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 2017–D011), in correspondence.

### VII. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

### List of Subjects in 48 CFR Parts 225 and 252

Government procurement.

**Jennifer Lee Hawes,**

*Regulatory Control Officer, Defense Acquisition Regulations System.*

Therefore, 48 CFR parts 225 and 252 are proposed to be amended as follows:

■ 1. The authority citation for 48 CFR parts 225 and 252 continues to read as follows:

**Authority:** 41 U.S.C. 1303 and 48 CFR chapter 1.

## PART 225—FOREIGN ACQUISITION

■ 2. Amend section 225.7002–2 by revising paragraph (a) to read as follows:

**225.7002–2 Exceptions.**

* * * * *

(a) Acquisitions at or below the simplified acquisition threshold, except for athletic footwear purchased by DoD for use by members of the Army, Navy, Air Force, or Marine Corps upon their initial entry into the Armed Forces (section 817 of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 114–328)).

* * * * *

**225.7002–3 [Amended]**

■ 3. Amend section 225.7002–3, in paragraph (a) by removing ''commercial items, that exceed the simplified acquisition threshold'' and adding ''commercial items'' in its place.

**225.7004–1 [Amended]**

■ 4. Amend section 225.7004–1 by removing ''United States or Canada'' and adding ''United States, Australia, Canada, or the United Kingdom'' in its place.

**225.7004–3 [Amended]**

■ 5. Amend section 225.7004–3 by:

■ a. In paragraph (a) by removing ''United States or Canada'' and adding ''United States, Australia, Canada, or the United Kingdom'' in its place wherever it appears.

■ b. In paragraphs (a), (b), and (c) by removing ''United States and Canada'' and adding ''United States, Australia, Canada, or the United Kingdom'' in its place wherever it appears.

**225.7005–1 [Amended]**

■ 6. Amend section 225.7005–1, in the introductory text and paragraph (b), by removing ''United States or Canada'' and adding ''United States, Australia, Canada, or the United Kingdom'' in its place in both places.

**225.7006–1 [Amended]**

■ 7. Amend section 225.7006–1 by removing ''United States or Canada'' and adding ''United States, Australia, Canada, or the United Kingdom'' in its place.

■ 8. Revise section 225.7006–3 to read as follows:

**225.7006–3 Waiver.**

The waiver criteria at 225.7008(a) apply to this restriction.

**225.7006–4 [Amended]**

■ 9. Amend section 225.7006–4 by:

■ a. In paragraph (a)(2), removing ''A waiver has been granted, other than the waiver for the United Kingdom, which has been incorporated into the provision'' and adding ''A waiver has been granted'' in its place; and

■ b. In paragraph (b)(2), removing ''A waiver has been granted, other than the waiver for the United Kingdom, which has been incorporated into the clause'' and adding ''A waiver has been granted'' in its place.

## PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

**252.225–7037 [Amended]**

■ 10. Amend section 252.225–7037 by:

■ a. Removing the provision date of ''(JUN 2012)'' and adding ''(DATE)'' in its place; and

■ b. In paragraphs (a) and (b), removing ''outlying areas, Canada,'' and adding ''outlying areas, Australia, Canada,'' in its place in both places.

**252.225–7038 [Amended]**

■ 11. Amend section 252.225–7038 by:

■ a. Removing the provision date of ''(JUN 2005)'' and adding ''(DATE)'' in its place; and

■ b. Removing ''outlying areas, Canada,'' and adding ''outlying areas, Australia, Canada,'' in its place.

[FR Doc. 2018–18245 Filed 8–23–18; 8:45 am]

BILLING CODE 6820–ep–P

## DEPARTMENT OF DEFENSE

### Defense Acquisition Regulations System

### 48 CFR Parts 232, 242, and 252

**[Docket DARS–2018–0042]**

**RIN 0750–AJ28**

### Performance-Based Payments and Progress Payments (DFARS Case 2017–D019)

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

**ACTION:** Proposed rule; notice of meeting.

**SUMMARY:** DoD is proposing to implement a section of the National Defense Authorization Act for Fiscal Year 2017, which addresses the preference for performance-based payments, and to streamline the performance-based payment process. DoD is also proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to revise progress payments and performance-based payments policies for DoD contracts in order to increase its business effectiveness and efficiency as well as to provide an opportunity for both small and other than small entities to qualify for increased customary progress payment rates and maximum performance-based payment rates based on whether the offeror/contractor has met certain performance criteria.

DOD believes the proposed rule will eliminate the unintended consequences of not updating its contract financing policies (which, in turn will save hundreds of millions of dollars for the taxpayers), will improve contractor performance, and will distinguish and meaningfully recognize high performing companies and divisions of companies, as the case may be.

This rule proposes to relieve the administrative burden on contractors by deleting the current regulations relating to performance-based payments at DFARS subpart 232.10 and the associated clauses at DFARS 252.232–7012, Performance-Based Payments—Whole Contract Basis, and 252.232–7013, Performance-Based Payments—Deliverable Item Basis. This rule also removes the requirement to negotiate consideration due the Government for providing the contractor with the improved cash flow when utilizing performance-based payments.

In addition to the request for written comments on this proposed rule, DoD will hold a public meeting to hear the views of interested parties.

**DATES:** *Comment Date:* Comments on the proposed rule should be submitted in writing to the address shown below on or before October 23, 2018, to be considered in the formation of a final rule.

*Public Meeting Date:* The public meeting will be held on September 14, 2018, from 9 a.m. to 12 p.m. EST. Registration to attend this meeting must be received by September 6, 2018. Further information for the public meeting may be found under the heading **SUPPLEMENTARY INFORMATION**.

**ADDRESSES:** *Public Meeting:* The public meeting will be held at the Mark Center Auditorium, 4800 Mark Center Drive, Alexandria, VA 22350–3603. The Mark Center Auditorium is located on level B–1 of the building.

*Submission of Comments:* Submit comments identified by DFARS Case 2017–D019, using any of the following methods:

○ *Federal eRulemaking Portal: http://www.regulations.gov.* Search for ''DFARS Case 2017–D019.'' Select ''Comment Now'' and follow the instructions provided to submit a comment. Please include ''DFARS Case 2017–D019'' on any attached documents.

○ *Email: osd.dfars@mail.mil.* Include DFARS Case 2017–D019 in the subject line of the message.

○ *Fax:* 571–372–6094.

○ *Mail:* Defense Acquisition Regulations System, Attn: Ms. Amy G. Williams, OUSD (A&S) DPC/DARS, Room 3B941, 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. To confirm receipt of your comment(s), please check *www.regulations.gov,* approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

**FOR FURTHER INFORMATION CONTACT:** Ms. Amy Williams, DPC/DARS, at 571–372–6106.

**SUPPLEMENTARY INFORMATION:**

## I. Public Meeting

DoD is hosting a public meeting to obtain views of experts and interested parties in Government and the private sector regarding revising policies and procedures with regard to customary progress payment rates and maximum performance-based payment rates for DoD contracts.

