as necessary, for the administration of the clause.

Comment: One respondent expressed concern that since the proposed rule forces contractors to disclose extensive cost information and report incurred costs per milestone, the costs associated with this reporting obligation will increase the cost to the Government.

DoD Response: The cost information to be provided by the contractor takes two forms: A projected expenditure profile of total cost per month which is required once when PBPs are initially proposed (i.e., as part of the contractor's proposed performance-based payments schedule that includes all performance-based payments events, completion criteria, event values, etc.) and cumulative value of PBPs completed to date and total cost incurred to date, which are required during the performance of the contract. The expenditure profile is a key element in determining the expected financing needs over time and is needed by both parties in order to establish appropriate

PBP event values. Based on DoD experience, information without an expenditure profile is expected to be insufficient. On fixed-price contracts, it is in the contractor's best interest to closely track and manage cost during contract performance. The entering of a total cost incurred-to-date value on the PBP form should not result in increased cost to the contractor or the Government as it merely reports the sum total of the accumulation of costs recorded in the contractor's accounting system.

Comment: One respondent stated that the proposed rule adds to administrative costs by requiring two price negotiations, and by requiring systems to support progress payment financing to be reinstituted. By imposing the expense of establishing progress payment capabilities, this rule may drive some businesses out of the Government contracting market.

DoD Response: Every price negotiation involves a discussion of contract cost and profit. The negotiations will be the same regardless of the financing method used (progress payments or PBPs). Although there will be two negotiations of price, there is no need to conduct two negotiations on cost. With regard to requiring systems to support financing payments, FAR 32.1007(c) requires contracting officers to determine the adequacy of controls established by the contractor for the administration of performance-based payments. Therefore, contracting officers must consider the adequacy of the contractor's accounting system for providing reliable cost data to support the performance-based payments. Similarly, FAR 32.503–3(b)2) requires contracting officers to determine the adequacy of the contractor's accounting system and controls for the proper administration of progress payments. However, contractors are not obligated to accept contract financing payments, whether performance-based payments, progress payments, or any other type of contract financing. If the contractor decides not to seek Government-provided contract financing and the associated expense of establishing and maintaining an adequate accounting system to substantiate the costs incurred to support the contract financing payments and to protect the Government's interests, the contractor will not incur the additional costs of those requirements.

Comment: One respondent stated a concern that the proposed rule will result in increased costs for small businesses and prevent them from competing due to the adequate business system requirement.

DoD Response: Small business will not be at a competitive disadvantage whether or not they decide that a performance-based payment funding arrangement is in their best interest. Contractors are not obligated to negotiate or accept a performance-based payment financing arrangement. However, just as with any other form of Government-provided contract financing, there will be some form of requirement for contractor business systems to substantiate the incurrence of the costs to support the contract financing payments and to protect the Government's interests. A decision not to pursue performance-based payments will not be held against any offeror in a competitive source selection.

C. Conversion to Cost-Type Contracts

Comment: One respondent claimed that the rule effectively converts fixed-price contracts into cost-type contracts by focusing on incurred cost as opposed to completion of a subset of fixed price tasks.

DoD Response: This rule does not convert fixed-price contracts with PBPs into cost-type contracts. The rule merely provides a tool for determining a mutually beneficial financial arrangement using performance-based payments. The focus on incurred costs simply provides a check to prevent the contract from being in an advance payment scenario.

D. Commercial Items

Comment: One respondent expressed concern that the proposed rule may be misapplied to commercial items. The respondent recommended an explicit statement stating that PBPs do not apply to commercial items.

DoD Response: FAR 32.1000 already states that FAR subpart 32.10, Performance-Based Payments, applies to performance-based payments under noncommercial purchases pursuant to FAR 32.1.

E. Competition

Comment: One respondent stated that the economic consequences of the rule will add another barrier for non-traditional contractors/businesses from entering the marketplace, stifling competition.

DoD Response: When a contractor accepts Government-provided financing payments, it must accept some form of requirement for the oversight of business systems that substantiate the incurrence of the costs to support the financing payments and to protect the Government's interests. No contractor is under obligation to accept performance-based payments or any other type of contract financing, and thus, avoid any additional economic consequence of the rule for an adequate accounting system. Thus, the rule is not another barrier to keep a non-traditional contractor from entering the Government marketplace if it utilizes its normal private financing, and does not accept Government-provided contract financing, i.e., the rule does not stifle competition.

