

**8.405-8 [Redesignated as 8.405-7]**

■ 8. Redesignate section 8.405-8 as 8.405-7.

[FR Doc. 05-14667 Filed 7-26-05; 8:45 am]

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**DEPARTMENT OF DEFENSE****GENERAL SERVICES  
ADMINISTRATION****NATIONAL AERONAUTICS AND  
SPACE ADMINISTRATION****48 CFR Parts 14, 32, and 52**

[FAC 2005-05; FAR Case 2004-003; Item III]

RIN 9000-AJ94

**Federal Acquisition Regulation;  
Payment Withholding**

**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) by removing the mandatory requirement that a contracting officer withhold 5 percent of the payments due under a time-and-materials contract, unless it is necessary to withhold payment to protect the Government's interest or otherwise prescribed in the contract schedule. The final rule also amends FAR guidance that requires the use of a contract modification to withhold payment and to state that the withhold is to be made by the contractor.

**DATES:** *Effective Date:* August 26, 2005.

**FOR FURTHER INFORMATION CONTACT:** The FAR Secretariat at (202) 501-4755 for information pertaining to status or publication schedules. For clarification of content, contact Mr. Jeremy Olson, at (202) 501-3221. Please cite FAC 2005-05, FAR case 2004-003.

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

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 69 FR 29838, May 25, 2004, with request for public comments. The proposed rule would permit contracting officers to use their judgment regarding whether to withhold payments under time-and-materials and labor-hour contracts so that the withhold would be applied only when necessary to protect

the Government's interests. The proposed rule also made it clear that normally there should not be a need to withhold payments when dealing with contractual release requirements in a timely manner. Six respondents submitted comments on the proposed FAR rule. Three of the six respondents supported the proposed rule, two of the six respondents supported it but with certain additional changes that would align it with the Defense Federal Acquisition Regulations Supplement (DFARS) rule that was published in the **Federal Register** at 68 FR 69631, December 15, 2003, and one of the six respondents requested clarification. A discussion of the comments is provided below. The Councils considered all comments and concluded that the proposed rule should be converted to a final rule with changes to the proposed rule. Differences between the proposed rule and final rule are discussed in Comments 1 and 2, below.

*Align With DFARS*

1. *Comment:* While five respondents supported the proposed rule, two stated that it is not consistent with the changes to relax the requirements included in the DFARS rule published in the **Federal Register** at 68 FR 69631, December 15, 2003. That rule stated that, if it was necessary to withhold payment to protect the Government's interest, the contracting officer would issue a modification requiring the contractor to withhold 5 percent of the amount due, up to a maximum of \$50,000. One of the respondents stated the DFARS guidance should be applicable Governmentwide "because requiring withholds to protect the interests of the Government is a serious matter, necessitating, in our opinion, the execution of a formal contract modification." In addition, the same respondent believes that, in most situations, it would be more efficient and less costly for both contractors and the Government if contractors take the withhold prior to submission of their invoices.

*Councils' response:* Concur. The Councils believes that, based on the analysis performed for the DFARS rule, it would be more efficient and less costly for both contractors and the Government if contractors take the withhold prior to the submission of their vouchers. In addition, in order to make it clear that the Government is exercising its right to a payment withhold to protect its interests, a contract modification should be issued requiring the withhold of payment under time-and-materials and labor-hour contracts. Therefore, the Councils

have revised the guidance at FAR 32.111(a)(7)(iii) and the clause at FAR 52.232-7(a)(2) to require the use of a modification to withhold payment and to allow for the withhold to be made by the contractor instead of by the Government payment office. The Councils note that this clause does not preclude the Government from withholding other amounts due to non-performance, delivery of non-conforming goods, or other failure(s) to comply with contract requirements.

*Task Order Versus Entire Contract*

2. *Comment:* A respondent stated that the proposed rule is unclear as to whether the \$50,000 ceiling on withholding applies to an individual task or to an entire contract. It recommended the proposed rule be clarified to identify the basis for application of the ceiling. The respondent added that it had previously recommended in an audit report that the \$50,000 ceiling be applied to each order where orders are closed separately. The respondent's recommendation is based on the belief that the clarification will assist contracting officers in performing their jobs.

*Councils' response:* The Councils agree that it would assist both contractors and the Government if the proposed rule were clarified as to whether the withhold ceiling applies to an entire contract or to individual orders. Such a clarification would reduce any possible confusion by either party as to the applicability of the ceiling and thus remove the potential for disagreements. The Councils agree that the withhold ceiling applies to the entire contract. Therefore, the Councils have revised the guidance at FAR 32.111(a)(7)(iii) and the clause at FAR 52.232-7(a)(2) to clarify that the withhold ceiling applies to the total contract.

