

2. Section 76.55 is amended by revising paragraph (e) to read as follows:

§ 76.55 Definitions applicable to the must-carry rules.

* * * * *

(e) *Television market.* (1) A commercial broadcast television station's market, unless amended pursuant to Section 76.59, shall be defined as its Area of Dominant Influence (ADI) as determined by Arbitron and published in the Arbitron 1991-92 Television ADI Market Guide, except that for areas outside the contiguous 48 states, the market of a station shall be defined using Nielsen's Designated Market Area (DMA), where applicable as published in the Nielsen 1991-92 DMA Market and Demographic Rank Report, and that Puerto Rico, the U.S. Virgin Islands, and Guam will each be considered a single market.

(2) A cable system's television market(s) shall be the one or more ADIs in which the communities it serves are located.

(3) In addition, the county in which a station's community of license is located will be considered within its market.

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BILLING CODE 6712-01-P

DEPARTMENT OF DEFENSE

48 CFR Part 232

Defense Federal Acquisition Regulation Supplement; Finance

AGENCY: Department of Defense (DoD).
ACTION: Proposed rule with request for comment.

SUMMARY: The Department of Defense is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to reflect recent changes in the Federal Acquisition Regulation pertaining to contract financing.

DATE: Comments on the proposed rule should be submitted in writing to the address shown below on or before March 25, 1996, to be considered in the formulation of the final rule.

ADDRESS: Interested parties should submit written comments to: Defense Acquisition Regulations Council, PDUSD(A&T)DP(DAR), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301-3062, telefax number (703) 602-0350. Please cite DFARS Case 95-D710 in all correspondence related to this issue.

FOR FURTHER INFORMATION CONTACT: Mr. John Galbraith, Finance Team Leader,

(703) 697-6710. Please cite DFARS Case 95-D710

SUPPLEMENTARY INFORMATION:

A. Background

The proposed revisions to the Defense Federal Acquisition Regulation Supplement (DFARS) implement the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103-355) and resulting changes to the Federal Acquisition Regulation (FAR) published as Item VII of Federal Acquisition Circular 90-32 on September 18, 1995 (60 FR 48206), and Items I and IV of Federal Acquisition Circular 90-33 on September 26, 1995 (60 FR 49706). The proposed revisions include deletion of DFARS sections 232.173, Reduction or Suspension of Contract Payments Upon Finding of Fraud, and 232.970, Payment of Subcontractors, since equivalent coverage is now provided in the FAR; the addition of DFARS Subpart 232.2, Commercial Item Purchase Financing, to establish prompt payment times for commercial payments, to provide guidance on the use of installment payments for commercial financing, and to specify administrative instructions for Foreign Military Sales (FMS) contracts; the addition of DFARS Subpart 232.10, Performance-Based Payments, to establish prompt payment times for performance-based payments and to specify administrative instructions for FMS contracts; and to make a number of editorial changes to reflect revisions made in the FAR.

B. Regulatory Flexibility Act

The proposed changes to DFARS Part 232 may 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 specifies prompt payment times, at 232.206(f) and 232.1001(d), that are shorter than the equivalent standard prompt payment times in the Federal Acquisition Regulation, and thus should be beneficial for small entities. An Initial Regulatory Flexibility Analysis (IRFA) has been prepared and may be obtained from the address stated herein. A copy of the IRFA has been submitted to the Chief Counsel for Advocacy of the Small Business Administration. comments are invited. Comments from small entities concerning the affected DFARS subparts will be considered in accordance with Section 610 of the Act. Such comments must be submitted separately and cite DFARS Case 95-D710 in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed rule does not impose any new recordkeeping, information collection requirements, or collections of information from offerors, contractors, or members of the public which require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Part 232

Government procurement.

Michele P. Peterson,

Executive Editor, Defense Acquisition Regulations Council.

Therefore, it is proposed that 48 CFR Part 232 be amended as follows:

1. The authority citation for 48 CFR Part 232 continues to read as follows:

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

PART 232—CONTRACT FINANCING

2. Sections 232.006, 232.006-5, 232.070, 232.072, 232.071-1, 232.072-2, and 232.072-3 are added to read as follows:

Sec.