F. Conflict With DoD's User's Guide to PBPs

Comment: One respondent stated that the proposed rule conflicts with DoD's ''User's Guide to PBP'' which states that payment requests are event driven and contain no financial information that must be prepared according to financial regulations and practices dictated by the Government.

DoD Response: A new PBP User's Guide has been created which is consistent with this rule, and is available on the DPAP Web site.

G. Contractor Risk

Comment: One respondent asserted that the proposed rule's attempt to begin negotiations with the benchmark of a negotiated fixed-price contract based on customary progress payments is misplaced due to higher risk to contractors and additional administrative burden of PBPs.

DoD Response: The use of a negotiated price using customary progress payments as the benchmark for determining a mutually beneficial financial arrangement using PBPs is appropriate. Customary progress payments will be the likely financing method utilized if agreement on a PBP arrangement cannot be reached. In determining the amount of consideration due the Government as a result of the improved cash flow to the contractor provided by PBPs, the parties will use the DoD PBP analysis tool, which is designed to allow users to objectively measure both the benefits and risks of the PBP arrangement.

H. Weighted Guidelines and Profit

Comment: One respondent asserted that an alternative to the rule exists in the weighted guidelines method, which provides a far simpler and fairer profit adjustment for the value of the PBPs, as well as recognizing the added risk to contractors of event-based financing. The weighted guidelines reasonably method recognizes that performance-based payments impose added risk on the contractor by tying financing to performance. Consequently, the DFARS provides that such payments should lead to an increase in the negotiated profit rate.

DoD Response: The weighted guidelines method is not designed to accurately measure the financial benefits and risks associated with a particular PBP arrangement. The DoD PBP analysis tool is a cash flow model that was specifically designed to allow users to objectively measure both the benefits and risks of each PBP arrangement. DoD is therefore amending the DFARS to improve the process of negotiating PBP financing arrangements. Contractors are not obligated to negotiate or accept a PBP financing arrangement. If a contractor determines that the risk of tying financing to performance is too great, the contractor may always choose traditional progress payments and forego the financial benefits of a PBP financing arrangement.

Comment: One respondent expressed concern that the rule further provides unnecessary visibility into the contractor's proprietary profit.

DoD Response: The rule will provide no more insight into a contractor's profitability than is already provided in customary progress payments.

Comment: One respondent stated that the proposed rule establishes the Government's cash outlay under traditional progress payments as the cap for PBPs and does not allow any payment of profit or fee for PBPs until performance is completed.

DoD Response: As previously stated, the use of a negotiated price using customary progress payments as the benchmark for determining a mutually beneficial financial arrangement using PBPs is appropriate. Customary progress payments will be the likely financing method utilized if agreement on a PBP arrangement cannot be reached. In determining the amount of consideration due the Government as a result of the improved financing provided by PBPs, the parties will use the DoD PBP analysis tool which is designed to allow users to objectively measure both the benefits and risks of the PBP financing arrangement. The rule does not establish the Government's cash outlay under customary progress payments as the cap for PBPs. The FAR limitation is that PBPs cannot exceed 90% of the contract price. This limitation does not change under this rule. Further, the rule requires that cumulative PBPs will not exceed the contractor's cumulative cost incurred, in accordance with FAR 32.104(a), which states that PBPs are to be provided only to the extent actually needed for prompt and efficient performance. Therefore, the payment of profit as part of PBPs will not occur.

I. Cost Risk

Comment: One respondent expressed concern that the proposed rule focused on cost risk, which is a disincentive on contracts that carry a greater than average technical performance and schedule risk.

DoD Response: PBPs are a method of contract financing and do not add or detract from the underlying cost, performance or schedule risk on a contract. The purpose of all contract financing is to assist the contractor in paying the contract cost incurred during contract performance. Per FAR 32.104(a), contract financing is intended to be provided ''only to the extent actually needed for prompt and efficient performance.'' Therefore, the rule appropriately links PBPs with cost incurred to ensure that financing is not provided to a greater extent than intended by FAR.

