



Federal Register

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Part III

Department of Defense

Defense Acquisition Regulations System

**48 CFR Parts 205, 210, 212, et al.
Defense Federal Acquisition Regulation
Supplements; Interim and Final Rules**

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

RIN 0750-AG56

Defense Federal Acquisition Regulation Supplement; Payments in Support of Emergencies and Contingency Operations (DFARS Case 2009-D020)

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

ACTION: Interim rule with request for comments.

SUMMARY: DoD is issuing an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to bring DoD into compliance with OMB implementation of the Prompt Payment Act by exempting military contingencies, and certain payments related to emergencies and the release or threatened release of hazardous substances.

DATES: *Effective Date:* July 13, 2010.

Comment date: Comments on this interim rule should be submitted in writing to the address shown below on or before September 13, 2010, to be considered in the formation of the final rule.

ADDRESSES: You may submit comments, identified by DFARS Case 2009-D020, using any of the following methods:

Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

E-mail: dfars@osd.mil. Include DFARS Case 2009-D020 in the subject line of the message.

Fax: 703-602-0350.

Mail: Defense Acquisition Regulations System, Attn: Mr. Julian E. Thrash, OUSD (AT&L) DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Mr. Julian E. Thrash, 703-602-0310.

SUPPLEMENTARY INFORMATION:**A. Background**

This rule implements the full authority granted by 5 CFR 1315.1 for payments covered by 5 CFR 1315.1(b)(2) that are either certified for payment in an operational area, or are contingent upon the receipt of necessary supporting documentation (*i.e.*,

contract, invoice, receiving report) emanating from an operational area.

5 CFR part 1315 exempts Prompt Payment Act compliance for payments related to emergencies (defined in the Disaster Relief Act of 1974, Pub. L. 93-288, as amended (42 U.S.C. 5121, *et seq.*); contingency operations (as defined in 10 U.S.C. 101(a)(13)); and the release/threatened release of hazardous substances (as defined in 4 U.S.C. 9606, Section 106). DoD requires the flexibility provided by 5 CFR 1315, Exemption from the Prompt Payment Act, because of the potential for unstable environments during emergencies and contingency operations.

This DFARS change will provide DoD needed flexibility in limited circumstances. The head of the contracting activity shall make subsequent determinations, after consultation with the cognizant comptroller, as the operational area evolves into a more stable business environment to enable the provisions of FAR 32.9 to apply.

This DFARS change adds section 232.901, Applicability, which provides criteria that the head of the contracting activity will use in determining when conditions exist that limit normal business operations during emergencies and contingency operations. It also adds DFARS 232.908, Contract clauses, which prescribes the use of the new clause 252.232-7011, Payments in Support of Emergencies and Contingency Operations. A conforming change is also required to 212.301, Solicitation provisions and contract clauses for the acquisition of commercial items.

This rule was 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

DoD does not expect this rule to have a significant economic impact on small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* However, an initial regulatory flexibility analysis has been performed as follows:

This initial regulatory flexibility analysis has been prepared consistent with 5 U.S.C. 604.

1. Reasons for the Action

On May 22, 2008, the Department of Defense Inspector General (DoD IG) issued the results of an audit, Report No. D-2008-098, entitled "Internal Controls Over Payments Made in Iraq, Kuwait, and Egypt." The audit report

cited inconsistencies in FAR 32.9, DFARS 232.9, and 5 CFR in regard to compliance with the Prompt Payment Act for military contingency operations. The report further recommended that DoD establish procedures to address contingency operations.

During emergencies and contingency operations, the operational area can be so fluid and dynamic that carrying out normal business practices can be extremely challenging. It is necessary for the head of the contracting activity (HCA) to have the authority to appropriately respond to emergency and contingency operations accordingly whenever limited operational conditions exist. This includes the payment of contractors.

This interim rule will bring DoD into compliance with OMB implementation of the Prompt Payment Act, which exempts military contingencies.

2. Objectives of, and Legal Basis for, the Rule

The objectives of this rule allow the HCA to make a determination of whether stable business operations exist in theater, which allows the Prompt Payment Act to apply in an emergency and contingency operation. If stable conditions don't exist, then the HCA is authorized to apply the clause at 252.232-7011. When this clause is used, it will be used instead of the appropriate payment clause at FAR 52.232-25, 52.232-26, or 52.232-27. DFARS 232.901 will require the HCA to make subsequent determinations as the operational area evolves into a more stable environment to enable the provisions of the Prompt Payment Act to apply. It will also require the contracting officer to notify, by contract modification, each contractor that has a contract containing DFARS clause 252.232.7011, that it is no longer applicable, and the applicable FAR Prompt Payment clause in the contract applies.

3. Description of and Estimate of the Number of Small Entities to Which the Rule Will Apply

This interim rule will have an economic impact on small entities. It is expected the rule will initially be applied to contracts supporting Afghanistan. Currently, normal business operations are hindered in Afghanistan due to the uncertain environment and instability in the region. It may be impractical for U.S. forces to adequately match receipt of necessary supporting documentation (*i.e.*, contract, invoice, and receiving report) in such an operational area. It is expected that the HCA for Afghanistan could exempt

“payments made in the theater of operations” from Prompt Payment Act interest and interest penalties.