232.006 Reduction or suspension of contract payments upon finding of fraud.
232.006-5 Reporting.
232.070 Responsibilities.
232.071 Contract Finance Committee.
232.072 Financial responsibility of contractors.
232.072-1 Required financial reviews.
232.072-2 Appropriate information.
232.072-3 Cash flow forecasts

232.006 Reduction or suspension of contract payments upon finding of fraud.

232.006-5 Reporting.

Departments and agencies, in accordance with department/agency procedures, shall prepare and submit to the Under Secretary of Defense (Acquisition and Technology), through the Director of Defense Procurement, annual reports (Report control symbol DD-ACO(A) 1891) containing the information required by FAR 32.006-5.

232.070 Responsibilities.

(a) The Director of Defense Procurement, Office of the Under Secretary of Defense (Acquisition and Technology), USD(A&T)DP, is responsible for ensuring uniform administration of DoD contract financing, including DoD contract financing policies and important related procedures. Agency discretion under FAR part 32 is at the DoD level and is not delegated to the military departments or defense agencies. Proposals by the military departments

and defense agencies, to exercise agency discretion, shall be submitted to the Director of Defense Procurement, through the DoD Contract Finance Committee (see 232.071).

(b) The departments and agencies are responsible for their day-to-day contract financing operations. Refer specific cases involving financing policy or important procedural issues to USD(A&T)DP for consideration through the department/agency Contract Finance Committee members (see also subpart 201.4 for deviation request and approval procedures).

(c) The Under or Assistant Secretary, or other designated official, responsible for the comptroller function within the department or agency is the focal point for financing matters at the departmental/agency headquarters. Departments/agencies may establish contract financing offices at operational levels.

(1) Department/agency contract financing offices are—

(i) Army—Office, Assistant Secretary of the Army (Financial Management);

(ii) Navy—Executive Comptroller for Banking, Cash Management, Contract Financing and Compensation Systems, Assistant Comptroller of the Navy for Financial Management;

(iii) Air Force—Chief of Banking and Contract Financing, Directorate of Accounting, Air Force Accounting and Finance Center;

(iv) Defense agencies—Office of the agency comptroller.

(2) Contract financing offices should participate in—

(i) Developing regulations for contract financing;

(ii) Developing contract provisions for contract financing; and

(iii) Resolving specific cases which involve unusual contract financing requirements.

232.071 Contract Finance Committee.

(a) The Contract Finance Committee consists of—

(1) A representative of the USD(A&T)DP, serving as chairman;

(2) A representative of the Comptroller of the Department of Defense;

(3) A representative of the Defense Finance and Accounting Service;

(4) A representative of the Civilian Agency Acquisition Council (for matters pertaining to the Federal Acquisition Regulation);

(5) A representative of the National Aeronautics and Space Administration (for matters pertaining to the Federal Acquisition Regulation);

(6) An advisory consultant from the Defense Contract Audit Agency; and

(7) Two representatives of each military department and the Defense Logistics Agency (one representing contracting and one representing the contract finance office).

(b) The Committee—

(1) Advises and assists the USD(A&T)DP in ensuring proper and uniform application of policies, procedures, and forms;

(2) Is responsible for formulating, revising, and promulgating uniform contract financing regulations;

(3) May recommend to the Secretary of Defense through the USD(A&T)DP further policy directives on financing; and

(4) Meets at the request of the Chair or a member.

232.072 Financial responsibility of contractors.

Use the policies and procedures in this section in determining the financial capability of current or prospective contractors.

232.072-1 Required financial reviews.

The contracting officer shall perform a financial review when the contracting officer does not otherwise have sufficient information to make a positive determination of financial responsibility. In addition, the contracting officer shall consider performing a financial review—

(a) Prior to award of a contract, when—

(1) The contractor is on a list requiring preaward clearance or other special clearance before award;

(2) The contractor is listed on the Consolidated List of Contractors Indebted to the Government (Hold-Up List), or is otherwise known to be indebted to the Government;

(3) The contractor may receive Government assets such as contract financing payments or Government property;

(4) The contractor is experiencing performance difficulties on other work; or

(5) The contractor is a new company or a new supplier of the item.

(b) At periodic intervals after award of a contract, when—

(1) Any of the conditions of paragraphs (a)(2) through (a)(5) of this subsection are applicable; or

(2) There is any other reason to question the contractor's ability to finance performance and completion of the contract.