*Registration:* Individuals wishing to attend the public meeting must register by September 6, 2018, to ensure adequate room accommodations and to facilitate security screening and entry to the Mark Center. Individuals desiring to attend the meeting must register at this website, *https://www.acq.osd.mil/dpap/dars/performance-based_payments_and_progress_payments.html,* by providing the following information:

(1) Company or organization name.

(2) Full name, valid email address, and telephone number of each person planning to attend, and whether the individual is a U.S. citizen. For each person, the Pentagon Force Protection Agency will send additional instructions to the email address provided at the time of registration in order for the individual to be approved for entry to the Mark Center.

(3) Name, title, organizational affiliation of presenter, if desiring to make a presentation, limited to a 5-minute presentation per company or organization. This limitation may be subject to adjustment, depending on the number of entities requesting to present, in order to ensure adequate time for discussion.

Once registered, attendees will be prompted by the Pentagon Force Protection Agency on building entry requirements.

One valid government-issued photo identification card (*i.e.,* driver's license or passport) will be required in order to enter the building.

Attendees are encouraged to arrive at least 45 minutes early to accommodate security procedures. Public parking is not available at the Mark Center.

*Presentations:* If you wish to make a presentation, please submit an electronic copy of your presentation to *osd.dfars@mail.mil* no later than September 10, 2018. When submitting presentations, provide presenter's name, organization affiliation, telephone number, and email address on the cover page. Please submit presentations only and cite ''Public Meeting, DFARS Case 2017–D019'' in all correspondence related to the public meeting. There will be no transcription at the meeting. The submitted presentations will be the only record of the public meeting.

*Special accommodations:* The public meeting is physically accessible to people with disabilities. Requests for reasonable accommodations, sign language interpretation or other auxiliary aids should be directed to Daniel Weinstein at 571–372–6105, at least 10 working days prior to the meeting date.

The TTY number for further information is: 1–800–877–8339. When the operator answers the call, let them know the agency is the Department of Defense; the point of contact is Daniel Weinstein at 571–372–6105.

*Correspondence and Comments:* Please cite ''Public Meeting, DFARS Case 2017–D019'' in all correspondence related to this public meeting. The submitted presentations will be the only record of the public meeting. To have a presentation considered as a public comment for the formation of the final rule, the presentation, or pertinent excerpts, must be submitted separately as a written comment as instructed in the paragraph titled ''Submission of Comments'' in **ADDRESSES**.

## II. Background

### *A. Purpose*

The fundamental purpose of the rule change is to increase the effectiveness and efficiency of the Department of Defense in five domains while recognizing that its cash flow policy was outdated and costly to the tax payers. The five domains are:

- On Time or Accelerated Contract Deliveries;
- Contractor Quality;
- Contractor Business Systems;
- Increasing Contract Opportunities for Small Business and for the Blind and Severely Disabled; and
- Receipt of Timely Quality Proposals.

The present progress payment rate was established in an economic environment when interest rates were significantly higher than the historic lows that have been experienced over the past several years. As a result of the aforementioned, and because DoD desires to take an enterprise-wide view of contractor performance and to recognize and distinguish performance among the companies with which it deals, DoD is proposing to modify the customary progress payment rate for large businesses. DoD recognizes that small businesses do not have the borrowing power that large businesses have and, therefore, is not proposing a change to the basic customary progress payment for small business, which is 90 percent. In modifying the customary rate for large business, DoD is proposing to allow large and small business to achieve progress payment rates greater than the customary rates.

The goal would be that a significant majority of the large and small businesses would eventually meet the desired level of enterprise-wide performance.

In the case of large business, for progress payments, a two-step process:

1. Modify the customary progress payment rate to 50 percent (effectively updating the premises of the Defense

Financial and Investment Review (DFAIR) study to address today's business and market environment).

2. Establish opportunities for recognizing contractor behaviors that align themselves with the performance objectives established in the five business domains that are important to the DoD such that large business contractors could potentially increase the rate determined in Step 1 and receive progress payments that can be as high as 95 percent of contract cost. The increased customary progress payment rate will be established for each company or company division as the case may be.

*B. Brief History*

The most comprehensive review of Government financing was the DFAIR study. One key recommendation from the DFAIR study was that ''interest cost should remain an unallowable cost and progress payment rates should be reset in the future based on changes in interest rates.'' Between the DFAIR study in 1985 and 2001, the customary progress payment rate for other than small business was changed five times and was usually a somewhat delayed reaction to changes in interest rates in prior years. In 2001, the customary rate was increased from 75 percent to 80 percent and has remained unchanged ever since.

In the rule making process it is customary to analyze the impact of the proposed rule versus the status quo and that traditional analysis is included in the regulatory cost analysis (see section V. of this preamble). However, DoD has been providing financing in excess of that warranted based on the historically low interest rates in effect since 2008. By modifying the customary progress payment rate to 50 percent, it will result in savings hundreds of millions of dollars to the taxpayers by eliminating an unintended consequence of the past practice associated with providing contract financing in excess of what was necessary. In the future, contractors will have the opportunity to earn increased contract financing benefit through improved performance.

**III. Discussion and Analysis**

DoD is proposing to amend DFARS parts 232, 242, and 252 to revise how contract financing, in the form of progress payments and performance-based payments, is calculated and determined for DoD contracts.

*A. Current FAR and DFARS*

*1. Progress payments.* Currently, FAR 52.232–16, Progress Payments, sets a customary progress payment rate of 80 percent, except the rate is 85 percent for a small business, unless it is a letter contract. There is a statutory cap of 80 percent for letter contracts. DFARS 252.232–7004, DoD Progress Payment Rates, currently increases the FAR customary progress payment rate for small businesses to 90 percent (except for letter contracts).

*2. Performance-based payments.* FAR 52.232–28, Invitation to Propose Performance-Based Payments, sets a maximum performance-based rate of 90 percent of the contract price if on a whole contract basis, or 90 percent of the delivery item price if on a delivery item basis. DFARS 232.1004 provides procedures for analysis of proposed performance-based payments using the performance-based payments analysis tool, and also requires that the contractor provide consideration to the Government, if the performance-based payments payment schedule will be more favorable to the contractor than customary progress payments. DFARS 232.1005–70 prescribes the use of the provision at DFARS 252.232–7012, Performance-Based Payments—Whole Contract Basis, or the provision at DFARS 252.232–7013, Performance-Based Payments—Deliverable Item Basis.

*B. Proposed Changes*

*1. Progress payments (DFARS 232.501–1(a) and 52.232–7004).* DoD proposes a customary progress payment rate of 50 percent for other than small businesses and retains the 90 percent rate for small businesses, but provides criteria by which contractors can achieve a customary progress payment rate of up to 95 percent. However, if a contractor or any of its principals has within the preceding Government fiscal year been convicted of or had a civil judgment rendered against the contractor or any of its principals for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State, or local) contract or subcontract; violation of Federal or State antitrust statutes relating to the submission of offers; or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating Federal criminal tax laws, or receiving stolen property, then the contractor will not be eligible for any incentives and the customary progress payment rate will be 25 percent for that contractor.

On December 1 of each year, a contractor, or higher-level owner of a contractor, may submit a representation as to which criteria it meets and request a higher customary progress payment rate. Based on the representation received, the Director of Defense Pricing and Contracting will determine the appropriate customary progress payment rate for the following calendar year, and that data will be entered into the Contract Business Analysis Repository (CBAR) by December 31.

