



DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 204, 232, and 252

[Docket DARS-2022-0029]

RIN 0750-AJ46

Defense Federal Acquisition Regulation Supplement: Payment Instructions (DFARS Case 2017-D036)

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 payment instructions for certain contracts based on the type of item acquired and the type of payment.

DATES: Effective [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

FOR FURTHER INFORMATION CONTACT: Mr. David E. Johnson, telephone 202-913-5764.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule in the **Federal Register** at 87 FR 77053 on December 16, 2022, to amend the DFARS to provide payment instructions for certain contracts based on the type of item acquired and the type of payment. Two respondents submitted comments in response to the proposed rule.

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. Summary of Significant Changes from the Proposed Rule

Language in the clause at DFARS 252.232-7002, Progress Payments for Foreign Military Sales Acquisitions, is changed for clarity. The term "subcontractor progress payments" is changed to "subcontract financing" in the clauses at DFARS 252.232-7002, paragraph (d), and 252.232-7018, Progress Payments—Multiple Lots, paragraph (b) (4).

B. Analysis of Public Comments

1. Data Underlying the Proposed Rule

Comment: One respondent inquired about the set of data that underlies the proposed rule and whether such data adequately supports the proposed rule.

Response: Such data has not been published for public comment, but it was gathered in the normal course of compiling operational statistics relating to the manual entry of payment instructions in DoD payment systems. This rule standardizes payment instructions and therefore eliminates the need for such manual entry. This in turn eliminates the possibility of both data-entry errors and application of incorrect payment instructions.

2. Possible Ambiguity in Instructions for Progress Payment

Requests

Comment: One respondent inquired whether paragraph (a) of the clause at DFARS 252.232-7002, Progress Payments for Foreign Military Sales Acquisitions, requires separate submission of foreign military sales (FMS) progress payment requests combined with U.S. sales progress payment requests, or rather that the clause requires submission of FMS progress payment requests separate from U.S. ones.

Response: The intent is for FMS progress payment requests to be submitted separately from U.S. sales progress payment requests. The language in the clause at DFARS 252.232-7002 has been clarified in the final rule.

3. Prescription for the Clause at DFARS 252.232-70XX

Comment: One respondent inquired whether the prescription for the clause at DFARS 252.232-70XX, Progress Payments—Multiple Lots, should explicitly limit application of the clause to fixed price contracts.

Response: In accordance with Federal Acquisition Regulation 32.500(a), only fixed-price contracts may provide for progress payments. The prescription limits application of the clause at DFARS 252.232-7018 to contracts that provide for progress payments. DoD therefore declines the suggested change as unnecessary.

4. References to "subcontractor progress payments"

Comment: One respondent recommends changing the term "subcontractor progress payments" to "subcontract financing" in the clauses at DFARS 252.232-7002(d) and 252.232-70XX(b)(4) to better align with relevant language in the Federal Acquisition Regulation.

Response: In the final rule, the term "subcontractor progress payments" is changed to "subcontract financing" in the clauses at DFARS 252.232-7002, paragraph (d), and 252.232-7018, paragraph (b)(4).

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Services, and for Commercial Products, Including Commercially Available Off-the-Shelf (COTS) Items

This rule clarifies payment instructions for certain contracts based on the type of item acquired and the type of payment by amending DFARS 252.204-7006, Billing Instructions—Cost Vouchers, and 252.232-7002, Progress Payments for Foreign Military Sales Acquisitions. Application of these clauses to contracts at or below the SAT and to commercial services, commercial products, and COTS items is unchanged. This final rule adds a new clause at 252.232-7018, Progress Payments—Multiple Lots. DoD will apply this clause to solicitations and contracts at or below the SAT and will not apply the clause to commercial services or commercial products, including COTS items.

IV. Expected Impact of the Rule

Currently, payment instructions are being entered manually into DoD's payment systems due to a lack of clarity in the DFARS regarding payment instructions. This rule clarifies the payment instruction language in the DFARS. The clarifications in this rule will reduce data errors and inoperability problems throughout DoD's business processes created by manual entry of payment instructions in the payment systems, as well as reducing the cost of data entry.

V. 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 not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

VI. Congressional Review Act

As required by the Congressional Review Act (5 U.S.C. 801-808) before an interim or final rule takes effect, DoD will submit a copy of the interim or final rule with the form, Submission of Federal Rules under the Congressional Review Act, to the U.S.

Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule under the Congressional Review Act cannot take effect until 60 days after it is published in the **Federal Register**. The Office of Information and Regulatory Affairs has determined that this rule is not a major rule as defined by 5 U.S.C. 804.

VII. Regulatory Flexibility Act

A final regulatory flexibility analysis (FRFA) has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The FRFA is summarized as follows:

The purpose of this rule is to provide clarifications on payment instructions for certain contracts based on the type of item acquired and the type of payment. DoD has found that the payment instructions often are not inserted when required and that payment instructions, if inserted, are often not appropriate for the contracts in question. An analysis of the issue showed that the appropriate accounting treatment for payments can be derived from the type of item acquired and the type of payment. In addition, the analysis highlighted the need to establish procedures for structuring progress payment requests for contracts with multiple production lots. The clarifications in this rule will promote consistency with generally accepted accounting principles and reduce data errors created by manual entry of payment instructions in the payment systems.

No public comments were received in response to the initial regulatory flexibility analysis.