232.072-2 Appropriate information.

(a) The contracting officer shall obtain whatever type and depth of financial and other information is required to

establish a contractor's financial capability or disclose a contractor's financial condition. While the contracting officer should not request information that is not necessary for the protection of the Government's interests, the contracting officer must insist upon obtaining that information which is necessary. The unwillingness or inability of a contractor to present reasonably requested information in a timely manner, especially information that a prudent business person would be expected to have and use in the professional management of a business, may be a material fact in the determination of the contractor's responsibility and prospects for contract completion.

(b) Obtain the following information to the extent required to protect the Government's interest. In addition, if the contracting officer concludes that information not listed in paragraphs (b) (1) through (10) is required to comply with 232.072-1, that information should be requested. The information must be for the person(s) who are legally liable for contract performance. If the contractor is not a corporation, obtain the required information for each individual/joint venturer/partner:

(1) Balance sheet and income statement—

(i) For the current fiscal year (interim);

(ii) For the most recent fiscal year and, preferably, for the two preceding fiscal years. These should be certified by an independent public accountant or by an appropriate officer of the firm; and

(iii) Forecasted for each fiscal year for the remainder of the period of contract performance;

(2) Summary history of the contractor and its principal managers, disclosing any previous insolvencies—corporate or personal, and describing its products or services;

(3) Statement of all affiliations disclosing—

(i) Material financial interests of the contractor;

(ii) Material financial interests in the contractor;

(iii) Material affiliations of owners, officers, directors, major stockholders; and

(iv) The major stockholders if the contractor is not a widely-traded, publicly-held corporation;

(4) Statement of all forms of compensation to each officer, manager, partner, joint venturer, or proprietor, as appropriate—

(i) Planned for the current year;

(ii) Paid during the past two years; and

(iii) Deferred to future periods.

(5) Business base and forecast which—

(i) Shows, by significant markets, existing contracts and outstanding offers, including those under negotiation; and

(ii) Is reconcilable to indirect cost rate projections.

(6) Cash forecast for the duration of the contract (see 232.072–3).

(7) Financing arrangement information which discloses—

(i) Availability of cash to finance contract performance;

(ii) Contractor's exposure to financial crisis from creditor's demands;

(iii) Degree to which credit security provisions could conflict with Government title terms under contract financing;

(iv) Clearly stated confirmations of credit with no unacceptable qualifications; and

(v) Unambiguous written agreement by a creditor if credit arrangements include deferred trade payments or creditor subordinations/repayment suspensions.

(8) Statement of all state, local, and Federal tax accounts, including special mandatory contributions, e.g., environmental superfund.

(9) Description and explanation of the financial effect of issues such as—

(i) Leases, deferred purchase arrangements, patent or royalty arrangements;

(ii) Insurance, when relevant to the contract;

(iii) Contemplated capital expenditures, changes in equity, or contractor debt load;

(iv) Pending claims either by or against the contractor;

(v) Contingent liabilities such as guarantees, litigation, environmental, or product liabilities;

(vi) Validity of accounts receivable and actual value of inventory, as assets; and

(vii) Status and aging of accounts payable.

(10) Significant ratios such as—

(i) Inventory to annual sales;

(ii) Inventory to current assets;

(iii) Liquid assets to current assets;

(iv) Liquid assets to current liabilities;

(v) Current assets to current liabilities; and

(vi) Net worth to net debt.

232.072–3 Cash flow forecasts.

(a) A contractor must be able to sustain a sufficient cash flow to perform the contract. Whenever there is doubt about the sufficiency of a contractor's cash flow, the contracting officer should require the contractor to submit a cash flow forecast covering the duration of the contract.

(b) A contractor's inability or refusal to prepare and provide cash flow forecasts or to reconcile actual cash flow with previous forecasts is a strong indicator of serious managerial deficiencies or potential contract cost or performance problems.

(c) Single or one-time cash flow forecasts are of limited forecasting power. As such, they should be limited to preaward survey situations. Reliability of cash flow forecasts can be established only by comparing a series of previous actual cash flows with the corresponding forecasts and examining the causes of any differences.