If a contractor fails to submit by the December 1 deadline, then the rate for that contractor in CBAR will be 50 percent if the offeror is other than a small business and 90 percent if the offeror is a small business, unless the rate is 25 percent as provided in DFARS 232.501–1(a)(ii). If the offeror subsequently submits a representation after the December 1 deadline, any increase in rates will not be effective in CBAR until 30 days after submission.

The rate may be adjusted at any time during the year if it is subsequently determined that the representation provided by a contractor was not accurate.

*2. Performance-based payments (DFARS 232.1004(b)(2) and 252.232–70YY).* For maximum performance-based payments, DoD proposes rates and procedures comparable to those for determining the customary progress payment rate. The same representation will be used to determine both the customary progress payment rate and the maximum performance-based payment rate.

DoD proposes to amend DFARS 232.1004 to remove the procedures for analysis of proposed performance-based payments using the performance-based payments analysis tool, and also removes the requirement that the contractor provide consideration to the Government, if the performance-based payments payment schedule will be more favorable to the contractor than customary progress payments. The current solicitation provisions at DFARS 252.232–7012 and 252.232–7013 are no longer required and will be removed, thus reducing burden on contractors.

*3. Corrective action requests (DFARS 242.302(a)).* One of the criteria to qualify for higher customary progress payments or maximum performance-based payments is that the offeror/contractor does not have any open level III or level IV corrective action requests. Because the DFARS does not currently address corrective action requests, a paragraph has been added at DFARS 242.302(a) to explain the different levels of corrective action requests.

*4. Withholding of payments (DFARS 242.7000 and 252.242–7005).* DFARS 242.7000, Contractor business system deficiencies, and 252.242–7005, Contractor Business Systems, provide

for withholding of payments (including progress and performance-based payments) when there are significant deficiencies in a required business system. However, the contracting officer will not withhold progress or performance-based payments from a contract that includes the clause 252.232–7004 or the provision 252.232–70YY, unless the contractor is receiving progress payments or performance-based payments under the contract at a rate specified in CBAR that includes the 10 percent incentive based on having acceptable business systems without significant deficiencies.

*5. Preference for performance-based payments.* This rule also proposes to implement section 831 of the National Defense Authorization Act for Fiscal Year 2017, which modifies 10 U.S.C. 2307(b) to address preference for performance-based payments.

## IV. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Items, Including Commercially Available Off-the-Shelf (COTS) Items

This rule proposes to amend the clause at DFARS 252.232–7004, DoD Progress Payment Rates, and adds a new provision at DFARS 252.232–70YY, DoD Maximum Performance-Based Payment Rates. DFARS 252.232–7004 is used with FAR clause 52.232–16, Progress Payments, and DFARS 252.232–70YY is used with FAR provision 52.232–28, Invitation to Propose Performance-Based Payments. The FAR provision and clause are not prescribed for use in contracts for the acquisition of commercial items or for acquisitions at or below the SAT. The DFARS provision and clause, therefore, will not be applied to commercial items or to contact actions at or below the simplified acquisition threshold.

## V. Expected Costs and Benefits

This rule proposes to amend the DFARS to implement changes to the progress payment and performance-based payment policies for DoD contracts by amending the section on customary progress payment rates at DFARS 232.501–1; adding new procedures for performance-based payments at 232.1003; amending the clause at 252.232–7004, DoD Customary Progress Payment Rates, and adding a new provision at 252.232–70YY, DoD Maximum Performance-Based Payment Rates. This rule also proposes to delete the clauses at DFARS 252.232–7012, Performance-Based Payments—Whole Contract Basis, and 252.232–7013, Performance-Based Payments—Deliverable Item Basis.

This rule will impact all offerors/contractors (large or small) seeking DoD contracts that offer progress payments or performance-based payments. Although there are added costs associated with submission of an annual representation, the contractors/offerors that can meet the criteria will qualify for substantial savings on interest payments, due to increased Government financing.

The expected benefits are that the modified approach to the establishment of a performance-based cash flow environment will enable DoD to take an enterprise-wide view of contractor performance and to recognize and distinguish performance among the companies with which it deals. The goal would be that a significant majority of the large and small businesses would eventually meet the desired level of enterprise-wide performance. As a result of the improved industrial performance, DOD's efficiency and effectiveness will be improved thereby increasing the lethality of its fighting force and positively reforming DOD's business practices.

*A. Summary of Expected Costs to the Public.* DoD has performed a regulatory cost analysis on this rule. The following is a summary of the estimated net public costs in millions, calculated in 2016 dollars in perpetuity at a 7-percent discount rate.

Annualized at 7 percent: $5.5 million
Present Value at 7 percent: $78.8 million

*B. Summary of Expected Transfers.* The following is a summary of the expected transfer of interest costs/savings from the Government to the public, due to an expected net increase in progress payment and performance-based payment rates paid by the Government.

*1. Reduced Interest Payments by Contractors:*

Annualized at 7 percent: $60.2 million
Present Value at 7 percent: $859.6 million

*2. Increased Interest Payments by Government:*

Annualized at 7 percent: $30.2 million
Present Value at 7 percent: $431.8 million

To access the complete Regulatory Cost Analysis, go to the Federal eRulemaking Portal at *www.regulations.gov,* search for ''DFARS Case 2017–D019'', click ''Open Docket'', and view ''Supporting Documents''.

## VI. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is an economically significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is a major rule under 5 U.S.C. 804.

## VII. Executive Order 13771

This proposed rule is subject to E.O. 13771, Reducing Regulation and Controlling Regulatory Costs, because this rule is a significant regulatory action under E.O. 12866. If finalized as proposed, this rule would be an E.O. 13771 regulatory action. The E.O. 13771 status will be informed by public comment, so please share any data and/or analysis that would relate to the rule's potential to be considered a deregulatory action. Details on the expected costs and benefits can be found in section V of this preamble.

## VIII. Regulatory Flexibility Act

DoD expects that this proposed 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.* Therefore, an initial regulatory flexibility analysis has been prepared and is summarized as follows:

This rule revises progress payments and performance-based payments policies for DoD contracts, basing the payment rate on whether the offeror/contractor has met certain performance criteria. This rule also implements section 831 of the National Defense Authorization Act for Fiscal Year (FY) 2017, which modifies 10 U.S.C. 2301(b) to address preference for performance-based payments.

The objective of this rule is to increase the effectiveness and efficiency of DoD in five domains: on time or accelerated contract deliveries, contractor quality, contractor business systems, increasing contract opportunities for small businesses and for the blind and severely disables, and receipt of timely quality proposals. The statutory basis is 41 U.S.C. 1303 and 10 U.S.C. 2301(b).

This rule will apply to small entities that receive either progress payments or performance-based payments for

noncommercial fixed-price contracts. There were 1,938 unique small entities receiving progress payments or performance-based payments in FY 2017.