A review of Federal Procurement Data System (FPDS) data for FY08 shows that of the 140 awards made to U.S. firms, only 21 were made to small business entities. This total represents 15% of all awards made during this time period. Therefore, the overall impact of this rule is not expected to have a significant aggregate economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* However, a regulatory flexibility analysis was completed because there is an economic impact to consider.

4. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Rule, Including an Estimate of the Classes of Small Entities Which Will Be Subject to the Requirement and the Type of Professional Skills Necessary for Preparation of the Report or Record

There is no reporting requirement established by this rule. See preceding item 3 regarding an estimate of the effect on small entities that will be subject to this requirement.

5. Relevant Federal Rules Which May Duplicate, Overlap, or Conflict With the Rule

This rule does not duplicate, overlap, or conflict with any other Federal rules.

6. Description of any Significant Alternatives to the Rule Which Accomplish the Stated Objectives of Applicable Statutes and Which Minimize Any Significant Economic Impact of the Rule on Small Entities

There are no significant alternatives which accomplish the stated objectives. This rule will bring DoD into compliance with OMB implementation of the Prompt Payment Act, which exempts military contingencies.

DoD invites comments from small businesses and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C 610 (DFARS case 2009–D020), in correspondence.

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.*

D. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense that urgent and compelling reasons exist to publish an interim rule prior to affording the public an opportunity to comment. Specifically, during emergencies and contingency operations, the operational area can be so fluid and dynamic that carrying out normal business practices can become impractical. It is necessary for the head of the contracting activity to have the authority to incorporate the Payments in Support of Emergencies and Contingency Operations clause provided by 252.232–7011, when an unstable business environment exists. This case brings DoD into compliance with OMB implementation of the Prompt Payment Act, which exempts military contingencies under 5 CFR 1315.1(b)(2).

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

Government procurement.

Ynette R. Shelkin,

Editor, Defense Acquisition Regulations System.

■ Therefore, 48 CFR parts 212, 232, and 252 are amended as follows:

■ 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)(xiv) to read as follows:

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

(f) * * *

(xiv) Use the clause at 252.232–7011, Payments in Support of Emergencies and Contingency Operations, as prescribed in 232.908.

PART 232—CONTRACT FINANCING

■ 3. Section 232.901 is added to read as follows:

232.901 Applicability.

(1) FAR subpart 32.9, Prompt Payment, does not apply when—

(i) There is—

(A) An emergency, as defined in the Disaster Relief Act of 1974;

(B) A contingency operation (*see* FAR 2.101(b)); or

(C) The release or threatened release of hazardous substances (as defined in 4 U.S.C. 9606, Section 106); and

(ii) The head of the contracting activity has made a determination, after consultation with the cognizant comptroller, that conditions exist that limit normal business operations; and

(iii) Payments will be made in the operational area or made contingent upon receiving supporting documentation (*i.e.*, contract, invoice, and receiving report) from the operational area.

(2) Criteria limiting normal business operations during emergencies and contingency operations that restrict the use of FAR 32.9 may include such conditions as—

(i) Support infrastructure, hardware, communications capabilities, and bandwidth are not consistently available such that normal business operations can be carried out;

(ii) Support resources, facilities, and banking needs are not consistently available for use as necessary in carrying out normal business operations;

(iii) Military mission priorities override the availability of appropriately skilled personnel in support of back-office operations;

(iv) Mobility impairments and security concerns restrict free movement of personnel and documents necessary for timely processing;

(v) Foreign vendors are not familiar with or do not understand DoD contract requirements (*i.e.*, proper invoice, receiving documentation, and contracting terms); or

(vi) Documents received in support of payment requests and shipments require language translations that cannot be performed and documented within normal business processing times.

(3) *Subsequent Determinations.* The head of the contracting activity shall make subsequent determinations, after consultation with the cognizant comptroller, as the operational area evolves into either a more stable or less stable environment.

(i) If the head of the contracting activity determines that the operational area has evolved into a more stable environment, the contracting officer shall notify, by issuance of a contract modification, each contractor performing in the operational area under review. The modification deactivates clause 252.232–7011 and activates the applicable FAR Prompt Payment clause in the contract.

(ii) If after deactivation of clause 252.232–7011, the head of the

contracting activity subsequently determines that the operational area has evolved into a less stable environment, the head of the contracting activity will make a determination that conditions exist that limit normal business operations. The contracting officer will then reactivate clause 252.232-7011 by issuance of a contract modification.

■ 4. Section 232.908 is added to read as follows:

232.908 Contract clauses

Use the clause at 252.232-7011, Payments in Support of Emergencies and Contingency Operations, in solicitations and contracts in addition to the approved clause prescribed in FAR 32.908 in acquisitions that meet the applicability criteria at 232.901(1).

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 5. Section 252.232-7011 is added to read as follows:

252.232-7011 Payments in Support of Emergencies and Contingency Operations.

