

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 36, 44, 49, and 52**

[FAR Case 97-043]

RIN 9000-A122

**Federal Acquisition Regulation; Cost-
Reimbursement Architect-Engineer
Contracts**

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council are proposing to amend the Federal Acquisition Regulation (FAR) to provide guidance on the applicability of certain clauses to cost-reimbursement architect-engineer (A-E) contracts.

DATES: Comments should be submitted on or before March 1, 1999 to be considered in the formulation of a final rule.

ADDRESSES: Interested parties should submit written comments to: General Services Administration, FAR Secretariat (MVR), Attn: Laurie Duarte, 1800 F Street, NW, Room 4035, Washington, DC 20405.

E-mail comments submitted over Internet should be addressed to: farcase.97-043@gsa.gov.

Please cite FAR case 97-043 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405, (202) 501-4755, for information pertaining to status or publication schedules. For clarification of content, contact Mr. Jack O'Neill, Procurement Analyst, at (202) 501-3856. Please cite FAR case 97-043.

SUPPLEMENTARY INFORMATION:**A. Background**

This rule proposes to amend the prescriptions for use of the following FAR clauses to include cost-reimbursement A-E contracts:

- 52.236-24—Work Oversight in Architect-Engineer Contracts
- 52.236-25—Requirements for Registration of Designers
- 52.244-4—Subcontractors and Outside Associates and Consultants (Architect-Engineer Services)

52.249-6—Termination (Cost-Reimbursement)

Presently, FAR 36.609 requires use of the clauses at 52.236-24 and 52.236-25 in fixed-price A-E contracts; FAR 44.204 permits use of the clause at 52.244-4 in fixed-price A-E contracts; and FAR 49.503 requires use of the clause at 52.249-6 in cost-reimbursement contracts, except those for A-E services or for research and development with an educational or nonprofit institution on a no-fee basis. The terms of these clauses also are deemed appropriate for cost-reimbursement A-E contracts. Therefore, this rule proposes to expand the applicability of these clauses to such contracts. As a result of this, the FAR matrix at 52.301 is amended to include cost reimbursement A-E contracts and is also being revised and corrected where necessary as a result of this proposed rule. The matrix is provided in looseleaf format only.

This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993, and is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

This proposed rule is not expected to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule only corrects certain clause prescriptions and this correction will not bring about any increased costs to be borne by the contractor. An Initial Regulatory Flexibility Analysis has, therefore, not been performed. Comments from small entities concerning the affected FAR subpart will be considered in accordance with 5 U.S.C. 610 of the Act. Such comments must be submitted separately and should cite 5 U.S.C. 601, *et seq.* (FAR case 97-043), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. 3501, *et seq.*) is deemed to apply because the proposed rule contains information collection requirements. The proposed rule requires use of the clause at FAR 52.249-6, Termination (Cost-Reimbursement), in cost-reimbursement contracts for architect-engineer services. The information collection requirements relating to termination clauses are covered by OMB Control No. 9000-0028.

Annual Reporting Burden

Public reporting burden for this collection of information is estimated to average 3 hours per response, including

the time for reviewing instruction, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

The annual reporting burden is estimated as follows: *Respondents:* 2,920; *Responses per respondent:* 1; *Total annual responses:* 2,920; *Preparation hours per response:* 3; *Total response burden hours:* 8,760; and *Total recordkeeping hours:* 2,920.

**D. Request for Comments Regarding
Paperwork Burden**

Members of the public are invited to comment on the recordkeeping and information collection requirements and estimates set forth above. Please send comments to: Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Mr. Peter N. Weiss, FAR Desk Officer, New Executive Office Building, Room 10102, 725 17th Street, NW., Washington, DC 20503.

Also send a copy of any comments to the FAR Secretariat at the address shown under **ADDRESSES**. Please cite the corresponding OMB Clearance Number in all correspondence related to the estimate.

**List of Subjects in 48 CFR Parts 36, 44,
49, and 52**

Government procurement.

Dated: December 22, 1998.

Victoria Moss,

Acting Director, Federal Acquisition Policy Division.

