

**DEPARTMENT OF DEFENSE****48 CFR Part 228****[DFARS Case 2002–D030]****Defense Federal Acquisition Regulation Supplement; Payment Bonds on Cost-Reimbursement Contracts****AGENCY:** Department of Defense (DoD).**ACTION:** Proposed rule with request for comments.

**SUMMARY:** DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to permit the use of alternative payment protections for fixed-price construction subcontracts between \$25,000 and \$100,000 issued under cost-reimbursement contracts. This change is consistent with the corresponding Federal Acquisition Regulation (FAR) policy applicable to fixed-price construction contracts.

**DATES:** Comments on the proposed rule should be submitted in writing to the address shown below on or before April 15, 2003, to be considered in the formation of the final rule.

**ADDRESSES:** Respondents may submit comments directly on the World Wide Web at <http://emissary.acq.osd.mil/dar/dfars.nsf/pubcomm>. As an alternative, respondents may e-mail comments to: [dfars@acq.osd.mil](mailto:dfars@acq.osd.mil). Please cite DFARS Case 2002–D030 in the subject line of e-mailed comments.

Respondents that cannot submit comments using either of the above methods may submit comments to: Defense Acquisition Regulations Council, Attn: Mr. Euclides Barrera, OUSD(AT&L)DPAP(DAR), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301–3062; facsimile (703) 602–0350. Please cite DFARS Case 2002–D030.

At the end of the comment period, interested parties may view public comments on the World Wide Web at <http://emissary.acq.osd.mil/dar/dfars.nsf>.

**FOR FURTHER INFORMATION CONTACT:** Mr. Euclides Barrera, (703) 602–0296.

**SUPPLEMENTARY INFORMATION:****A. Background**

This proposed rule updates DFARS policy on performance and payment bonds for construction contracts. In accordance with the Miller Act (40 U.S.C. 270a–270f), FAR 28.102–1(a) requires performance and payment bonds for construction contracts exceeding \$100,000. In accordance with section 4104(b)(2) of the Federal Acquisition Streamlining Act of 1994

(Pub. L. 103–355), FAR 28.102–1(b) permits alternative payment protections for construction contracts between \$25,000 and \$100,000. DFARS 228.102–1(a) presently waives the requirement for performance and payment bonds for cost-reimbursement contracts, but requires the prime contractor to obtain bonds for its fixed-price subcontracts exceeding \$25,000. This proposed DFARS rule authorizes the use of alternative payment protections for subcontracts between \$25,000 and \$100,000, for consistency with the corresponding FAR policy applicable to prime contracts.

In addition, this proposed rule updates text implementing 10 U.S.C. 2701(h) and (i), pertaining to bonds under Defense Environmental Restoration Program contracts. 10 U.S.C. 2701(h) and (i) were to expire on December 31, 1999; however, section 314 of the National Defense Authorization Act for Fiscal Year 2002 (Pub. L. 107–107) removed this expiration date. Therefore, the corresponding DFARS text has been amended to remove the expiration date. Additionally, the text has been relocated to a new section 228.102–70, as its present location and numbering has led to confusion regarding its relationship with the subsequent text.

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

**B. Regulatory Flexibility Act**

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 the rule still requires payment protections for fixed-price construction subcontracts exceeding \$25,000, while providing flexibility for subcontractors to choose the type of protection to be provided for subcontracts between \$25,000 and \$100,000. Therefore, DoD has not performed an initial regulatory flexibility analysis. DoD invites comments from small businesses and other interested parties. DoD also will consider comments from small entities concerning the affected DFARS subpart in accordance with 5 U.S.C. 610. Such comments should be submitted separately and should cite DFARS Case 2002–D030.

**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.*

**List of Subjects in 48 CFR Part 228**

Government procurement.

**Michele P. Peterson,***Executive Editor, Defense Acquisition Regulations Council.*

Therefore, DoD proposes to amend 48 CFR Part 228 as follows:

1. The authority citation for 48 CFR Part 228 continues to read as follows:

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

**PART 228—BONDS AND INSURANCE**

2. Section 228.102–1 is revised to read as follows:

**228.102–1 General.**

The requirement for performance and payment bonds is waived for cost-reimbursement contracts. However, for cost type contracts with fixed-price construction subcontracts over \$25,000, require the prime contractor to obtain from each of its construction subcontractors performance and payment protections in favor of the prime contractor as follows:

(1) For fixed-price construction subcontracts over \$25,000, but not exceeding \$100,000, payment protection sufficient to pay labor and material costs, using any of the alternatives listed at FAR 28.102–1(b)(1).

(2) For fixed-price construction subcontracts over \$100,000—

(i) A payment bond sufficient to pay labor and material costs; and

(ii) A performance bond in an equal amount if available at no additional cost.

3. Section 228.102–70 is added to read as follows:

**228.102–70 Defense Environmental Restoration Program construction contracts.**

For Defense Environmental Restoration Program construction contracts entered into pursuant to 10 U.S.C. 2701—

(a) Any rights of action under the performance bond shall only accrue to, and be for the exclusive use of, the obligee named in the bond;

(b) In the event of default, the surety's liability on the performance bond is limited to the cost of completion of the contract work, less the balance of unexpended funds. Under no circumstances shall the liability exceed the penal sum of the bond;

(c) The surety shall not be liable for indemnification or compensation of the obligee for loss or liability arising from personal injury or property damage,

even if the injury or damage was caused by a breach of the bonded contract; and

(d) Once it has taken action to meet its obligations under the bond, the surety is entitled to any indemnification and identical standard of liability to which the contractor was entitled under the contract or applicable laws and regulations.