The rule provides an opportunity to submit a representation as to whether a small entity meets certain performance criteria, in order to obtain higher progress payments or performance-based payments. DoD estimates that the professional skill set necessary to prepare the representation annually will approximate 25 percent at the journeyman level, 60 percent at the senior level, and 15 percent at the executive/attorney level. DoD estimates an average of 13 hours per response from small entities. The rule also removes a burden of approximately one hour per entity, associated with paragraph (b) of DFARS subpart 32.10 and the associated clauses at DFARS 252.232–7012 and 252.232–7013, which this rule proposes to delete.

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

DoD did not identify any significant alternatives that would meet the objectives of the rule. However, the rule provides certain advantages for small entities as the basic customary progress payment rate for small entities remains at 90 percent, with possible increase up to 95 percent. So, small entities can continue to get the same rate, even if they do not submit a representation or meet the criteria. Small entities are only asked to represent with regard to three criteria: timely delivery or performance, contractor quality, and contractor business systems.

DoD invites comments from small business concerns 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 2017–D019), in correspondence.

## IX. Paperwork Reduction Act

The rule contains information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35). Accordingly, DoD has submitted a request for approval of a revised information collection requirement 0704–0359, Defense Federal Acquisition Regulation Supplement (DFARS) Part 232, Contract Financing, and associated clauses at DFARS 252.232, to the Office of Management and Budget.

*A. Public Reporting Burden*

1. Public reporting burden for the collection of information proposed by this DFARS case 2017–D019 is estimated to average 28.8 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

The annual reporting burden estimated as follows:

*Respondents:* 3,200.

*Responses per respondent:* 1.

*Total annual responses:* 3,200.

*Preparation hours per response:* 28.8 hours.

*Total response Burden Hours:* 92,027 hours.

2. In addition, this information collection includes a pre-existing burden related to DFARS clause 252.232–7007 (800 hours, 1 response per respondent, 800 responses, 1 hour per response, for a total of 8,000 hours). Therefore, the total burden for 0704–0359, rounded, is as follows:

*Respondents:* 4,000.

*Responses per respondent:* 1.

*Total annual responses:* 4,000.

*Preparation hours per response:* 24 hours.

*Total response Burden Hours:* 93,000 hours.

*B. Request for Comments Regarding Paperwork Burden*

Written comments and recommendations on the proposed information collection, including suggestions for reducing this burden, should be sent to Ms. Jasmeet Seehra at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503, or email *Jasmeet_K._Seehra@omb.eop.gov,* with a copy to the Defense Acquisition Regulations System, Attn: Ms. Amy G. Williams, OUSD (A&S) DPC/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301–3060. Comments can be received from 30 to 60 days after the date of this notice, but comments to OMB will be most useful if received by OMB within 30 days after the date of this notice.

Public comments are particularly invited on: whether this collection of information is necessary for the proper performance of functions of the DFARS, and will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to the Defense Acquisition Regulations System, Attn: Ms. Amy G. Williams, OUSD (A&S) DPC/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301–3060, or email *osd.dfars@mail.mil.* Include DFARS Case 2017–D019 in the subject line of the message.

This rule also affects the information collection requirements at DFARS subpart 232.10 (and associated clauses at DFARS 252.232–7012 and 252.232–7013, currently approved under OMB Control Number 0704–0359. This rule proposes to remove these requirements.

## List of Subjects in 48 CFR Parts 232, 242, and 252

Government procurement.

**Jennifer Lee Hawes,**

*Regulatory Control Officer, Defense Acquisition Regulations System.*

Therefore, 48 CFR parts 232, 242, and 252 are proposed to be amended as follows:

■ 1. The authority citation for parts 232, 242, and 252 continues to read as follows:

**Authority:** 41 U.S.C. 1303 and 48 CFR chapter 1.

## PART 232—CONTRACT FINANCING

■ 2. Revise section 232.501–1 to read as follows:

### 232.501–1 Customary progress payment rates.

(a) Except for undefinitized contract actions as provided at FAR 32.501–1(d), in lieu of the customary progress payment rates specified at FAR 32.501–1(a), the customary progress payment rates for DoD solicitations issued on or after January 1, 2019, and resultant contracts, including contracts that contain foreign military sales (FMS) requirements, are 50 percent for other than small businesses and 90 percent for small businesses, unless a different rate is specified for the contractor in the Contract Business Analysis Repository (CBAR) at *[details TBD].*

(i) Contractors can qualify for an increased customary progress payment rate of up to 95 percent, based on the following criteria:

(A) Other than small businesses:

| Additional percentage | Criteria |
|---|---|
| 10 | Met the contract delivery dates for contract end items and contract data requirements lists or performance milestone schedule, as the case may be, at least 95 percent of the time during the preceding Government fiscal year (October 1 through September 30). |
| 10 | Does not have open level III or IV corrective action requests. See 242.302(a). |
| 10 | All applicable contractor business systems are acceptable, without significant deficiencies. |
| 7.5 | At least 95 percent of the time during the preceding Government fiscal year, when responding to solicitations that required submission of certified cost or pricing data, met the due date in the request for proposal and complied with the Proposal Adequacy Checklist (252.215–7009). |
| 5 | Has met its small business subcontracting goals during the preceding Government fiscal year. |
| 2.5 | Has provided subcontracting opportunities for AbilityOne *[details TBD].* |

(B) Small businesses:

| Additional percentage | Criteria |
|---|---|
| 2 | Met the contract delivery dates for contract end items and contract data requirements lists or performance milestone schedule, as the case may be, at least 95 percent of the time during the preceding Government fiscal year (October 1 through September 30). |
| 2 | Does not have open level III or IV corrective action requests. See 242.302(a). |
| 1 | All applicable contractor business systems are acceptable, without significant deficiencies. |

(ii) However, if a contractor or any of its principals has within the preceding Government fiscal year been convicted of or had a civil judgment rendered against the contractor or any of its principals for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State, or local) contract or subcontract; violation of Federal or State antitrust statutes relating to the submission of offers; or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating Federal criminal tax laws, or receiving stolen property, the contractor will not be eligible for any of the above incentives and the customary progress payment rate will be 25 percent for that contractor.

(iii)(A) On or before December 1 of each year, except as provided in paragraph (a)(ii) of this section, a contractor, or a higher-level owner of a contractor, may submit to *[email address TBD]* a representation as to which criteria specified in paragraph (a)(i) of this section the contractor meets, and request a higher customary progress payment rate on that basis.

(*1*) If a representation is made on behalf of multiple business segments, the representation must address the criteria in paragraph (a)(i) of this section for each business segment for which higher customary progress payment rates are requested.

(*2*) If the size status of a contractor varies dependent upon the North American Industry Classification System (NAICS) code of the acquisition, the contractor may submit a representation and request for higher customary progress payment rates that addresses the rates for both a small business and an other than small business.

(*3*) A separate representation is not required to also request a higher maximum performance-based payment rate (see 232.1001(b)(2)).

(B) The representation is required to be executed by a person authorized to sign for the entity submitting the representation and must at a minimum include—

(*1*) The unique entity identifier and Commercial and Government Entity (CAGE) code(s) of the contractor;

(*2*) Size status of the contractor (small, other than small, or varies dependent upon the NAICS code of the acquisition); and

(*3*) Identification of the criteria for which the contractor is requesting increase in the customary progress payment rate for the following calendar year. It is not necessary to submit supporting data with the representation, but the contractor is required to provide such data upon request.

