

and National Aeronautics and Space Administration (NASA).

**ACTION:** Final rule.

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) have adopted as final, without change, an interim rule amending the Federal Acquisition Regulation (FAR) to implement the Dominican Republic—Central America—United States Free Trade Agreement with respect to Costa Rica, the United States-Oman Free Trade Agreement, and the United States-Peru Trade Promotion Agreement.

**DATES:** *Effective Date:* March 19, 2010.

**FOR FURTHER INFORMATION CONTACT:** For clarification of content, contact Ms. Lori Sakalos, Procurement Analyst, at (202) 208-0498. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501-4755. Please cite FAC 2005-39, FAR case 2008-036.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

The Councils published an interim rule in the **Federal Register** at 74 FR 28426 on June 15, 2009. No public comments were received in response to the interim rule.

The interim rule added Costa Rica, Oman, and Peru to the definition of “Free Trade Agreement country”. The rule also deleted Costa Rica from the definition of “Caribbean Basin country” because, in accordance with section 201(a)(3) of Pub. L. 109-53, when the Dominican Republic—Central America—United States Free Trade Agreement (CAFTA—DR) agreement enters into force with respect to a country, that country is no longer designated as a beneficiary country for purposes of the Caribbean Basin Economic Recovery Act.

The excluded services for the Oman and Peru Free Trade Agreements (FTAs) are the same as for the Bahrain FTA, CAFTA-DR, Chile FTA, and North American Free Trade Agreement. Costa Rica has the same thresholds as the other CAFTA-DR countries.

This is a significant regulatory action and, therefore, 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**

The Department of Defense, General Services Administration, and National Aeronautics and Space Administration certify that this final rule will not 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 acquisitions that are set aside for small businesses are exempt from trade agreements. In addition, the Department of Defense only applies the trade agreements to the non-defense items listed at the Defense Federal Acquisition Regulation Supplement 225.401-70. No comments were received relating to impact on small business concerns.

**C. Paperwork Reduction Act**

The Paperwork Reduction Act does apply, and this rule is added to the certification and information collection requirements in the provisions at FAR 52.212-3, 52.225-4, 52.225-6, and 52.225-11 currently approved under Office of Management and Budget clearance 9000-0136 (Commercial Item Acquisition; FAR sections affected are part 12 and provisions 52.212-1 and 52.212-3), 9000-0130 (Buy America Act, Trade Agreements Act Certificate; FAR section affected is provision 52.225-4), 9000-0025 (Buy American Act, Trade Agreements Act Certificate; FAR section affected is provision 52.225-6), and 9000-0141 (Buy America Act—Construction; FAR sections affected are subpart 25.2 and provisions 52.225-9 and 52.225-11) respectively. The impacts of this change on information collection requirements are negligible. No comments were received on the burden or number of entities affected by this rulemaking.

**List of Subjects in 48 CFR Parts 25 and 52**

Government procurement.

Dated: March 15, 2010.

**Al Matera,**

*Director, Acquisition Policy Division.*

■ Interim Rule Adopted as Final Without Change

■ Accordingly, the interim rule amending 48 CFR parts 25 and 52, which was published in the **Federal Register** at 74 FR 28426 on June 15, 2009, is adopted as a final rule without change.

[FR Doc. 2010-5990 Filed 3-18-10; 8:45 am]

**BILLING CODE 6820-EP-S**

**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES  
ADMINISTRATION**

**NATIONAL AERONAUTICS AND  
SPACE ADMINISTRATION**

**48 CFR Part 52**

[FAC 2005-39; FAR Case 2008-015; Item VI; Docket 2009-0015, Sequence 1]

**RIN 9000-AL26**

**Federal Acquisition Regulation; FAR  
Case 2008-015, Payments Under  
Fixed-Price Architect-Engineer  
Contracts**

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

**ACTION:** Final rule.

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to revise the withholding of payment requirements under FAR 52.232-10. This FAR change was initiated by the Small Business Administration (SBA) Advocacy Office and is a part of the SBA, Office of Advocacy’s Regulatory Review and Reform Initiative, or r3 initiative. The r3 program was established to help small businesses address the cumulative Federal regulatory burden.