Therefore, it is proposed that 48 CFR Parts 36, 44, 49, and 52 be amended as set forth below:

1. The authority citation for 48 CFR Parts 36, 44, 49, and 52 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

**PART 36—CONSTRUCTION AND
ARCHITECT-ENGINEER CONTRACTS****36.609-3 [Amended]**

2. Section 36.609-3 is amended by removing "fixed-price" and adding "all" in its place.

36.609-4 [Amended]

3. Section 36.609-4 is amended in the introductory paragraph by removing "fixed-price".

**PART 44—SUBCONTRACTING
POLICIES AND PROCEDURES****44.204 [Amended]**

4. Section 44.204 is amended in paragraph (b) by removing the words "fixed-price".

PART 49—TERMINATION OF CONTRACTS

5. Section 49.503 is amended by revising paragraph (a)(1) to read as follows:

49.503 Termination for convenience of the Government and default.

(a) *Cost-reimbursement contracts*—(1) *General use.* The contracting officer shall insert the clause at 52.249-6, Termination (Cost-Reimbursement), in solicitations and contracts when a cost-reimbursement contract is contemplated, except contracts for research and development with an educational or nonprofit institution on a no-fee basis.

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PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

6. Section 52.236-25 is amended by revising the introductory text of the clause to read as follows:

52.236-25 Requirements for Registration of Designers.

As prescribed in 36.609-4, insert the following clause:

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DEPARTMENT OF DEFENSE**GENERAL SERVICES ADMINISTRATION****NATIONAL AERONAUTICS AND SPACE ADMINISTRATION****48 CFR Parts 28 and 52**

[FAR Case 98-014]

RIN 9000-AI21

Federal Acquisition Regulation; Increased Payment Protection

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council are proposing to amend the Federal Acquisition Regulation (FAR) to increase the required penal amount of payment bonds on construction contracts over \$6,250,000 and to allow the contracting officer to increase the amount of any payment bond or alternative payment protection to an

amount not to exceed the contract price, if the contracting officer decides that a greater amount is appropriate.

DATES: Comments should be submitted on or before March 1, 1999 to be considered in the formulation of a final rule.

ADDRESSES: Interested parties should submit written comments to: General Services Administration, FAR Secretariat (MVR), Attn: Laurie Duarte 1800 F Street, NW, Room 4035, Washington, DC 20405.

E-mail comments submitted over Internet should be addressed to: farcase.98-014@gsa.gov.

Please cite FAR case 98-014 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405, (202) 501-4755, for information pertaining to status or publication schedules. For clarification of content, contact Mr. Jack O'Neill, Procurement Analyst, at (202) 501-3856. Please cite FAR case 98-014.

SUPPLEMENTARY INFORMATION:**A. Background**

This rule proposes to amend the Federal Acquisition Regulation (FAR) to increase the required penal amount of payment bonds from the current maximum of \$2.5 million for any contract that exceeds \$5 million, to 40 percent of the contract price, if that amount exceeds \$2.5 million. This occurs when the contract price exceeds \$6,250,000. The contracting officer may also increase the amount of any payment bond or alternative payment protection to an amount not to exceed the contract price, if the contracting officer decides that a greater amount is appropriate. The contracting officer may consider local payment bond practices under state "Little Miller Acts" or whether the nature, location, or unique quality of the work might increase the risks of payment defaults.

The proposed rule was initiated at the request of the Administrator of the Office of Federal Procurement Policy, in order to provide more adequate protection for subcontractors and suppliers under Federal construction contracts. Over time, the price of construction has continued to rise but the \$2.5 million statutory payment bond amount has remained the same (40 U.S.C. 270a(a)(2)). The proposed rule is based on the statutory authority at 40 U.S.C. 270a(c), which permits the contracting officer to require additional security.

This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866,

dated September 30, 1993, and is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The proposed changes 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 small business firms will in some cases be required to provide additional payment protection. On the other hand, many small businesses may be the beneficiaries of the increased payment protection. An Initial Regulatory Flexibility Analysis (IRFA) has been prepared and is summarized as follows:

We estimate that approximately 4,300 small business firms per year will be required to provide increased payment protection. A majority of these firms use corporate bonds. We do not expect this change to affect these firms ability to do business because these firms already acquire corporate performance bonds at 100 percent of contract value, and the payment and performance bonds are normally priced off contract price. Furthermore, if there are any cost increases, these increases would be passed through to the Government. For that small group of small businesses that utilize alternate payment protections, the impact may be more significant. The beneficiaries of the increased payment protection should include both large and small businesses that are first- and second-tier suppliers and subcontractors to Government prime contractors.

A copy of the IRFA may be obtained from the FAR Secretariat. Comments are invited. Comments from small entities concerning the affected FAR subpart will be considered in accordance with 5 U.S.C. 610. Such comments must be submitted separately and should cite 5 U.S.C. 601, *et seq.* (FAR Case 98-014), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed changes to the FAR do not impose recordkeeping or 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 Parts 28 and 52

Government procurement.

Dated: December 22, 1998.

Victoria Moss,

Acting Director,

Federal Acquisition Policy Division.

Therefore, it is proposed that 48 CFR Parts 28 and 52 be amended as set forth below: