

Executive Order 12866 (58 FR 51735, October 4, 1993);

- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this proposed rule pertaining to Delaware's RFP Plan, 2002 base year emissions inventory, contingency measures, RACM analysis, and transportation conformity budgets, does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: January 6, 2010.

William C. Early,

Acting Regional Administrator, Region III.

[FR Doc. 2010-745 Filed 1-14-10; 8:45 am]

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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 215, 234, 242, 244, and 252

RIN 0750-AG58

Defense Federal Acquisition Regulation Supplement; Business Systems—Definition and Administration (DFARS Case 2009-D038)

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

ACTION: Proposed rule with request for comments.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to improve the effectiveness of DoD oversight of contractor business systems.

DATES: Interested parties should submit comments in writing to the address shown below on or before March 16, 2010.

ADDRESSES: You may submit comments, identified by DFARS Case 2009-D038, using any of the following methods:

Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

E-mail: dfars@osd.mil. Include DFARS Case 2009-D038 in the subject line of the message.

Fax: 703-602-0350.

Mail: Defense Acquisition Regulations System, Attn: Mr. Mark Gomersall, OUSD (AT&L) DPAP (DARS), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301-3062.

Hand Delivery/Courier: Defense Acquisition Regulations System, Crystal Square 4, Suite 200A, 241 18th Street, Arlington, VA 22202-3402.

FOR FURTHER INFORMATION CONTACT: Mr. Mark Gomersall, 703-602-0302.

SUPPLEMENTARY INFORMATION:

A. Background

Contractor business systems and internal controls are the first line of defense against waste, fraud, and abuse. Weak control systems increase the risk of unallowable and unreasonable costs on Government contracts. To improve the effectiveness of Defense Contract Management Agency (DCMA) and Defense Contract Audit Agency (DCAA) oversight of contractor business systems, DoD is considering a rule to clarify the definition and administration of contractor business systems as follows:

1. DoD is proposing to define contractor business systems as accounting systems, estimating systems, purchasing systems, earned value management systems (EVMS), material management and accounting systems (MMAS), and property management systems.

2. DoD is proposing to implement compliance enforcement mechanisms in the form of a business systems clause which includes payment withholding that allows administrative contracting officers to withhold a percentage of payments, under certain conditions, when a contractor's business system contains deficiencies. Under such circumstances, payments could be withheld on—

- Interim payments under—
 - Cost reimbursement contracts;
 - Incentive type contracts;
 - Time-and-materials contracts;
 - Labor-hour contracts;
- Progress payments; and
- Performance-based payments.

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

DoD has prepared an initial regulatory flexibility analysis consistent with 5 U.S.C. 603. A copy of the analysis may be obtained from the point of contact specified herein. The analysis is summarized as follows:

The objective of the rule is to establish a definition for contractor business systems and implement compliance mechanisms to improve DoD oversight of those contractor business systems. The requirements of the rule will apply to entities contractually required to maintain one or more of the defined contractor business systems.

At this time DoD is unable to estimate the number of small entities to which this rule will apply. Therefore, 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 2009-D038) in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) applies because the

proposed rule contains information collection requirements. DoD invites comments on the following aspects of the proposed rule: (a) Whether the collection of information is necessary for the proper performance of the functions of DoD, including whether the information will have practical utility; (b) the accuracy of the estimate of the burden of the information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including the use of automated collection techniques or other forms of information technology. The following is a summary of the information collection requirement:

The business systems clause in this proposed rule contains a requirement for contractors to respond to initial and final determinations of deficiencies. The information that contractors will be required to submit to respond to deficiencies in four of the six business systems defined in this rule has been approved by the Office of Management and Budget (OMB) as follows:

- (1) Accounting Systems—OMB Clearance 9000-0011;
- (2) Estimating Systems—OMB Clearance 0704-0232;
- (3) MMAS—OMB Clearance 0704-0250; and
- (4) Purchasing Systems—OMB Clearance 0704-0253.

DoD is also proposing a new information collection requirement as follows:

Title: Defense Federal Acquisition Regulation Supplement (DFARS) Business Systems—Definition and Administration.

Type of Request: New request.

The information that contractors will be required to submit to respond to deficiencies in contractors' EVMS is estimated as follows:

- Number of Respondents:* 186.
- Responses per Respondent:* 48.
- Annual Responses:* 8,928.
- Burden per Response:* 40 hours.
- Annual Burden Hours:* 357,120 hours.

The information that contractors will be required to submit to respond to deficiencies in contractors' property management systems is estimated as follows:

- Number of Respondents:* 2,646.
- Responses per Respondent:* 1.
- Annual Responses:* 2,646.
- Average Burden per Response:* 1.2 hours.

Annual Burden Hours: 3,175 hours.

Needs and Uses: DoD needs the information required by the business systems clause in this proposed rule to mitigate the risk of unallowable and

unreasonable costs on Government contracts when a contractor has one or more deficiencies in a business system.

Affected Public: Businesses or other for-profit institutions, and not-for-profit institutions.

Frequency: On occasion.

Written comments and recommendations on the proposed information collection 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, with a copy to the Defense Acquisition Regulations System, Attn: Mr. Mark Gomersall, OUSD (AT&L) DPAP (DARS), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301-3062. 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.

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: Mr. Mark Gomersall, OUSD (AT&L) DPAP (DARS), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301-3062.

List of Subjects in 48 CFR Parts 215, 234, 242, 244, and 252

Government procurement.

Amy G. Williams,

Editor, Defense Acquisition Regulations System.

Therefore, DoD proposes to amend 48 CFR parts 215, 234, 242, 244, and 252 as follows:

1. The authority citation for 48 CFR parts 215, 234, 242, 244, and 252 continues to read as follows:

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

PART 215—CONTRACTING BY NEGOTIATION

- 2. Amend section 215.407-5-70 by:
 - a. Revising paragraphs (a)(4), (c)(3), and (d);
 - b. Removing paragraphs (e) and (f);
 - c. Redesignating paragraph (g) as paragraph (e);
 - d. Adding new paragraphs (f), (g), and (h) to read as follows:

215.407-5-70 Disclosure, maintenance, and review requirements.

(a) * * *

(4) *Deficiency* means failure to maintain an element of an acceptable estimating system.

* * * * *

(c) * * *

(3) The auditor conducts estimating system reviews.

* * * * *

(d) *Characteristics of an acceptable estimating system*—(1) General. An acceptable system shall provide for the use of appropriate source data, utilize sound estimating techniques and good judgment, maintain a consistent approach, and adhere to established policies and procedures.

(2) *Evaluation.* In evaluating the acceptability of a contractor's estimating system, the ACO shall consider whether the contractor's estimating system complies with the requirements for an acceptable estimating system as contained in 252.215-7002(d).

* * * * *

(f) The ACO, in consultation with the auditor, shall—

- (1) Approve the system; and
- (2) Pursue correction of any system deficiencies.

(g) *Disposition of audit findings*—(1) *Reporting of audit findings.* The auditor shall document findings and recommendations in a report to the ACO.

(2) *Notification of initial determination.* The ACO shall—

- (i) Provide a notification of any system deficiencies to the contractor, evaluate contractor responses, and make determinations to disapprove the system in accordance with the clause at 252.215-7002, Cost Estimating System Requirements;
- (ii) Withhold payments in accordance with 252.242-7XXX, Business Systems, if applicable; and
- (iii) Follow the procedures at 252.215-7002, Cost Estimating System Requirements and PGI 215.407-5-70(g) for disposition of estimating system deficiencies.

(h) The ACO shall approve the estimating system when the ACO determines that the contractor has substantially corrected the system deficiencies. The ACO shall notify the contractor, auditor, payment office, appropriate action officers responsible for reporting past performance at the requiring activities, and affected contracting and contract administration activities of the system approval and the ACO's decision, as appropriate, to reduce or discontinue the withholding of payments in accordance with 252.242-7XXX, Business Systems.

PART 234—MAJOR SYSTEM ACQUISITION

2. Amend section 234.201 by adding paragraphs (5), (6), and (7) to read as follows:

234.201 Policy.

* * * * *

(5) The cognizant ACO shall—

(i) Determine whether the contractor is compliant with the contractual EVMS requirements; and

(ii) Pursue correction of any noncompliance with the contractual EVMS requirements.

(6) *Disposition of system deficiencies*—(i) *Reporting of system deficiencies*. The cognizant functional specialist or auditor shall document findings and recommendations in a report to the ACO.(ii) *Notification of initial determination*. The ACO shall—

(A) Provide a notification of system deficiencies to the contractor, evaluate contractor responses, and make determinations of noncompliance in accordance with the clause at 252.234–7002, Earned Value Management System;

(B) Withhold payments in accordance with 252.242–7XXX, Business Systems, if applicable; and

(C) Follow the procedures at 252.234–7002(h), Earned Value Management System, and PGI 234.201 for disposition of EVMS deficiencies.

(7) *Withdrawal of finding of system noncompliance*. The ACO shall withdraw the finding of system noncompliance when the ACO determines that the contractor has substantially corrected the system deficiencies. The ACO shall notify the contractor, auditor, payment office, and affected contracting and contract administration activities of the system approval and the ACO's decision, as appropriate, to reduce or discontinue the withholding of payments in accordance with 252.242–7XXX, Business Systems.**PART 242—CONTRACT ADMINISTRATION AND AUDIT SERVICES**

3. Add subpart 242.70 to read as follows:

Subpart 242.70—Business Systems**242.70X1 Business system deficiencies.**(a) *Definitions*. “Acceptable business systems” and “Business systems” are defined in the clause at 252.242–7XXX, Business Systems.(b) *Reporting of deficiencies*. The auditor or other cognizant functional specialist shall document deficiencies in a report to the ACO. The report shall describe the deficiencies in sufficient detail to allow the contracting officer to understand what the contractor would need to correct to comply with the applicable standard or system

requirement, and the potential magnitude of the risk to the Government posed by the deficiency. Follow the procedures at PGI 242.70X1(b) for reporting of deficiencies.