**DATES:** *Effective Date:* April 19, 2010.

**FOR FURTHER INFORMATION CONTACT:** For clarification of content, contact Ms. Suzanne Neurauter, Procurement Analyst, at 202-219-0310. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501-4755. Please cite FAC 2005-39, FAR case 2008-015.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

The FAR at 52.232-10, Payments Under Fixed-Price Architect-Engineer Contracts, currently requires contracting officers to withhold 10 percent of the amounts due on each voucher; however, payment can be made in full during any month in which the contracting officer determines the performance to be satisfactory. The Government retains the withheld amount until the contracting officer determines that the work has been satisfactorily completed. The contracting officer may release excess withheld amounts to the contractor when the contracting officer determines

that the work is substantially complete or when the contracting officer determines that the amount retained is in excess of the amount adequate for the protection of the Government's interests.

This final rule revises FAR 52.232-10 to permit contracting officers to use their judgment regarding the amount of payment withheld to apply under fixed-price architect-engineer (A-E) contracts (based on an assessment of the contractor's performance under the contract) so that the withheld amount will be applied at the level necessary to protect the Government's interests. This is in contrast to the current requirement that contracting officers withhold 10 percent on all payments. Thus, this final rule revises paragraph (b) of the contract clause at FAR 52.232-10 to state that contracting officers shall withhold up to 10 percent of the payment due only if the contracting officer determines that such a withholding is necessary to protect the Government's interest and ensure satisfactory completion of the contract. The amount of withholding shall be determined based upon the contractor's performance record. This final rule also makes several related editorial changes including one that clarifies that the contractor will be paid any unpaid balance due to include withheld amounts at the successful completion of the A-E services work.

#### Discussion and Analysis

A proposed rule was published in the *Federal Register* at 74 FR 20666 on May 5, 2009. The FAR Secretariat received eight (8) responses to the proposed rule from seven (7) respondents. These responses included a total of 34 comments on 13 issues. Each issue is discussed in the following sections.

##### 1. Support for the proposed revision.

Four respondents wrote in support of the proposed rule. One respondent commended the Councils for following through on the change, which was initially undertaken as part of the SBA's r3 initiative, a tool for small business stakeholders to suggest needed reforms.

##### 2. Clearly distinguish A-E contracts from construction contracts.

Two respondents recommended that the FAR clearly distinguish between A-E contracts and construction contracts, pointing out that A-E services are not construction services.

**Response:** The Councils thought this would be unnecessary, given that FAR part 36 addresses the two types of contracts separately, even assigning a separate subpart, subpart 36.6, for A-E contracts. Both A-E and construction are thoroughly, and separately, defined at FAR 2.101, in terms that do not overlap. No change to the FAR is needed.

##### 3. Require contracting officers to release excess retainage once work is substantially complete.

**Response:** This change, requested by three respondents, has been made in paragraph (c) of the clause. The clause at FAR 52.232-10, Payments under Fixed-Price Architect-Engineer Contracts, requires (not merely "authorizes") payment by the Government of "the unpaid balance of any money due for work under the statement, including all withheld amounts" upon satisfactory completion and final acceptance of "all the work done by the Contractor under the 'Statement of Architect-Engineer Services.'" The "Statement of Architect-Engineer Services" is the statement of work for the instant A-E contract; it does not include any follow-on construction contract. The rule also deletes the second sentence of FAR 52.232-10(c), which allowed the Government to retain some monies due until "satisfactory completion and final acceptance of the construction work".

The matter of the Government's acceptance of the work is addressed at item 10 below.

##### 4. Adopt retainage requirements similar to those for fixed-price contracts with the rest of the construction industry.

One respondent recommended that the Councils "adopt FAR requirements identical to those for fixed-price contracts made with the rest of the construction industry."