J. Early Performance Disincentive

Comment: One respondent stated that the rule effectively eliminates contractor incentives to perform early and below anticipated costs, and in essence treats PBPs as a form of cost-type, not-to-exceed interim payment because it implements a policy that states: ''At no time will cumulative performance-based payments exceed cumulative cost incurred on this contract.''

DoD Response: PBPs are a form of contract financing and not incentive payments. FAR 32.1004(a)(2)(iv) specifically states: ''Because performance-based payments are contract financing, events or criteria shall not serve as a vehicle to reward the contractor for completion of performance levels over and above what is required for successful completion of the contract.'' PBP financing that provides the contractor the opportunity to receive payments up to 100% of cost incurred, so long as they are less than 90% of the contract price, can be considerably more advantageous than customary progress payments, which cannot exceed 80% of costs incurred (or 85% of costs incurred for small businesses). The DoD PBP analysis tool will enable both sides to determine the financial value of the improved cash flow provided by PBPs on a given contract.

K. Executive Orders 12866 and 13563

Comment: One respondent asserted that the proposed rule has not undergone a comprehensive review of the 5 U.S.C. 804 classification as a ''Major Rule'' as required by Executive Order (E.O.) 12866 and 13563, and as such, should be subject to a thorough assessment of the economic impact, regulatory inconsistencies, and cost-benefit evaluation of other options.

DoD Response: This rule was submitted to the Office of Information and Regulatory Affairs (OIRA). OIRA determined that this rule is not a major rule under 5 U.S.C. 804, but that this is a significant regulatory action and, therefore, the rule was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

L. FAR Preference for PBP Financing

Comment: A number of respondents indicated that the proposed rule is inconsistent with the FAR preference for performance-based payments. One respondent recommended that a statement be added to DFARS 232.1001 that private financing without Government guarantee is preferred.

DoD Response: This rule does not change the FAR stated preference for PBPs when Government financing is determined to be appropriate. The first preference in FAR 32.106(a) is that the contractor should obtain private financing without Government guarantee. Customary contract financing is secondary in preference. As stated in FAR 32.1001(a), PBPs ''are the preferred method of Government contract financing when the contracting officer finds them to be practical and the contractor agrees to their use''.

M. Limitation to PBP Financing Ceiling

Comment: One respondent expressed concern that the proposed rule imposes further constraints to FAR 32.1004(b)(2)(ii) limitation of 90% of price. The respondent questioned why DoD contracts should have less favorable financing terms than other Federal contracts.

DoD Response: This rule is consistent with the existing FAR requirements regarding financing in general and PBPs in particular. It is important to remember that the fundamental purpose of all contract financing is to assist the contractor in paying cost incurred during the performance of the contract. Per FAR 32.1004(b)(2)(i), financing is to be provided ''only to the extent actually needed for prompt and efficient performance''. In other words, the contractor should not be reimbursed more than its actual cost incurred at any point in time. FAR 32.1004(b)(3)(ii) further states that the contracting officer must ensure that PBPs ''are not expected to result in an unreasonably low or negative level of contractor investment in the contract.'' Therefore, the proposed rule appropriately links PBPs

with cost incurred to ensure that financing is not provided to a greater extent than intended by FAR.

N. Foreign Military Sales

Comment: One respondent stated that the application of the proposed rule on FMS contracts has the potential to reduce Federal income tax revenue. Since there is no existing regulatory or statutory requirement to do so, the respondent recommends exempting FMS contracts from performance-based payments.

DoD Response: In accordance with DFARS 225.7303(a) the general rule for the pricing of FMS contracts is that they should be priced using the same principles used in pricing other defense contracts. Therefore, there would be no reason to exempt FMS contracts from the proposed rule. Additionally, the potential for federal income tax revenues is not a factor in contract pricing.

O. Government Benefits for Using PBPs

Comment: One respondent stated that the proposed rule does not account for the benefits that the performance-based financing approach provides for the Government.

DoD Response: PBPs, when properly structured, can provide benefits to both the Government and the contractor. The key benefit to the contractor is improved cash flow. However, there is a cost to the Government of providing improved contract financing to the contractor. Therefore, the PBP analysis tool appropriately calculates a lower profit to ensure that the use of PBPs provides a mutually beneficial financial arrangement for both parties.

P. Incurred Cost Accounting

Comment: One respondent requests clarification on how the Government will treat commitments to subcontractors and/or vendors who have not been paid in determining total cost incurred.