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 applies only to time-and-materials and labor-hour contracts. Time-and-

materials or labor-hour contracts with small business represent only approximately 2 percent of all contracts. In addition, the rule eases the impact of the current FAR by permitting the contracting officer to use judgment in deciding whether to withhold payments, thus the number of contracts affected is a subset of the 2 percent figure. This change is expected to have a small but beneficial impact on small businesses.

### 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. 3501, *et seq.*

### List of Subjects in 48 CFR Parts 14, 32, and 52

Government procurement.

Dated: July 20, 2005.

Julia B. Wise,

Director, Contract Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 14, 32, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 14, 32, and 52 is revised to read as follows:

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

### PART 14—SEALED BIDDING

#### 14.408-3 [Amended]

■ 2. Amend section 14.408-3 in paragraph (b) by removing “See 32.111(c)(1),” and adding “See 32.111(b)(1),” in its place.

### PART 32—CONTRACT FINANCING

■ 3. Amend section 32.111 by—

■ a. Removing from the end of paragraph (a)(5) the word “and”;

■ b. Removing the period from the end of paragraph (a)(6) and adding “; and” in its place;

■ c. Adding paragraph (a)(7);

■ d. Removing paragraph (b); and

■ e. Redesignating paragraphs (c) and (d) as (b) and (c), respectively.

The added text reads as follows:

#### 32.111 Contract clauses for non-commercial purchases.

(a) \* \* \*

(7) The clause at 52.232-7, Payments under Time-and-Materials and Labor-Hour Contracts, in solicitations and contracts when a time-and-materials or labor-hour contract is contemplated.

(i) If the nature of the work to be performed requires the contractor to

furnish material that is regularly sold to the general public in the normal course of business by the contractor and the price is under the limitations prescribed in 16.601(b)(3), the contracting officer shall use the clause with its Alternate I.

(ii) If a labor-hour contract is contemplated, and if no specific reimbursement for materials furnished is intended, the contracting officer may use the clause with its Alternate II.

(iii) If the contracting officer determines that it is necessary to withhold payment to protect the Government's interests, paragraph (a)(2) of the clause permits the contracting officer to unilaterally issue a modification requiring the contractor to withhold 5 percent of amounts due, up to a maximum of \$50,000 under the contract. The contracting officer shall ensure that the modification specifies the percentage and total amount of the withhold payment. Normally, there should be no need to withhold payment for a contractor with a record of timely submittal of the release discharging the Government from all liabilities, obligations, and claims, as required by paragraph (f) of the clause.

\* \* \* \* \*

### PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 4. Amend section 52.232-7 by—

■ a. Removing from the introductory text “32.111(b)” and adding “32.111(a)(7)” in its place;

■ b. Revising the date of the clause; and

■ c. Revising paragraph (a)(2).

The revised text reads as follows:

#### 52.232-7 Payments under Time-and-Materials and Labor-Hour Contracts.

\* \* \* \* \*

#### PAYMENTS UNDER TIME-AND-MATERIALS AND LABOR-HOUR CONTRACTS (AUG 2005)

\* \* \* \* \*

(a) \* \* \*

(2) Unless otherwise prescribed in the Schedule, the Contracting Officer may unilaterally issue a contract modification requiring the Contractor to withhold amounts from its billings until a reserve is set aside in an amount that the Contracting Officer considers necessary to protect the Government's interests. The Contracting Officer may require a withhold of 5 percent of the amounts due under paragraph (a), but the total amount withheld for the contract shall not exceed \$50,000. The amounts withheld shall be retained until the Contractor executes and delivers the release required by paragraph (f) of this clause.

\* \* \* \* \*

#### 52.232-8 [Amended]

■ 5. In the introductory text of section 52.232-8, remove “32.111(c)(1)” and add “32.111(b)(1)” in its place.

#### 52.232-9 [Amended]

■ 6. In the introductory text of section 52.232-9, remove “32.111(c)(2)” and add “32.111(b)(2)” in its place.

#### 52.232-10 [Amended]

■ 7. In the introductory text of section 52.232-10, remove “32.111(d)(1)” and add “32.111(c)(1)” in its place.

#### 52.232-11 [Amended]

■ 8. In the introductory text of section 52.232-11, remove “32.111(d)(2)” and add “32.111(c)(2)” in its place.

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## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Parts 19 and 52

[FAC 2005-05; FAR Case 2005-009; Item IV]

RIN 9000-AK22

### Federal Acquisition Regulation; Confirmation of HUBZone Certification

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

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

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed to an interim rule amending the Federal Acquisition Regulation (FAR) to clarify that prime contractors must confirm that a subcontractor representing itself as a Historically Underutilized Business Zone (HUBZone) small business concern is certified, consistent with the requirements of 15 U.S.C. 632 *et seq.*, as amended.

**DATES:** *Effective Date:* July 27, 2005.

*Comment Date:* Interested parties should submit comments to the FAR Secretariat at the address shown below on or before September 26, 2005 to be considered in the formulation of a final rule.

**ADDRESSES:** Submit comments identified by FAC 2005-05, FAR case