**Response:** The Councils note that other respondents rejected treating A-E services as a type of construction service. Further, the Councils believe that retainage for A-E contracts is now predicated on contracting officers determining if retainage is necessary to protect the Government's interests and ensure satisfactory completion of the contract. Any such retainage is to be released in full, not partially, upon satisfactory completion of the A-E statement of work.

##### 5. Consider past performance in retainage decisions.

Three respondents asked that past performance (on previous contracts) be taken into consideration when negotiating whether retainage will be applied to a fixed-price A-E contract.

**Response:** The Councils partially concur. Past performance is taken into account in selecting the successful offeror and making the contract award. In effect, contracting officers are considering performance to date on the instant contract when deciding whether to retain and in assessing whether current performance is satisfactory.

##### 6. Proposed rule removes a mandatory requirement designed to protect the Government's financial interests.

One respondent, a Government agency, disagreed with the proposed rule, stating that it removes a mandatory requirement designed to (a) protect the financial interest of the Government in a fixed-price contract, (b) apply a uniform withholding of payments to all contractors; and (c) provide an incentive for contractors to complete the contract obligation in a timely manner.

**Response:** Retainage was a mandatory 10 percent unless performance was satisfactory during that month. The rule continues to require retainage when determined necessary to protect the Government's interests and ensure satisfactory completion of the contract.

##### 7. Proposed rule fails to provide statutory authority.

One respondent stated that the proposed rule fails to provide the statutory authority for this clause or for retainage on Federal A-E contracts.

**Response:** Title 40 of the United States Code, chapter 11, Selection of Architects and Engineers, is the statutory authority for FAR coverage on A-E contracts. The authority for retainage on A-E contracts is not statutory but is included in the FAR to ensure the Government's interests are protected until final delivery and acceptance of these types of services is made.

##### 8. Proposed rule inappropriately uses the term "design work".

Two respondents believe that the proposed rule loosely and inappropriately uses the term "design work", while the retainage requirement is applied to all types of A-E contracts, not just those for design services. A third respondent states that all A-E services should be covered by the revised retainage rule.

**Response:** The Councils agree, noting that the definition of A-E services at FAR 2.101 includes other services such as surveying and mapping, consultations, and plans and specifications (see item 9 below). The final rule has deleted the term "design" in the two places it is used in FAR 52.232-10(c) of the proposed rule.

##### 9. Specifically include "surveying, mapping, and geospatial".

One respondent requested that the term "surveying, mapping, and geospatial" be specifically included in the rule and in FAR 52.232-10.

**Response:** Any revisions to the definition of A-E services are outside the scope of this case. The Councils note that A-E services are defined at FAR 2.101.

**10. Add requirements to ensure prompt and timely review and acceptance of deliverables from A-E contractors.**

Four respondents commented upon the need for prompt and timely review and acceptance by the Government of deliverables under A-E contracts.

**Response:** The Councils take no position on this question because it is outside the scope of this case, which was limited to the question of retainage on A-E contracts. Other FAR clauses such as FAR 52.232–26, Prompt Payment for Fixed-Price Architect-Engineer Contracts, deal with these requirements.

**11. Eliminate retainage altogether, except for cause, and require contracting officer to bear burden of proving that any withholding of fee is necessary.**

Three respondents expressed opposition to the concept of mandatory retainage. One respondent opposed the use of any fee withholding requirement, and another respondent asked the Councils to clarify that retainage is now discretionary, not mandatory.

**Response:** The Councils agree that retainage remains an option, one that depends on the contractor's performance on the instant contract. If the contractor's performance is satisfactory, there need not be any retainage at all for the period. The revised paragraph (b) of FAR 52.232–10 states that contracting officers "shall require a withholding from amounts due under paragraph (a) of this clause of up to 10 percent only if the Contracting Officer determines that such a withholding is necessary to protect the Government's interest and ensure satisfactory completion of the contract." (Emphasis added). This means that, if performance is satisfactory for the period, then retainage could be zero. Also, some amount less than 10 percent could be retained.