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## DEPARTMENT OF DEFENSE

### 48 CFR Part 252

[DFARS Case 2002-D016]

#### Defense Federal Acquisition Regulation Supplement; Liability for Loss Under Vessel Repair and Alteration Contracts

**AGENCY:** Department of Defense (DoD).

**ACTION:** Proposed rule with request for comments.

**SUMMARY:** DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to increase a contractor's liability for loss or damage under vessel repair and alteration contracts, from \$5,000 to \$50,000 per incident. The increased dollar ceiling is based on adjustments for inflation and the need to provide a financial incentive for contractors to minimize loss or damage.

**DATES:** DoD will consider all comments received by April 15, 2003.

**ADDRESSES:** Respondents may submit comments directly on the World Wide Web at <http://emissary.acq.osd.mil/dar/dfars.nsf/pubcomm>. As an alternative, respondents may e-mail comments to: [dfars@acq.osd.mil](mailto:dfars@acq.osd.mil). Please cite DFARS Case 2002-D016 in the subject line of e-mailed comments.

Respondents that cannot submit comments using either of the above methods may submit comments to: Defense Acquisition Regulations Council, Attn: Ms. Sandra Haberlin, OUSD(AT&L)DPAP(DAR), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301-3062; facsimile (703) 602-0350. Please cite DFARS Case 2002-D016.

At the end of the comment period, interested parties may view public comments on the World Wide Web at <http://emissary.acq.osd.mil/dar/dfars.nsf>.

**FOR FURTHER INFORMATION CONTACT:** Ms. Sandra Haberlin, (703) 602-0289.

**SUPPLEMENTARY INFORMATION:**

#### A. Background

DoD uses the clause at DFARS 252.217-7012, Liability and Insurance, in master agreements for repair and alteration of vessels. The clause holds a contractor liable for loss or damage resulting from defective contractor workmanship and materials. For any other contractor-incurred loss or damage, the contractor bears the first \$5,000 of loss or damage from each occurrence or incident.

This rule proposes to increase the contractor's liability ceiling from \$5,000 to \$50,000, because—

1. The \$5,000 ceiling dates back to 1982. This dollar ceiling is outdated after considering inflation; and
2. An analysis of contractor-incurred damages for a period of 3 years indicates that 70 percent of the incidents were below \$50,000. DoD anticipates that this increase will incentive contractors to reduce the number of such incidents. Improved contractor performance will not only reduce the vessel "down time" for maintenance and repair, but will also make more efficient use of scarce maintenance dollars that would otherwise be used to pay for the damage between the \$5,000 and the \$50,000 ceilings.

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

#### B. Regulatory Flexibility Act

This rule 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.* DoD has prepared an Initial Regulatory Flexibility Analysis (IRFA), which is summarized as follows:

This rule proposes to increase a contractor's liability from \$5,000 to \$50,000 for loss or damage to a Government vessel, materials, or equipment. The rule will apply to small entities that have a master agreement with DoD for repair and alteration of vessels. There is no available estimate of the total number of small entities that will be subject to the rule. However, the Naval Sea Systems Command (NAVSEA), which is responsible for the maintenance and repair of the majority of vessels, has collected data indicating that, during the period from May 1997 to October 2002, there were 61 occurrences of contractor-caused damages. Of those, 13 occurrences (21 percent) were attributed to small entities. The proposed rule does not impose any reporting, recordkeeping, or other compliance requirements and

does not duplicate, overlap, or conflict with any other Federal rules. This rule will impact small entities, since they will need to increase their insurance coverage from \$5,000 to \$50,000. DoD considered using a ceiling of less than \$50,000, but believes the \$50,000 ceiling to be appropriate because—

1. This ceiling would capture a majority of claims, since a NAVSEA study shows that 70 percent of claims incurred during a recent 3-year period were for amounts less than \$50,000; and

2. This increase should incentivize contractors to reduce the number of such occurrences, thereby reducing vessel "down-time" for maintenance and repair and making more efficient use of scarce maintenance dollars.

A copy of the IRFA may be obtained from the address specified herein. DoD invites comments from small businesses and other interested parties. DoD also will consider comments from small entities concerning the affected DFARS subparts in accordance with 5 U.S.C. 610. Such comments should be submitted separately and should cite DFARS Case 2002-D016.

#### 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.*

#### List of Subjects in 48 CFR Part 252

Government procurement.

**Michele P. Peterson,**  
*Executive Editor, Defense Acquisition Regulations Council.*

Therefore, DoD proposes to amend 48 CFR Part 252 as follows:

1. The authority citation for 48 CFR Part 252 continues to read as follows:

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

#### PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

##### 252.217-7012 [Amended]

2. Section 252.217-7012 is amended as follows:

a. By revising the clause date to read "(XXX 2003)"; and

b. In paragraph (b)(6), by removing "\$5,000" and adding in its place "\$50,000".

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