(iv) Based on the representation received, the Director, Defense Pricing and Contracting, will determine the appropriate customary progress payment rate(s) for the following calendar year. DoD will enter the customary progress payment rate(s) into CBAR by December 31.

(v) If a contractor fails to submit by the December 1 deadline, then the rate for that contractor in CBAR will be 50 percent if the contractor is other than a small business and 90 percent if the contractor is a small business, unless the rate is 25 percent as provided in (a)(ii) of this section. If the contractor subsequently submits a representation after the December 1 deadline, any increase in rates will not be effective in CBAR until 30 days after submission.

(vi) The rate(s) may be adjusted at any time during the year if the Director, Defense Pricing and Contracting, subsequently determines that the representation provided by a contractor was not accurate.

■ 3. Add new section 232.502–4 heading to read as follows:

**232.502–4 Contract clauses.**

■ 4. Amend section 232.502–4–70 by revising paragraph (b) to read as follows:

**232.502–4–70 Additional clauses.**

* * * * *

(b) Use the clause at 252.232–7004, DoD Customary Progress Payment Rates, in solicitations and contracts that include FAR 52.232–16. Do not use Alternate I of FAR 52.232–16.

■ 5. Amend section 232.503–6 by revising paragraph (b) to read as follows:

**232.503–6 Suspension or reduction of payments.**

(b) *Contractor noncompliance.*

(i) If the Director, Defense Pricing and Contracting, subsequently determines that the representation in accordance with 232.501–1(a) is inaccurate, the progress payment rate in CBAR will be adjusted.

(ii) See also 242.7502(c).

* * * * *

■ 6. Amend section 232.1001 by revising paragraph (a) to read as follows:

**232.1001 Policy.**

(a) In accordance with 10 U.S.C. 2307(b)(2), performance-based payments shall not be conditioned upon costs incurred in contract performance, but on the achievement of performance outcomes.

* * * * *

■ 7. Amend section 232.1004 by—

■ a. Revising paragraph (b); and

■ b. Adding a new paragraph (S–70).

The revision and addition read as follows:

**232.1004 Procedures.**

(b) *Establishing performance-based finance payment amounts.*

(2) In lieu of the 90 percent maximum rate specified in the FAR for performance-based payments, the maximum rates for DoD performance-based payments in solicitations issued on or after January 1, 2019, are 50 percent for other than small businesses and 90 percent for small businesses, unless a different rate is specified for the offeror in the Contract Business Analysis Repository *[details TBD].*

(A) Offerors can qualify for an increased maximum performance-based payment rate of up to 95 percent, based on the following criteria:

(*1*) Other than small businesses:

| Additional percentage | Criteria |
|---|---|
| 10 | Met the contract delivery dates for contract end items and contract data requirements lists or performance milestone schedule, as the case may be, at least 95 percent of the time during the preceding Government fiscal year (October 1 through September 30). |
| 10 | Does not have open level III or IV corrective action requests. See 242.302(a). |
| 10 | All applicable contractor business systems are acceptable, without significant deficiencies. |
| 7.5 | At least 95 percent of the time during the preceding Government fiscal year, when responding to solicitations that required submission of certified cost or pricing data, met the due date in the request for proposal and complied with the Proposal Adequacy Checklist (252.215–7009). |
| 5 | Has met its small business subcontracting goals during the preceding Government fiscal year. |
| 2.5 | Has provided subcontracting opportunities for the blind and severely disabled *[details TBD].* |

(*2*) Small businesses:

| Additional percentage | Criteria |
|---|---|
| 2 | Met the contract delivery dates for contract end items and contract data requirements lists or performance milestone schedule, as the case may be, at least 95 percent of the time during the preceding Government fiscal year (October 1 through September 30). |
| 2 | Does not have open level III or IV corrective action requests. See 242.302(a). |
| 1 | All applicable contractor business systems are acceptable, without significant deficiencies. |

(B) However, if an offeror or any of its principals has within the preceding Government fiscal year been convicted of or had a civil judgment rendered against the offeror or any of its principals for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State, or local) contract or subcontract; violation of Federal or State antitrust statutes relating to the submission of offers; or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating Federal criminal tax laws, or receiving stolen property, the offeror will not be eligible for any of the above incentives and the maximum performance-based payment rate will be 25 percent for that offeror.

(C)(*1*) On December 1 of each year, except as provided in paragraph (b)(2)(B) of this section, an offeror, or a higher-level owner of an offeror, may submit to *[email address TBD]* a representation as to which criteria specified in paragraph (b)(2)(A) of this section the offeror meets, and request a higher customary progress payment rate on that basis.

(*i)* If a representation is made on behalf of multiple business segments, the representation must address the criteria in paragraph (b)(2)(A) of this section for each business segment for which higher customary progress payment rates are requested.

(*ii*) If the size status of an offeror varies dependent upon the North American Industry Classification System (NAICS) code of the acquisition, the offeror may submit a representation and request for a higher customary progress payment rate that addresses the rates for both a small business and an other than small business.

(*iii*) A separate representation is not required to also request a higher maximum performance-based payment rate (see 232.501–1(a)).

(*2*) The representation is required to be executed by a person authorized to sign for the entity submitting the representation and must at a minimum include—

(*i*) The unique entity identifier and Commercial and Government Entity (CAGE) code(s) of the offeror;

(*ii*) Size status of the offeror (small, other than small, or varies dependent upon the NAICS code of the acquisition); and

(*iii*) Identification of the criteria for which the offeror is requesting increase in the customary progress payment rate for the following calendar year. It is not necessary to submit supporting data with the representation, but the offeror is required to provide such data upon request.

(D) Based on the representation received, the Director, Defense Pricing and Contracting, will determine the appropriate maximum performance-based payment rate(s) for the following calendar year. DoD will enter the maximum performance-based payment rate(s) into CBAR by December 31.

(E) If an offeror fails to submit by the December 1 deadline, then the rate for that offeror in CBAR will be 50 percent if the offeror is other than a small business and 90 percent if the offeror is a small business, unless the rate is 25 percent as provided in (b)(2)(B) of this section. If the offeror subsequently submits a representation after the December 1 deadline, any increase in

rates will not be effective in CBAR until 30 days after submission.

(F) The rate(s) may be adjusted at any time during the year if the Director, Defense Pricing and Contracting, subsequently determines that the representation provided by an offeror was not accurate.

* * * * *

(S–70) *Eligibility for performance-based payments.* Nontraditional defense contractors and other private sector companies shall be eligible for performance-based payments, consistent with best commercial practices. In accordance with 10 U.S.C. 2307(b), a contractor's accounting system shall be in compliance with Generally Accepted Accounting Principles in order to receive performance-based payments. 10 U.S.C. 2307 does not grant the Defense Contract Audit Agency the authority to audit compliance with Generally Accepted Accounting Principles.

■ 8. Revise section 232.1005–70 to read as follows:

**232.1005–70 Solicitation provision.**

Use the provision 252.232–70YY, DoD Maximum Performance-Based Payment Rates, in solicitations that include FAR 52.232–28, Invitation to Propose Performance-Based Payments.