(d) Cash flow forecasts must—

(1) Show the origin and use of all material amounts of cash within the entire business unit responsible for contract performance, period by period, for the length of the contract (or until the risk of a cash crisis ends); and

(2) Provide an audit trail to the date and assumptions used to prepare it.

(e) Cash flow forecasts can be no more reliable than the assumptions on which they are based. Most important of these assumptions are—

(1) Estimated amounts and timing of purchases and payments for materials, parts, components, subassemblies, and services;

(2) Estimated amounts and timing of payments for purchase or production of capital assets, test facilities, and tooling;

(3) Amounts and timing of fixed cash charges such as debt installments, interest, rentals, taxes, and indirect costs;

(4) Estimated amounts and timing of payments for projected labor, both direct and indirect;

(5) Reasonableness of projected manufacturing and production schedules;

(6) Estimated amounts and timing of billings to customers (including progress payments), and customer payments;

(7) Estimated amounts and timing of cash receipts from lenders or other credit sources, and liquidation of loans; and

(8) Estimated amounts and timing of cash receipts from other sources.

(f) The contracting officer should receive the assumptions underlying the cash flow forecasts. In determining whether the assumptions are reasonable and realistic, the contracting officer should consult with—

(1) The contractor;

(2) Government personnel in the areas of finance, engineering, production, cost, and price analysis; or

(3) Prospective supply, subcontract, and loan or credit sources.

3. Subpart 232.1 is revised to read as follows:

Subpart 232.1—Non-Commercial Item Purchase Financing

Sec.

232.102 Description of contract financing methods.

232.102–70 Provisional delivery payments.

232.108 Financial consultation.

Subpart 232.1—Non-Commercial Items Purchase Financing

232.102 Description of contract financing methods.

(e)(2) Progress payments based on percentage or stage of completion are authorized only for contracts for construction (as defined in FAR 36.102), shipbuilding, and ship conversion, alteration, or repair. However, percentage or stage of completion methods of measuring contractor performance may be used for performance-based payments in accordance with FAR subpart 32.10.

232.102–70 Provisional delivery payments.

(a) The contracting officer may establish provisional delivery payments to pay contractors for the costs of supplies and services delivered to and accepted by the Government under the following contract actions, if undefinitized:

(1) Letter contracts contemplating a fixed-price contract;

(2) Orders under basic ordering agreements;

(3) Spares provisioning documents annexed to contracts;

(4) Unpriced equitable adjustments on fixed-price contracts; and

(5) Orders under indefinite delivery contracts.

(b) Provisional delivery payments shall be—

(1) Used sparingly;

(2) Priced conservatively; and

(3) Reduced by liquidating previous progress payments in accordance with the Progress Payments clause.

(c) Provisional delivery payments shall not—

(1) Include profit;

(2) Exceed funds obligated for the undefinitized contract action; or

(3) Influence the definitized contract price.

232.108 Financial consultation.

See 232.070 for offices to be consulted concerning financial matters within the Department of Defense.

4. Subpart 232.2 is added to read as follows:

Subpart 232.2—Commercial Item Purchase Financing

Sec.

232.202–4 Security for Government financing.

232.206 Solicitation provisions and contract clauses.

232.207 Administration and payment of commercial financing payments.

Subpart 232.2—Commercial Item Purchase Financing**232.202–4 Security for Government financing.**

(a)(2) When determining whether an offeror's financial condition is adequate security, see 232.072–2 and 232.072–3 for guidance on evaluation of financial condition. It should be noted that an offeror's financial condition may be sufficient to make the contractor responsible for award purposes, but not be sufficient to be adequate as security for commercial contract financing.

232.206 Solicitation provisions and contract clauses.

(d) *Instructions for multiple appropriations.* If the contract contains Foreign Military Sales requirements, the contracting officer shall provide instructions for distribution of the contract financing payments to each country's account.

(f) *Prompt payment for commercial purchase payments.* The contracting officer shall incorporate the following standard prompt payment times for commercial item contract financing:

(i) Commercial Advance Payments: 30 days from the later of receipt by the designated billing office of a proper request for payment, or the contractor entitlement date specified in the contract;

(ii) Commercial Interim Payments: 14 days from the later of receipt by the designated billing office of a proper request for payment, or the contractor entitlement date specified in the contract. The prompt payment standards for commercial delivery payments shall be the same as specified in FAR subpart 32.9 for invoice payments for the item delivered.