As prescribed in section 232.908, use the following clause:

PAYMENTS IN SUPPORT OF EMERGENCIES AND CONTINGENCY OPERATIONS (JUL 2010)

(a) Definitions of pertinent terms are set forth in sections 2.101, 32.001, and 32.902 of the Federal Acquisition Regulation.

(b) Notwithstanding any other payment clause in this contract, the Government will make invoice payments under the terms and conditions specified in this clause. The Government considers payment as being made on the day a check is dated or the date of an electronic funds transfer

(c) *Invoice payments.*

(1) *Due date.*

(i) Payment will be made as soon as possible once a proper invoice is received and matched with the contract and the receiving/acceptance report.

(ii) If the contract does not require submission of an invoice for payment (e.g., periodic lease payments), the due date will be as specified in the contract.

(2) *Contractor's invoice.* The Contractor shall prepare and submit invoices to the designated billing office specified in the contract. A proper invoice should include the items listed in paragraphs (c)(2)(i) through (c)(2)(x) of this clause.

(i) Name and address of the Contractor.

(ii) Invoice date and invoice number. (The Contractor should date invoices as close as possible to the date of the mailing or transmission.)

(iii) Contract number or other authorization for supplies delivered or services performed (including order number and contract line item number).

(iv) Description, quantity, unit of measure, unit price, and extended price of supplies delivered or services performed.

(v) Shipping and payment terms (e.g., shipment number and date of shipment, discount for prompt payment terms). Bill of lading number and weight of shipment will be shown for shipments on Government bills of lading.

(vi) Name and address of Contractor official to whom payment is to be sent (must be the same as that in the contract or in a proper notice of assignment).

(vii) Name (where practicable), title, phone number, and mailing address of person to notify in the event of a defective invoice.

(viii) Taxpayer Identification Number (when required). The taxpayer identification number is required for all payees subject to the U.S. Internal Revenue Code.

(ix) Electronic funds transfer banking information.

(A) The Contractor shall include electronic funds transfer banking information on the invoice only if required elsewhere in this contract.

(B) If electronic funds transfer banking information is not required to be on the invoice, in order for the invoice to be a proper invoice, the Contractor shall have submitted correct electronic funds transfer banking information in accordance with the applicable solicitation provision (e.g., 52.232-38, Submission of Electronic Funds Transfer Information with Offer), contract clause (e.g., 52.232-33, Payment by Electronic Funds Transfer—Central Contractor Registration, or 52.232-34, Payment by Electronic Funds Transfer—Other Than Central Contractor Registration), or applicable agency procedures.

(C) Electronic funds transfer banking information is not required if the Government waived the requirement to pay by electronic funds transfer.

(x) Any other information or documentation required by the contract (e.g., evidence of shipment).

(3) *Discounts for prompt payment.* The designated payment office will take cost-effective discounts if the payment is made within the discount terms of the contract.

(4) *Contract financing payment.* If this contract provides for contract financing, the Government will make contract financing payments in accordance with the applicable contract financing clause.

(5) *Overpayments.* If the Contractor becomes aware of a duplicate contract financing or invoice payment or that the Government has otherwise overpaid on a contract financing or invoice payment, the Contractor shall—

(i) Remit the overpayment amount to the payment office cited in the contract along with a description of the overpayment, including the—

(A) Circumstances of the overpayment (e.g., duplicate payment, erroneous payment, liquidation errors, date(s) of overpayment);

(B) Affected contract number and delivery order number, if applicable;

(C) Affected contract line item or subline item, if applicable; and

(D) Contractor point of contact; and
(ii) Provide a copy of the remittance and supporting documentation to the Contracting Officer.

(d) This clause is applicable until otherwise notified by the Contracting Officer.

Upon notification by issuance of a contract modification, the appropriate FAR Prompt Payment clause in the contract becomes applicable.

(End of clause)

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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 205 and 210

Defense Federal Acquisition Regulation Supplement; Publication of Notification of Bundling of Contracts of the Department of Defense (DFARS Case 2009-D033)

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

ACTION: Interim rule with request for comments.

SUMMARY: DoD is issuing an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement section 820 of the National Defense Authorization Act for Fiscal Year 2010 (Pub. L. 111-84, enacted October 28, 2009).

DATES: *Effective Date:* July 13, 2010.

Comment Date: Comments on the interim rule should be submitted in writing to the address shown below on or before September 13, 2010, to be considered in the formation of the final rule.

ADDRESSES: Submit comments identified by DFARS Case 2009-D033, using any of the following methods:

○ *Federal eRulemaking Portal:*

<http://www.regulations.gov>. Follow the instructions for submitting comments.

○ *E-mail:* dfars@osd.mil. Include DFARS Case 2009-D033 in the subject line of the message.

○ *Fax:* 703-602-0350.

○ *Mail:* Defense Acquisition Regulations System, Attn: Ms. Meredith Murphy, OUSD(AT&L)DPAP(DARS), Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Meredith Murphy, Defense Acquisition Regulations System, OUSD(AT&L)DPAP(DARS), Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060. Telephone 703-602-1302; facsimile 703-602-0350.