The rule will apply to all small entities that will be awarded cost-reimbursement, time-and-material, or labor-hour contracts. However, the rule requires negligible additional effort by contractors, including small entities, because it simply clarifies the identification and use of payment information elements in payment requests. According to data from the Federal Procurement Data System for fiscal years 2020 through 2022, approximately 6,800 cost-reimbursement, time-and-material, and labor-hour contracts (0.01% percent of all awards) are awarded to approximately 1,100 small businesses (3 percent of all awardees) each year. This rule also applies to contracts that use multiple accounting classifications or that involve progress payments for multiple production lots. DoD cannot accurately quantify the number of contracts subject to the multiple-lot progress payments clause, but such contracts are likely few in number.

The rule does not contain any new reporting, recordkeeping, or other compliance requirements for small entities.

There are no known, significant, alternative approaches to the rule that would meet the objectives of the rule.

VIII. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) applies to this rule regarding new DFARS clause 252.232-7018, Progress Payments—Multiple Lots. However, these changes to the DFARS do

not impose additional information collection requirements to the paperwork burden previously approved under Office of Management and Budget (OMB) Control Number 9000-0010, titled Progress Payments, SF 1443. The rule affects information collection requirements in DFARS 252.232-7002, Progress Payments for Foreign Military Sales Acquisitions, currently approved under OMB Control Number 0704-0321, titled "DFARS Part 232, Contract Financing, and the Clause at 252.232-7002, Progress Payments for Foreign Military Sales Acquisition." The impact, however, is negligible because the changed reporting requirement is not anticipated to increase the estimate of total burden hours; rather the requirement to submit separate payment requests by rate is merely replaced by a requirement to submit separate payment requests for FMS and U.S. line items in the contract.

List of Subjects in 48 CFR Parts 204, 232, and 252

Government procurement.

Jennifer D. Johnson,

Editor/Publisher, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 204, 232, and 252 are amended as follows:

1. The authority citation for 48 CFR parts 204, 232, and 252 continues to read as follows:

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

PART 204—ADMINISTRATIVE AND INFORMATION MATTERS

2. Amend section 204.7109 by revising paragraph (b) to read as follows:

204.7109 Contract clauses.

* * * * *

(b) Use the clause at 252.204-7006, Billing Instructions—Cost Vouchers, in solicitations and contracts when a cost-reimbursement contract, a time-and-materials contract, or a labor-hour contract is contemplated.

PART 232—CONTRACT FINANCING

3. Amend section 232.502-4-70 by adding paragraph (c) to read as follows:

232.502-4-70 Additional clauses.

* * * * *

(c) Use the clause at 252.232-7018, Progress Payments—Multiple Lots, to authorize separate progress payment requests for multiple lots.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

4. Amend section 252.204-7006—
- a. By revising the section heading, clause heading, and clause date; and
 - b. In the clause introductory text, removing “payment” and adding “payment using a cost voucher” in its place.

The revisions read as follows:

252.204-7006 Billing Instructions—Cost Vouchers.

* * * * *

BILLING INSTRUCTIONS—COST VOUCHERS (MAY 2023)

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5. Revise section 252.232-7002 to read as follows:

252.232-7002 Progress Payments for Foreign Military Sales

Acquisitions.

As prescribed in 232.502-4-70(a), use the following clause:

PROGRESS PAYMENTS FOR FOREIGN MILITARY SALES ACQUISITIONS (MAY 2023)

If this contract includes foreign military sales (FMS) requirements, the Contractor shall—

(a) Submit separate progress payment requests for the FMS and U.S. line items in the contract;

(b) Submit a supporting schedule showing the amount of each request distributed to each country's requirements;

(c) Identify in each progress payment request the contract requirements to which it applies (i.e., FMS or U.S.);

(d) Calculate each request on the basis of the prices, costs (including costs to complete), subcontract financing, and progress payment liquidations of the contract requirements to which it applies; and

(e) Distribute costs among the countries in a manner acceptable to the Administrative Contracting Officer.

(End of clause)

6. Add section 252.232-7018 to read as follows:

252.232-7018 Progress Payments—Multiple Lots.

As prescribed in 232.502-4-70(c), use the following clause:

PROGRESS PAYMENTS—MULTIPLE LOTS (MAY 2023)

(a) *Definitions.* As used in this clause—

Lot means one or more fixed-price deliverable line items or deliverable subline items representing a single, severable group where the sum of the costs for each group is segregated and a single progress payment rate is used.

Multiple lots means more than one lot on a single contract where progress payment proration is performed on a lot-wide, versus contract-wide, basis.

(b) When submitting progress payment requests under the billing instructions in Federal Acquisition Regulation (FAR) clause 52.232-16, Progress Payments, or Defense Federal Acquisition Regulation Supplement (DFARS) clause 252.232-7002, Progress Payments for Foreign Military Sales Acquisitions, of this contract, the Contractor shall—

(1) Submit separate progress payment requests for each lot identified in the contract;

(2) Identify the contract price for the lot as the sum of all fixed-priced line items identified to the lot, in accordance with FAR 32.501-3;

(3) Identify the lot on each progress payment request to which the request applies;

(4) Calculate each request on the basis of the price, costs (including the cost to complete), subcontractor financing, and progress payment liquidations of the lot to which it applies; and

(5) Distribute costs among lots in a manner acceptable to the Administrative Contracting Officer.

(c) Submit a separate progress payment request for U.S. and FMS requirements in accordance with the DFARS clause 252.232-7002, Progress Payments for Foreign Military Sales Acquisitions, of this contract.

(End of clause)

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