The third respondent compared A-E retainage to the payments for fixed-price construction contracts and claimed that the burden of proof remains on the contracting officer to justify withholding a portion of a construction contractor's fee, while this is not the case for A-E contracts.

**Response:** The Councils disagree with respondent, because the revised FAR 52.232–10(b), quoted above, makes it clear that contracting officers must make a decision each performance period, based on the contractor's performance, whether to retain any amount and, if so, how much—up to 10 percent of the vouchered amount—to retain.

**12. Fee withholding should be different for task orders under**

**indefinite-delivery/indefinite-quantity (IDIQ) contracts.**

Four respondents commented that IDIQ contracts should be treated differently. One respondent noted that some small A-E firms believe that the current regulation may not be consistent with IDIQ contracting practices. This comment is supported by four other comments received on this same point. One respondent claimed that retainage for individual task orders under an IDIQ contract is, at times, currently held until the entire IDIQ contract is complete.

**Response:** Retainage should be related to the contractor's performance on the individual task or delivery order and, in order to be compliant with the requirements of FAR 52.232–10, the contractor must be paid any unpaid balance upon satisfactory completion of the work under that contract, whether it is a task or delivery order or a stand-alone contract. However, this is a matter of educating contracting officers rather than changing policy; the policy is correct, but its execution needs improving.

**13. Impact on small businesses.**

One respondent disagreed with the proposed rule's finding that the proposed change would not have a significant impact on small firms.

**Response:** While the Councils agree that there were some cases during contract administration where the retainage in the mandatory amount of 10 percent was not justified, the changes made in this rule do not rise to the level of a significant impact on a substantial number of small entities.

This is not a significant regulatory action and, therefore, was not 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**

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not 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 does not impose any additional requirements on small businesses. There are approximately 230,000 architect-engineer firms, many of which are small businesses. This rule actually eases the impact on such firms, but not to the point of having a significant economic impact on a substantial number of small entities.

**C. Paperwork Reduction Act**

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. chapter 35, *et seq.*

**List of Subjects in 48 CFR Part 52**

Government procurement.

Dated: March 15, 2010.

**Al Matera,**

*Director, Acquisition Policy Division.*

■ Therefore, DoD, GSA, and NASA amend 48 CFR part 52 as set forth below:

**PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

■ 1. The authority citation for 48 CFR part 52 continues to read as follows:

**Authority:** 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

■ 2. Amend section 52.232–10 by revising the date of the clause and paragraphs (a), (b), and (c) to read as follows:

**52.232–10 Payments under Fixed-Price Architect-Engineer Contracts.**

\* \* \* \* \*

PAYMENTS UNDER FIXED-PRICE ARCHITECT-ENGINEER CONTRACTS  
APR 2010.

(a) Estimates shall be made monthly of the amount and value of the work and services performed by the Contractor under this contract which meet the standards of quality established under this contract. The estimates, along with any supporting data required by the Contracting Officer, shall be prepared by the Contractor and submitted along with its voucher.

(b) After receipt of each substantiated voucher, the Government shall pay the voucher as approved by the Contracting Officer or authorized representative. The Contracting Officer shall require a withholding from amounts due under paragraph (a) of this clause of up to 10 percent only if the Contracting Officer determines that such a withholding is necessary to protect the Government's interest and ensure satisfactory completion of the contract. The amount withheld shall be determined based upon the Contractor's performance record under this contract. Whenever the Contracting Officer determines that the work is substantially complete and that the amount retained is in excess of the amount adequate for the protection of the Government, the Contracting Officer shall release the excess amount to the Contractor.

(c) Upon satisfactory completion by the Contractor and final acceptance by the Contracting Officer of all the work done by the Contractor under the "Statement of Architect-Engineer Services", the Contractor will be paid the unpaid balance of any

money due for work under the statement, including all withheld amounts.