## PART 242—CONTRACT ADMINISTRATION AND AUDIT SERVICES

■ 9. Amend section 242.302 by adding paragraph (a) text to read as follows:

**242.302 Contract administration functions.**

(a) Government personnel performing contract administration duties outlined in FAR 42.302(a) and this paragraph issue a corrective action request when contractual noncompliance is independently identified. The Defense Contract Management Agency had identified four levels of corrective action requests.

(i) Level I is issued for noncompliances that are minor in nature, are promptly corrected by the contractor, and present no need for root cause determination or further preventive action.

(ii) Level II is issued for noncompliances that are not promptly correctable and warrant root cause analysis and preventive action, or need action by the contractor to determine if other product/services are affected.

(iii) Level III is issued to the contractor's management responsible for the company or business segment to call attention to a serious noncompliance, a significant deficiency pursuant to 252.242–7005(b), a failure to respond to a lower level corrective action request, or to remedy recurring noncompliance.

(iv) Level IV is issued to the contractor's segment or corporate management and when the contractual noncompliance(s) is of a serious nature or when a Level III corrective action request has been ineffective.

(v) For additional information on corrective action requests, see PGI 242.302(a).

* * * * *

■ 10. Amend section 242.7000 by revising the first sentence in paragraph (b)(1) to read as follows:

**242.7000 Contractor business system deficiencies.**

(b) * * *

(1) In accordance with agency procedures, identify one or more covered contracts containing the clause at 252.242–7005, Contractor Business Systems, from which payments will be withheld, except that, if a contract includes the clause 252.232–7004, DoD Customary Progress Payments, or the provision 252.232–70YY, DoD Maximum Performance-Based Payments, the contracting officer shall not withhold progress payments or performance based payments from that contract unless the contractor is receiving progress payments or performance-based payments under the contract at a rate specified in Contract Business Analysis Repository that includes the 10 percent incentive based on having acceptable business systems without significant deficiencies (see 232.501–1(a)). * * *

* * * * *

## PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 11. Revise section 252.232–7004 to read as follows:

**252.232–7004 DoD Customary Progress Payment Rates.**

As prescribed in 232.502–4–70(b), use the following clause:

**DoD Customary Progress Payment Rates (Date)**

(a) The Progress Payments clause of this contract is modified to change each mention of the progress payment rate and liquidation rate in paragraphs (a)(1), (a)(6), and (b) to 50 percent if the Contractor is other than a small business and 90 percent if the Contractor is a small business, unless a different rate is specified for the Contractor in the Contract Business Analysis Repository (CBAR) at *[details TBD]*. The limitations on undefinitized contract actions in paragraph (k) of the Progress Payments clause remain at a maximum of 80 percent for both the progress payment rate and the liquidation rate, notwithstanding any higher rate specified in CBAR.

(b) If the Contractor has a satisfactory record of performance, the Contractor can qualify for an increased customary progress payment rate of up to 95 percent, based on the following criteria:

(1) If the Contractor is other than a small business:

| Additional percentage | Criteria |
|---|---|
| 10 | Met the contract delivery dates for contract end items and contract data requirements lists or performance milestone schedule, as the case may be, at least 95 percent of the time during the preceding Government fiscal year (October 1 through September 30). |
| 10 | Does not have open level III or IV corrective action requests. See DFARS 242.302(a). |
| 10 | All applicable contractor business systems are acceptable, without significant deficiencies. |
| 7.5 | At least 95 percent of the time during the preceding Government fiscal year, when responding to solicitations that required submission of certified cost or pricing data, met the due date in the request for proposal and complied with the Proposal Adequacy Checklist (252.215–7009). |
| 5 | Has met its small business subcontracting goals during the preceding Government fiscal year. |
| 2.5 | Has provided subcontracting opportunities for AbilityOne *[details TBD].* |

(2) If the Contractor is a small business:

| Additional percentage | Criteria |
|---|---|
| 2 | Met the contract delivery dates for contract end items and contract data requirements lists or performance milestone schedule, as the case may be, at least 95 percent of the time during the preceding Government fiscal year (October 1 through September 30). |
| 2 | Does not have open level III or IV corrective action requests. See DFARS 242.302(a). |
| 1 | All applicable contractor business systems are acceptable, without significant deficiencies. |

(c) However, if the Contractor or any of its principals has within the preceding Government fiscal year been convicted of or had a civil judgment rendered against the Contractor or any of its principals for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State, or local) contract or subcontract; violation of Federal or State antitrust statutes relating to the submission of offers; or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating Federal criminal tax laws, or receiving stolen property, the Contractor will not be eligible for any of the above incentives and the customary progress payment rate will be 25 percent.

(d)(1) On December 1 of each year, except as provided in paragraph (c) of this clause, the Contractor, or a higher-level owner of the Contractor, may submit to *[email address TBD]* a representation as to which criteria specified in paragraph (b) of this clause the Contractor meets, and request a higher customary progress payment rate on that basis.

(i) If a representation is made on behalf of multiple business segments, the representation shall address the criteria in paragraph (b) of this clause for each business segment for which higher customary progress payment rates are requested. Business segments that meet the same criteria may be grouped together.

(ii) If the size status of the Contractor varies dependent upon the North American Industry Classification System (NAICS) code of the acquisition, the Contractor may submit a representation and request for a higher customary progress payment rate that addresses the rates for both a small business and an other than small business.

(iii) A separate representation is not required to also request a higher maximum performance-based payment rate (see DFARS 232.1004(b)(2)).

(2) The representation shall be executed by a person authorized to sign for the entity submitting the representation and shall at a minimum include—

(i) The unique entity identifier and Commercial and Government Entity (CAGE) code(s) of the Contractor;

(ii) The size status of the Contractor (small, other than small, or varies dependent upon the NAICS code of the acquisition); and

(iii) Identification of the criteria for which the Contractor is requesting increase in the customary progress payment rate for the following calendar year. It is not necessary to submit supporting data with the representation, but the Contractor is required to provide such data upon request.

(3) The template in paragraph (h) of this clause may be used for the submission of the request and representation.

(e) Based on the representation received, the Director, Defense Pricing and Contracting, will determine the appropriate customary progress payment rate(s) for the following calendar year. DoD will enter the customary progress payment rate(s) into CBAR by December 31.

(f) If the Contractor fails to submit by the December 1 deadline, then the rate for the Contractor in CBAR will be 50 percent if the Contractor is other than a small business and 90 percent if the Contractor is a small business, except as provided in paragraph (c) of this clause. If the Contractor subsequently submits a representation after the December 1 deadline, any increase in rates will not be effective in CBAR until 30 days after submission.

(g) The rate(s) may be adjusted at any time during the year if the Director, Defense Pricing and Contracting, subsequently determines that the representation provided by a contractor was not accurate.

(h) *Template.*

BILLING CODE 5001–06–P

Company Letterhead

I, [print name and title], request customary progress payment/maximum performance based payment rate(s) as follows:

1.a. Name and address of company:

b. Unique Entity Identifier

c. Commercial and Government Entity (CAGE) Code(s).

d. Size status. Fill out Table A if other than small business. Fill out Table B if a small business. If size status varies dependent upon NAICS code, fill out both tables.