DoD Response: The definition of what constitutes an ''incurred cost'' is not affected by the proposed rule.

Q. Incurred Cost Limitation

Comment: A number of respondents expressed concern with limitation of performance-based payments to only costs incurred. The respondents believe that this limitation reduces or eliminates the incentive to use performance-based payment financing arrangement and therefore shifts favor to progress payments. The incurred cost limitation eliminates the certainty that a contractor has in obtaining an agreed-to PBP milestone price, and concentrates on a contractor's incurred cost profile which shifts focus from performance and delivery to cost incurred in association to a milestone.

DoD Response: PBPs are a form of contract financing and not incentive payments. FAR 32.1004(a)(2)(iv) specifically states: ''Because performance-based payments are contract financing, events or criteria shall not serve as a vehicle to reward the contractor for completion of performance levels over and above what is required for successful completion of the contract.'' Furthermore, FAR 32.1004(b)(3) states that the contracting officer shall ensure that ''Performance-based payment amounts are commensurate with the value of the performance event or performance criterion, and are not expected to result in an unreasonably low or negative level of contractor investment in the contract.'' These requirements limit the PBP payments to only costs incurred. However, PBP financing that provides the contractor the opportunity to receive payments up to 100% of cost incurred (so long as they are less than 90% of the contract price) can be considerably more advantageous than customary progress payments, (which cannot exceed 80% of costs incurred or 85% of costs incurred for small businesses). The DoD PBP analysis tool will enable both sides to determine the financial value of the improved cash flow provided by PBPs on a given contract. PBPs require the contractor to successfully complete a PBP event in accordance with the completion criteria specified in the contract before being paid. Therefore, the contractor's focus will be on successfully performing those events in a prompt and efficient manner. Since the purpose of all contract financing is to assist the contractor in paying the contract cost incurred during contract performance, and given that in accordance with FAR 32.104(a), contract financing is intended to be provided ''only to the extent actually needed for prompt and efficient performance,'' the proposed rule appropriately links PBPs with cost incurred to ensure that financing is not provided to a greater extent than intended by the FAR.

R. Invoice Delay

Comment: One respondent expressed concern that the proposed rule will delay invoice payments.

DoD Response: The rule will have no impact on the timing of invoice payments.

S. Better Buying Power Initiative

Comment: One respondent claimed that the PBP Analysis Tool fails to address the ''Better Buying Power'' direction of flexibility to propose an alternative payment arrangement and innovative financing methods.

DoD Response: The rule does not impede the flexibility to propose an alternative payment arrangement. In many cases, performance-based payment financing arrangements will be the alternative payment arrangement. Therefore, the rule addresses how a PBP arrangement will be analyzed from a cash flow perspective. A similar cash flow analysis would be required in any arrangement that provided improved cash flow to the contractor.

T. PBP Analysis Tool Assessment Accuracy

Comment: One respondent asserted that the PBP Analysis Tool does not provide an accurate methodology for assessing improved cash flow. The respondent stated that the PBP Analysis Tool discounts the reduction in cash flows using an after-tax discount rate, but fails to account for the reduction in cash associated with applied taxes to earned income.

DoD Response: The DoD PBP analysis tool compares the series of financing cash flows that would be generated under customary progress payments and PBPs. Taxes are only applicable to profit, not financing cash flows. Since the model already produces a mutually beneficial financing arrangement in which the profit is lower using PBPs than with customary progress payments, accounting for taxes within the model would only result in an even lower profit position. Although the model could be revised to include the reduced taxes paid by the contractor as a result of reduced profit in the PBP scenario, the net impact would be negligible and does not warrant the added complexity.

Comment: One respondent recommended that DoD revise the cash flow model and its instructions to reflect the discount/interest rates recognized in the FAR for all other financing and cash flow valuations as the sole basis for consideration required (OMB A–94 or Prompt Payment Act Interest Rate).

DoD Response: The cost of raising money is not the same for industry and the Government and therefore the time-value of money is not the same for each. The model will be revised as follows: The discount rate for contractor cash flows will be reflective of the short term borrowing rate as represented by the published Prime Rate adjusted for the corporate income tax rate of 35%. At the current Prime Rate of 3.25%, the discount rate for contractor cash flows would be 2.11% [$3.25\% \times (1 - .35)$].