(g) *Installment payment financing for commercial items.* Installment payment financing shall not be used for defense contracts, unless market research has established that this form of contract financing is both appropriate and customary in the commercial marketplace. When used, the contracting officer shall use the ceiling percentage of contract price that is customary in the particular marketplace (not to exceed the maximum ceiling rate established in the FAR (See FAR 32.206(g)(2))).

232.207 Administration and payment of commercial financing payments.

(b)(2) If the contract contains Foreign Military Sales requirements, each approval shall specify the amount of contract financing to be charged to each country's account.

232.970, 232.970–1, 232.970–2 [Removed]

5. Sections 232.970, 232.970–1, and 232.970–2 are removed.

6. Subpart 232.10 is added to read as follows:

Subpart 232.10—Performance-Based Payments

Sec.

§ 232.1001 Policy.

§ 232.1004 Procedure.

232.1007 Administration and payment of performance-based payments.

Subpart 232.10—Performance-Based Payments**232.1001 Policy.**

(d) The contracting officer shall incorporate the following standard prompt payment times for performance-based payments: 14 days from the later of receipt by the designated billing office, of a proper request for payment, or the contractor entitlement date specified in the contract.

232.1004 Procedure.

(c) *Instructions for multiple appropriations.* If the contract contains Foreign Military Sales requirements, the contracting officer shall provide instructions for distribution of the contract financing payments to each country's account.

232.1007 Administration and payment of performance-based payments.

(b)(2) If the contract contains Foreign Military Sales requirements, each approval shall specify the amount of contract financing to be charged to each country's account.

[FRA Doc. 96–973 Filed 1–23–96; 8:45 am]

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DEPARTMENT OF TRANSPORTATION**Federal Railroad Administration****49 CFR Part 225**

[FRA Docket No. RAR–4, Notice No. 12]

RIN 2130–AA58

Railroad Accident Reporting

AGENCY: Federal Railroad Administration (FRA), DOT.

ACTION: Notice of decision not to issue a supplemental notice of proposed rulemaking.

SUMMARY: FRA published a notice on July 3, 1995 (60 FR 34498), which stated that a second or supplemental notice of proposed rulemaking (NPRM) would be issued for the rulemaking (59 FR 42880) to revise the railroad accident reporting regulations. The decision to issue a supplemental NPRM was made pursuant to requests advanced by some participants at a public regulatory conference held on January 30–February 2, 1995 (59 FR 66501), in Washington, D.C., during which specific topics were discussed related to the accident reporting NPRM. It was anticipated that the supplemental NPRM would address whether or not a meaningful performance standard for accident reporting could be devised for use by the railroads. It was also anticipated that the supplemental NPRM would discuss revised documentation requirements for the proposed Internal Control Plan; calculation of damage costs for rail equipment accidents and incidents for the determination of whether the threshold is met for FRA reporting purposes; and the proposed definition for the classification “worker on duty” as it pertains to “contractors” and “volunteers” performing safety-sensitive functions.

FRA has reviewed thoroughly the written comments received in response to the NPRM; the transcripts of the public hearings which were held in Washington, D.C., Kansas City, Missouri, and Portland, Oregon, in October–November, 1994; as well as the transcripts of the public regulatory conference held in Washington, D.C., in January–February, 1995. This review revealed that a supplemental NPRM is not warranted for the railroad accident reporting NPRM. In the notice issuing the final rule, FRA will deal fully with major alternative resolutions for the issues in the rulemaking explaining clearly why they are endorsed or rejected in favor of the option selected. The approach described in the final rule notice will be a logical outgrowth of the original proposal and the cooperative efforts of all parties involved in achieving solutions to the regulatory issues posited in the railroad accident reporting NPRM.

FOR FURTHER INFORMATION CONTACT: Marina C. Appleton, Trial Attorney, Office of Chief Counsel, FRA, 400 Seventh Street, SW., Washington, D.C. 20590 (telephone 202–366–0628); or Robert Finkelstein, Chief, Systems Support Division, Office of Safety Analysis, Office of Safety, FRA, 400 Seventh Street SW., Washington, D.C. 20590 (telephone 202–366–2760 or 202–501–4863).