Table A - Other than small business:

| Enter "Yes" if meet the criteria, "No" if do not meet. | 50 percent plus additional percentage | Criteria |
|---|---|---|
| | 10 percent | Met the dates in the delivery or performance schedule in the contract at least 95 percent of the time during the preceding Government fiscal year (October 1 through September 30). |
| | 10 percent | Does not have open level III or |

| | | | |
|---|---|---|---|
| | | | IV corrective action requests. See DFARS 242.302(a). |
| | | 10 percent | All applicable contractor business systems are acceptable, without significant deficiencies. |
| | | 7.5 percent | At least 95 percent of the time during the preceding Government fiscal year, when responding to solicitations that required submission of certified cost or pricing data, met the due date in the request for proposal and complied with the Proposal Adequacy Checklist (252.215-7009). |
| | | 5 percent | Has met its small business subcontracting goals during the preceding Government fiscal year. |
| | | 2.5 percent | Has provided subcontracting opportunities for AbilityOne [details TBD]. |

Total customary progress payment/maximum performance-based payment rate requested as an other than small business: _____

Table B - Small business:

| Enter "Yes" if meet the criteria, "No" if do not meet. | 90 percent plus additional percentage | Criteria |
|---|---|---|
| | 2 percent | Met the contract delivery dates for contract end items and contract data requirements lists or performance milestone schedule, as the case may be, at least 95 percent of the time during the preceding Government fiscal year (October 1 through September 30). |
| | 2 percent | Does not have open level III or IV corrective action requests. See DFARS 242.302(a). |
| | 1 percent | All applicable contractor business systems are |

| | | |
|---|---|---|
| | | acceptable, without significant deficiencies. |

Total customary progress payment/maximum performance-based payment rate requested as a small business: _____

2. Repeat above information for any additional companies for which increased customary progress payment/maximum performance-based payment rates are requested. Business segments that meet the same criteria may be grouped together.

The above identified entity (entities) and any of the principals thereof have not within the preceding Government fiscal year been convicted of or had a civil judgment rendered against any entity or any of its principals for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State, or local) contract or subcontract; violation of Federal or State antitrust statutes relating to the submission of offers; or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating Federal criminal tax laws, or receiving stolen property.

I represent, to the best of my knowledge and belief, that all of the above information is accurate.

[Signature]

[Printed name and title]

(End of clause)

**252.232–7012 [Removed and Reserved]**

■ 12. Remove and reserve section 252.232–7012.

**252.232–7013 [Removed and Reserved]**

■ 13. Remove and reserve section 252.232–7013.

■ 14. Add new section 252.232–70YY to read as follows:

**252.232–70YY DoD Maximum Performance-Based Payment Rates.**

As prescribed in 232.1005–70, use the following provision:

**DoD Maximum Performance-Based Payment Rates (Date)**

(a) The Invitation to Propose Performance-Based Payments provision in this solicitation is modified to change the maximum performance-based payment rate in paragraph (c)(2)(iii) of that provision to 50 percent if the Offeror is other than small business and 90 percent if the Offeror is a small business, unless a different rate is specified for the Offeror in the Contract Business Analysis Repository (CBAR) at *[details TBD].*

(b) If the Offeror has a satisfactory record of performance, the Offeror can qualify for an increased maximum performance-based payment rate of up to 95 percent, based on the following criteria:

(1) If the Offeror is other than small business:

| Additional percentage | Criteria |
|---|---|
| 10 | Met the contract delivery dates for contract end items and contract data requirements lists or performance milestone schedule, as the case may be, at least 95 percent of the time during the preceding Government fiscal year (October 1 through September 30). |
| 10 | Does not have open level III or IV corrective action requests. See DFARS 242.302(a). |
| 10 | All applicable contractor business systems are acceptable, without significant deficiencies. |
| 7.5 | At least 95 percent of the time during the preceding Government fiscal year, when responding to solicitations that required submission of certified cost or pricing data, met the due date in the request for proposal and complied with the Proposal Adequacy Checklist (252.215–7009). |
| 5 | Has met its small business subcontracting goals during the preceding Government fiscal year. |
| 2.5 | Has provided subcontracting opportunities for AbilityOne *[details TBD].* |

(2) If the Offeror is a small business:

| Additional percentage | Criteria |
|---|---|
| 2 | Met the contract delivery dates for contract end items and contract data requirements lists or performance milestone schedule, as the case may be, at least 95 percent of the time during the preceding Government fiscal year (October 1 through September 30). |
| 2 | Does not have open level III or IV corrective action requests. See DFARS 242.302(a). |
| 1 | All applicable contractor business systems are acceptable, without significant deficiencies. |

(c) However, if the Offeror or any of its principals has within the preceding Government fiscal year been convicted of or had a civil judgment rendered against the Offeror or any of its principals for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State, or local) contract or subcontract; violation of Federal or State antitrust statutes relating to the submission of offers; or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating Federal criminal tax laws, or receiving stolen property, the Offeror will not be eligible for any of the above incentives and the maximum performance-based payment rate will be 25 percent.

(d)(1) On December 1 of each year, except as provided in paragraph (c) of this provision, the Offeror, or a higher-level owner of the Offeror, may submit to *[email address TBD]* a representation as to which criteria specified in paragraph (b) of this provision it meets, and request a higher maximum performance-based payment rate on the basis of the applicable criteria.

(i) If a representation is made on behalf of multiple business segments, the representation shall address the criteria in paragraph (b) of this provision for each business segment for which higher customary progress payment rates are requested. Business segments that meet the same criteria may be grouped together.

(ii) If the size status of the Offeror varies dependent upon the North American Industry Classification System (NAICS) code of the acquisition, the Offeror may submit a representation and request for a higher customary progress payment rate that addresses the rates for both a small business and an other than small business.

(iii) A separate representation is not required to also request a higher customary progress payment rate (see DFARS 232.501–1(a)).

(2) The representation shall be executed by a person authorized to sign for the entity submitting the representation and shall at a minimum include—

(i) The unique entity identifier and Commercial and Government Entity (CAGE) code(s) of the Offeror;

(ii) The size status of the Offeror (small, other than small, or varies dependent upon the NAICS code of the acquisition); and

(iii) Identification of the criteria for which the Offeror is requesting increased maximum performance-based payment rate for the following calendar year. It is not necessary to submit supporting data with the representation, but the Offeror shall provide such data upon request.

(3) The template in paragraph (h) of this clause may be used for the submission of this request and representation.

(e) Based on the representation received, the Director, Defense Pricing and Contracting, will determine the appropriate maximum performance-based payment rate(s) for the following calendar year. DoD will enter the maximum performance-based payment rate(s) into CBAR by December 31.

(f) If the Offeror fails to submit by the December 1 deadline, then the rate for the Offeror in CBAR will be 50 percent if the Offeror is other than a small business and 90 percent if the Offeror is a small business, except as provided in paragraph (c) of this provision. If the Offeror subsequently submits a representation after the December 1 deadline, any increase in rates will not be effective in CBAR until 30 days after submission.