\* \* \* \* \*

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## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

#### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

##### 48 CFR Part 14

[FAC 2005-39; Item VII; Docket FAR 2010-0078; Sequence 1]

#### Federal Acquisition Regulation; Technical Amendment

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

**ACTION:** Final rule.

**SUMMARY:** This document makes an amendment to the Federal Acquisition Regulation in order to make an editorial change.

**DATES:** *Effective Date:* March 19, 2010.

**FOR FURTHER INFORMATION CONTACT:** The Regulatory Secretariat, 1800 F Street, NW., Room 4041, Washington, DC, 20405, (202) 501-4755, for information pertaining to status or publication schedules. Please cite FAC 2005-39, Technical Amendment.

**SUPPLEMENTARY INFORMATION:** This document makes an amendment to the Federal Acquisition Regulation in order to make an editorial change.

#### List of Subjects in 48 CFR Part 14

Government procurement.

Dated: March 15, 2010.

Al Matera,

Director, Acquisition Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR part 14 as set forth below:

#### PART 14—SEALED BIDDING

■ 1. The authority citation for 48 CFR part 14 continues to read as follows:

**Authority:** 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

##### 14.202-4 [Amended]

■ 2. Amend section 14.202-4 by removing from paragraph (a)(3) “subdivision (e)(1)(ii) below” and adding “paragraph (d)(1)(ii) of this section” in its place.

[FR Doc. 2010-5992 Filed 3-18-10; 8:45 am]

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## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

#### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

##### 48 CFR Chapter 1

[Docket FAR 2010-0077, Sequence 1]

#### Federal Acquisition Regulation; Federal Acquisition Circular 2005-39; Small Entity Compliance Guide

**AGENCIES:** Department of Defense (DoD), General Services Administration (GSA),

and National Aeronautics and Space Administration (NASA).

**ACTION:** Small Entity Compliance Guide.

**SUMMARY:** This document is issued under the joint authority of the Secretary of Defense, the Administrator of General Services and the Administrator of the National Aeronautics and Space Administration. This *Small Entity Compliance Guide* has been prepared in accordance with section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. It consists of a summary of rules appearing in Federal Acquisition Circular (FAC) 2005-39 which amend the Federal Acquisition Regulation (FAR). Interested parties may obtain further information regarding these rules by referring to FAC 2005-39 which precedes this document. These documents are also available via the Internet at <http://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** Hada Flowers, FAR Secretariat, (202) 208-7282. For clarification of content, contact the analyst whose name appears in the table below.

#### LIST OF RULES IN FAC 2005-39

Item	Subject	FAR case	Analyst
I .....	Extend Use of Simplified Acquisition Procedures for Certain Commercial Items .....	2009-035	Jackson.
II .....	Clarification of Submission of Cost or Pricing Data on Non-Commercial Modifications of Commercial Items.	2008-012	Chambers.
III .....	Use of Standard Form 26 - Award/Contract .....	2008-040	Jackson.
IV .....	Enhanced Competition for Task- and Delivery-Order Contracts-Section 843 of the Fiscal Year 2008 National Defense Authorization Act.	2008-006	Clark.
V .....	Trade Agreements—Costa Rica, Oman, and Peru .....	2008-036	Sakalos.
VI .....	Payments Under Fixed-Price Architect-Engineer Contracts .....	2008-015	Neurauter.
VII .....	Technical Amendment .....		

#### SUPPLEMENTARY INFORMATION:

Summaries for each FAR rule follow. For the actual revisions and/or amendments made by these FAR cases, refer to the specific item number and subject set forth in the documents following these item summaries.

FAC 2005-39 amends the FAR as specified below:

#### Item I—Extend Use of Simplified Acquisition Procedures for Certain Commercial Items (FAR Case 2009-035)

This final rule amends the FAR to implement section 816 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2010. The rule extends for two more years the commercial items test program in FAR subpart 13.5.

The program was to expire January 1, 2010.

#### Item II—Clarification of Submission of Cost or Pricing Data on Non- Commercial Modifications of Commercial Items (FAR Case 2008-012)

This final rule adopts, with minor changes, the interim rule published in the **Federal Register** at 74 FR 11826 on