The discount rate for Government cash flows will continue to be the rates published in OMB Circular A–94 Appendix C which are specified for use by the Government in cash flow analysis as they are reflective of the cost of borrowing to the Treasury. For contract periods of performance that fall between the rate periods identified in the circular, the model instructions will be revised to instruct the user on how to extrapolate to derive the appropriate rate for their contract action.

U. Overly Complex PBP Analysis Tool

Comment: One respondent recommended that DoD redesign the cash flow model to make it more intuitive and correct errors that have the potential to overstate the consideration requirement by $200 million a year.

DoD Response: The cash flow model will be used by trained contracting officers who will be able to walk the contractor through the process, if required. DoD has found no inconsistencies between the PBP cash-flow model and the FAR, nor has DoD found errors in the model that have the potential to overstate the consideration requirement by $200 million a year.

Comment: One respondent asserted that if a DoD contracting officer is unable to develop a fair and reasonable PBP schedule, why would DoD believe that there would be a better outcome from this new and complicated process.

DoD Response: There are a number of important aspects to establishing an effective and equitable PBP arrangement. The DoD PBP analysis tool addresses the cash flow consideration aspect of PBPs. The other aspects are addressed in the new PBP Users Guide.

V. Previously Implemented PBP Analysis Tool

Comment: One respondent indicated displeasure that the proposed rule fails to note that the PBP analysis tool has been in effect since the issuance of DPAP memo mandating a cash-flow analysis for alternative financing arrangements for fixed price contracts. The respondent requested DoD provide a historical background and explanation for the new PBP policy.

DoD Response: This rule provides requirements for the use of the performance-based payments (PBP) analysis tool. The PBP analysis tool is a cash-flow model for evaluating alternative financing arrangements, and is required to be used by all contracting officers contemplating the use of performance-based payments on new fixed-price type contract awards. The DoD PBP analysis tool has been available since the issuance of the DPAP memo and a cash flow analysis is mandatory when providing improved cash flow to the contractor.

W. Prompt Payment Act

Comment: A respondent recommended that DoD request a statutory change to the Prompt Payment Act to provide interest payments to contractors on late or delayed performance-based payment financing.

DoD Response: The Prompt Payment Act is not applicable to contract financing payments (see 31 U.S.C. 3902(a) and 5 CFR 1315.1(b)(1)). As PBPs are a form of contract financing, they are not subject to the Prompt Payment Act. DoD does not intend to seek a statutory change to, or a regulatory change to the implementation of, the Prompt Payment Act at this time to make contract financing payments subject to the Act.

X. Protracted Negotiations

Comment: One respondent expressed concern that the proposed rule constrains the normal constructive evaluation and negotiation of all aspects of the business being put under contract.

DoD Response: The proposed rule does not constrain the normal evaluation and negotiation of any other elements of the business deal. The proposed rule pertains to the analysis and negotiation of the consideration due the Government as a result of the improved cash flow provided by PBP financing.

Y. Timing of PBP Negotiations

Comment: One respondent expressed concern that the proposed rule language at DFARS 232.1004(b)(iii) requires the Government to negotiate the consideration to be received by the Government if using a PBP financing arrangement will be more favorable to the contractor than customary progress payments. The respondent claimed that such negotiations are inappropriate since, in accordance with FAR 32.005(a), contract financing consideration is required after award.

DoD Response: FAR 32.005(a) assumes that appropriate consideration for the contract financing included in a contract is already reflected in the contract price or other contract terms and conditions. The proposed rule simply defines the process by which contracting officers will determine the appropriate consideration when a contract will be awarded with PBP financing.

Z. Term Clarification

Comment: One respondent took exception to the proposed language at DFARS 232.1004(b)(ii)(A), which states in part ''. . . If performance-based payments are deemed practical, the Government will evaluate and negotiate the details of the performance-based payments schedule.'' The respondent believes that this introduces a nebulous new term (i.e., ''practical'') that does not appear to be defined, and appears to be in conflict with basic FAR requirements. The respondent recommends that this statement be replaced with the following: ''If the FAR Part 32 provisions for making contract financing payments are met, the Government will evaluate and may negotiate the details of the proposed performance-based payments schedule.''