(g) The rate(s) may be adjusted at any time during the year if the Director, Defense Pricing and Contracting, subsequently determines that the representation provided by the Offeror was not accurate.

(h) *Template.*

BILLING CODE 5001–06–P

Company Letterhead

I, [print name and title], request customary progress payment/maximum performance based payment rate(s) as follows:

1.a. Name and address of company:

b. Unique Entity Identifier:

c. Commercial and Government Entity (CAGE) code(s):

d. Size status. Fill out Table A if other than a small business. Fill out Table B if a small business. If size status varies dependent upon NAICS code, fill out both tables.

Table A - Other than small business:

| Enter "Yes" if meet the criteria, "No" if do not meet. | 50 percent plus additional percentage | Criteria |
|---|---|---|
| | 10 percent | Met the contract delivery dates for contract end items and contract data requirements lists or performance milestone schedule, as the case may be, at least 95 percent of the time during the preceding Government |

| | | | |
|---|---|---|---|
| | | | fiscal year (October 1 through September 30). |
| | | 10 percent | Does not have open level III or IV corrective action requests. See DFARS 242.302(a). |
| | | 10 percent | All applicable contractor business systems are acceptable, without significant deficiencies. |
| | | 7.5 percent | At least 95 percent of the time during the preceding Government fiscal year, when responding to solicitations that required submission of certified cost or pricing data, met the due date in the request for proposal and complied with the Proposal Adequacy Checklist (252.215-7009). |
| | | 5 percent | Has met its small business subcontracting goals during the preceding Government fiscal year. |

| | | |
|---|---|---|
| | 2.5 percent | Has provided subcontracting opportunities for AbilityOne [details TBD]. |

Total customary progress payment/maximum performance-based payment rate requested as an other than small business: _____.

Table B - Small business:

| Enter "Yes" if meet the criteria, "No" if do not meet. | 90 percent plus additional percentage | Criteria |
|---|---|---|
| | 2 percent | Met the contract delivery dates for contract end items and contract data requirements lists or performance milestone schedule, as the case may be, at least 95 percent of the time during the preceding Government fiscal year (October 1 through September 30). |
| | 2 percent | Does not have open level III or IV corrective action requests. See DFARS 242.302(a). |

| | | |
|---|---|---|
| | 1 percent | All applicable contractor business systems are acceptable, without significant deficiencies. |

Total customary progress payment/maximum performance-based payment rate requested as a small business: _____.

2. Repeat above information for any additional companies for which increased customary progress payment/maximum performance-based payment rates are requested. Business segments that meet the same criteria may be grouped together.

The above identified entity(entities) and any of the principals thereof have not within the preceding Government fiscal year been convicted of or had a civil judgment rendered against any entity or any of its principals for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State, or local) contract or subcontract; violation of Federal or State antitrust statutes relating to the submission of offers; or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating Federal criminal tax laws, or receiving stolen property.

I represent, to the best of my knowledge and belief, that all of the above information is accurate.

[Signature]

[Printed name and title]

(End of provision)

■ 15. Amend section 252.242–7005 by—
■ a. Removing the clause date of ''(FEB 2012)'' and adding ''(DATE)'' in its place;
■ b. In paragraph (d)(2) removing ''withhold payments'' and adding ''withhold payments, except as provided in paragraph (e) of this clause'' in its place;
■ c. Redesignating paragraphs (e) and (f) as paragraphs (f) and (g); and
■ d. Adding a new paragraph (e) to read as follows:

**§ 252.242–7005 Contractor Business Systems.**

* * * * *

(e) The requirements in paragraphs (f) and (g) of this clause regarding withholding of amounts due from progress payments and performance-based payments do not apply unless the Contractor is receiving progress payments or performance-based payments under this contract at a rate specified in CBAR that includes the 10 percent incentive based on having acceptable business systems without significant deficiencies.

* * * * *

[FR Doc. 2018–18238 Filed 8–23–18; 8:45 am]

**BILLING CODE 5001–06–C**

## DEPARTMENT OF DEFENSE

### Defense Acquisition Regulations System

### 48 CFR Part 236

**[Docket DARS–2018–0039]**

**RIN 0750–AJ75**

## Defense Federal Acquisition Regulation Supplement: Exemption From Design-Build Selection Procedures (DFARS Case 2018–D011)

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

**ACTION:** Proposed rule.

**SUMMARY:** DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement to implement a section of the National Defense Authorization Act for Fiscal Year 2018 that allows for more than five offerors on solicitations issued using two-phase design-build selection procedures for indefinite-delivery, indefinite-quantity contracts that exceed $4 million.

**DATES:** Comments on the proposed rule should be submitted in writing to the address shown below on or before October 23, 2018, to be considered in the formation of a final rule.

**ADDRESSES:** Submit comments identified by DFARS Case 2018–D011, using any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Search for ''DFARS Case 2018–D011''. Select ''Submit a Comment Now'' and follow the instructions provided to submit a comment. Please include ''DFARS Case 2018–D011'' on any attached document.
- *Email: osd.dfars@mail.mil.* Include DFARS Case 2018–D011 in the subject line of the message.
- *Fax:* 571–372–6094.
- *Mail:* Defense Acquisition Regulations System, Attn: Ms. Heather Kitchens, OUSD(A&S)DPC/DARS, Room 3B941, 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. To confirm receipt of your comment(s), please check *www.regulations.gov,* approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

**FOR FURTHER INFORMATION CONTACT:** Ms. Heather Kitchens, telephone 571–372–6104.

**SUPPLEMENTARY INFORMATION:**

### I. Background

This rule proposes to revise the DFARS to implement section 823 of the National Defense Authorization Act for Fiscal Year 2018 (Pub. L. 115–91). Section 823 amends 10 U.S.C. 2305a to allow for more than the maximum number of five offerors when a solicitation is issued using two-phase design-build selection procedures for an indefinite-delivery, indefinite-quantity (IDIQ) contract that exceeds $4 million.

Prior to the amendments made by section 823, 10 U.S.C. 2305a required the head of the contracting activity to approve the contracting officer's justification that it is in the best interest of the Government to exceed the maximum number of five offerors that may be selected to submit phase-two proposals, if certain conditions apply. Section 823 eliminates the requirement for such a justification when the solicitation is for an IDIQ contract that exceeds $4 million.

### II. Discussion and Analysis

The two-phase design-build selection procedures authorized by 10 U.S.C. 2305a are implemented at Federal Acquisition Regulation (FAR) subpart 36.3. The statutory requirement for a contracting officer to justify exceeding the maximum number of five offerors is implemented at FAR 36.303–1(a)(4). This rule proposes to implement section 823 by adding a new DFARS section 236.303–1(a)(4), to be used in lieu of the procedures at FAR 36.303–1(a)(4). The new DFARS section implements 10 U.S.C. 2305a, as amended by section 823, by providing—

- The new authority to exceed the five offeror maximum when the solicitation is for an IDIQ contract that exceeds $4 million;
- The authority to exceed the five offeror maximum when the contracting officer's decision is approved by the head of the contracting activity when the solicitation is for a contract that exceeds $4 million; and
- A statement that the number of offerors is at the contracting officer's discretion when the solicitation is for a contract that does not exceed $4 million.