DoD Response: The use of PBPs is not practical for all fixed price contracts. The FAR already states that PBPs ''are the preferred method of contract financing when the contracting officer finds them to be practical and the contractor agrees to their use.'' Therefore, it is important that the contracting officer determine if PBPs are practical for use on the contract before proceeding further with the evaluation and negotiation of a PBP arrangement.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

DoD has prepared a final regulatory flexibility analysis consistent with 5 U.S.C. 603. A copy of the analysis may be obtained from the point of contact specified herein. The analysis is summarized as follows:

This rule provides detailed guidance and instructions on the use of the performance–based payments (PBP) analysis tool. The objective of the rule is to amend the DFARS to provide

requirements for the use of the PBP analysis tool. The PBP analysis tool is a cash-flow model for evaluating alternative financing arrangements and is required to be used by all contracting officers contemplating the use of performance-based payments on new fixed-price type contract awards.

No comments were submitted by the Chief Counsel for Advocacy of the Small Business Administration in response to the initial regulatory flexibility analysis published with the proposed rule. However, one respondent stated a concern that the proposed rule will result in increased costs for small businesses and prevent them from competing due to the adequate business system requirement. Small business contractors are not obligated to negotiate or accept a performance-based payment financing arrangement, and a decision not to pursue performance-based payments will not be held against any offeror in a competitive source selection. Performance-based payment negotiations will commence only after the contracting officer and offeror have agreed on price using customary progress payments. Therefore, small business will not be at a competitive disadvantage whether or not they decide that a performance-based payment funding arrangement is in their best interest.

DoD does not expect this 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 requiring the use of the PBP analysis tool by all contracting officers contemplating the use of PBPs on new fixed-price type contract awards does not require contractors to expend significant effort or cost. No known alternatives to the rule have been identified.

V. Paperwork Reduction Act

The rule contains new information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35). This information collection is necessary in order to use the PBP analysis tool, required by all contracting officers contemplating the use of PBPs on new fixed-price type contract awards. OMB has cleared this information collection requirement under OMB Control Numbers 0704–0485, Performance-Based Payments (PBP) Analysis Tool, DFARS Part 232-Contract Financing.

List of Subjects in 48 CFR Parts 232 and 252

Government procurement.

Manuel Quinones,

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 232 and 252 are amended as follows:

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

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 232—CONTRACT FINANCING

■ 2. Amend section 232.1001 by—

■ a. Adding a new paragraph (a); and

■ b. Amending paragraph (d) by removing ''standard prompt payment terms'' and adding in its place ''standard payment terms''.

The addition reads as follows:

232.1001 Policy.

(a) As with all contract financing, the purpose of performance-based payments is to assist the contractor in the payment of costs incurred during the performance of the contract. Therefore, performance-based payments should never exceed total cost incurred at any point during the contract. See PGI 232.1001(a) for additional information on use of performance-based payments.

* * * * *

■ 3. Add section 232.1003–70 to read as follows:

232.1003–70 Criteria for use.

The contracting officer will consider the adequacy of an offeror's or contractor's accounting system prior to agreeing to use performance-based payments.

■ 4. In section 232.1004, revise the section heading and add paragraph (b) to read as follows:

232.1004 Procedures.

(b) Prior to using performance-based payments, the contracting officer shall—

(i) Agree with the offeror on price using customary progress payments before negotiation begins on the use of performance-based payments, except for modifications to contracts that already use performance-based payments;

(ii) Analyze the performance-based payment schedule using the performance-based payments (PBP) analysis tool. The PBP analysis tool is on the DPAP Web site in the Cost, Pricing & Finance section, Performance Based Payments—Guide Book & Analysis Tool tab, at *http://www.acq.osd.mil/dpap/cpic/cp/Performance_based_payments.html.*

(A) When considering performance-based payments, obtain from the offeror/contractor a proposed performance-based payments schedule that includes all performance-based payments events, completion criteria and event values along with the projected expenditure profile in order to negotiate the value of the performance events. If performance-based payments are deemed practical, the Government will evaluate and negotiate the details of the performance-based payments schedule.

(B) For modifications to contracts that already use performance-based payments financing, the basis for negotiation must include performance-based payments. The PBP analysis tool will be used in the same manner to help determine the price for the modification. The only difference is that the baseline assuming customary progress payments will reflect an objective profit rate instead of a negotiated profit rate;

(iii) Negotiate the consideration to be received by the Government if the performance-based payments payment schedule will be more favorable to the contractor than customary progress payments;

(iv) Obtain the approval of the business clearance approving official, or one level above the contracting officer, whichever is higher, for the negotiated consideration; and

(v) Document in the contract file that the performance-based payment schedule provides a mutually beneficial settlement position that reflects adequate consideration to the Government for the improved contractor cash flow.

* * * * *

■ 5. Add section 232.1005–70 to read as follows:

232.1005–70 Contract clauses.

The contracting officer shall include the following clauses with appropriate fill-ins in solicitations and contracts that include performance-based payments:

(a) For performance-based payments made on a whole-contract basis, use the clause at 252.232–7012, Performance-Based Payments—Whole-Contract Basis.

(b) For performance-based payments made on a deliverable-item basis, use the clause at 252.232–7013, Performance-Based Payments—Deliverable-Item Basis.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 6. Add sections 252.232–7012 and 252.232–7013 to read as follows:

252.232–7012 Performance-Based Payments—Whole-Contract Basis.

As prescribed in 232.1005–70(a), use the following clause: PERFORMANCE–BASED PAYMENTS—WHOLE–CONTRACT BASIS (MAR 2014)

(a) Performance-based payments shall form the basis for the contract financing payments provided under this contract, and shall apply to the whole contract. The performance-based payments schedule (Contract Attachment _____) describes the basis for payment, to include identification of the individual payment events, evidence of completion, and amount of payment due upon completion of each event.

(b)(i) At no time shall cumulative performance-based payments exceed cumulative contract cost incurred under this contract. To ensure compliance with this requirement, the Contractor shall, in addition to providing the information required by FAR 52.232–32, submit supporting information for all payment requests using the following format:

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Current performance-based payment(s) event(s) addressed by this request:		
Contractor shall identify—	Amount	Totals
(1a) Negotiated value of all previously completed performance-based payment(s) event(s);		
(1b) Negotiated value of the current performance-based payment(s) event(s);		
(1c) Cumulative negotiated value of performance-based payment(s) events completed to date (1a) + (1b);		
(2) Total costs incurred to date;		
(3) Enter the amount from (1c) or (2), whichever is less;		
(4) Cumulative amount of payments previously requested; and		
(5) Payment amount requested for the current performance-based payment(s) event(s) (3) - (4).		

(ii) The Contractor shall not submit payment requests more frequently than monthly.

(iii) Incurred cost is determined by the Contractor's accounting books and records, which the contractor shall provide access to upon request of the Contracting Officer for the administration of this clause.

(End of clause)

252.232–7013 Performance-Based Payments—Deliverable-Item Basis.

As prescribed in 232.1005–70(b), use the following clause: PERFORMANCE-BASED PAYMENTS—DELIVERABLE-ITEM BASIS (MAR 2014)

(a) Performance-based payments shall form the basis for the contract financing payments provided under this contract and shall apply to Contract Line Items (CLINs) ____, ____, and ____. The performance-based payments schedule (Contract Attachment ____) describes the basis for payment, to include identification of the individual payment events, CLINs to which each event applies, evidence of completion, and amount of payment due upon completion of each event.

(b)(i) At no time shall cumulative performance-based payments exceed cumulative contract cost incurred under CLINs ____, ____, and ____. To ensure compliance with this requirement, the Contractor shall, in addition to providing the information required by FAR 52.232–32, submit supporting information for all payment requests using the following format:

Current performance-based payment(s) event(s) addressed by this request:		
Contractor shall identify—	Amount	Totals
(1a) Negotiated value of all previously completed performance-based payment(s) event(s);		
(1b) Negotiated value of the current performance-based payment(s) event(s);		
(1c) Cumulative negotiated value of performance-based payment(s) event(s) completed to date (1a) + (1b);		
(2) Total costs incurred to date;		
(3) Enter the amount from (1c) or (2), whichever is less;		
(4) Cumulative amount of payments previously requested; and		
(5) Payment amount requested for the current performance-based payment(s) event(s) (3) - (4).		

(ii) The Contractor shall not submit payment requests more frequently than monthly.

(iii) Incurred cost is determined by the Contractor's accounting books and records, which the contractor shall provide access to upon request of the Contracting Officer for the administration of this clause.

(End of clause)

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