(1) *Initial determination of deficiencies*. If the ACO makes a determination that there is a system deficiency, the ACO shall provide an initial determination of deficiencies and a copy of the report to the contractor and require the contractor to submit a written response in accordance with the clause at 252.242–7XXX, Business Systems.(2) *Evaluation of contractor's response*. The ACO, in consultation with the auditor or cognizant functional specialist, shall evaluate the contractor's response and make a final determination.(3) *Notification of ACO final determination*. The ACO shall notify the contractor in writing of the ACO's final determination with copies provided, as applicable, to the auditor; other cognizant functional specialists; and affected contracting activities and contract administration offices. The ACO shall take one of the following actions—

(i) Withdraw the initial determination of deficiencies. The ACO shall withdraw the initial notification if the contractor has corrected all deficiencies or the ACO agrees with the contractor's written response disagreeing with the initial determination of deficiencies; or

(ii) The ACO shall notify the contractor of the ACO's decision to implement payment withholding in accordance with the clause at 252.242–7XXX, Business Systems. The notice shall—

(A) Identify any deficiencies requiring correction;

(B) Inform the contractor that—

(1) The contractor must correct the deficiencies;

(2) The contractor must submit an acceptable corrective action plan within 45 days if the deficiencies have not been corrected within that 45 day timeframe;

(3) Payments shall be withheld in accordance with 252.242–7XXX, Business Systems, until the ACO determines that all deficiencies have been corrected; and

(4) The ACO reserves the right to take other actions within the terms and conditions of the contract.

(c) *Monitoring contractor's corrective action*. The Government shall monitor the contractor's progress in correcting the deficiencies and shall notify the contractor of the decision to decrease or increase the amount of payment withholding in accordance with 252.242–7XXX, Business Systems.(d) *Correction of system deficiencies*.

(1) If the contractor notifies the ACO that the contractor has corrected the system deficiencies, the ACO shall request the auditor or other cognizant functional specialist to review the correction to determine if the deficiencies have been resolved.

(2) The ACO shall determine if the contractor has corrected the deficiencies.

(3) If the ACO determines the contractor has corrected all deficiencies, the ACO shall discontinue withholding payments.

(e) *System review matrix*. Refer to the matrix at PGI 242.70X1(e) to cross-reference DCAA internal control reviews and other business system audits to the list of “business systems” defined at 252.242–7XXX, Business Systems.**242.70X2 Contract clause.**

Use the clause at 252.242–XXXX, Business Systems, in solicitations and contracts when the solicitation or contract includes any of the following clauses:

(a) 52.244–2, Subcontracts.

(b) 52.245–1, Government Property.

(c) 252.215–7002, Cost Estimating System Requirements.

(d) 252.234–7002, Earned Value Management System.

(e) 252.242–7004, Material Management and Accounting System.

(f) 252.242–7YYY, Accounting System Administration.

4. Amend section 242.7203 by:

a. Removing paragraph (c);

b. Redesignating paragraph (d) as paragraph (c); and c. Revising the newly designated paragraph (c) to read as follows:

242.7203 Review procedures.

* * * * *

(c) *System deficiencies*—(1) *Report of MMAS review findings*. The auditor shall document the MMAS review findings and recommendations in the MMAS report to the ACO. If there are any MMAS deficiencies, the report shall provide an estimate of the adverse impact on the Government resulting from those deficiencies.(2) *Notification of initial determination*. The ACO shall—

(i) Provide a notification of system deficiencies to the contractor, evaluate contractor responses, and make determinations to disapprove the system in accordance with the clause at 252.242–7004, Material Management and Accounting System;

(ii) Withhold payments in accordance with 252.242–7XXX, Business Systems, if applicable; and

(iii) Follow the procedures at 252.242-7004(d), Material Management and Accounting System, and PGI 242.7203 for disposition of MMAS deficiencies.

(3) *Withdrawal of MMAS disapproval.* The ACO shall approve the MMAS when the ACO determines that the contractor has substantially corrected the system deficiencies. The ACO shall notify the contractor, auditor, payment office, and affected contracting and contract administration activities of the system approval and the ACO's decision, as appropriate, to reduce or discontinue the withholding of payments in accordance with 252.242-7XXX, Business Systems.

5. Revise the heading of subpart 242.75 to read as follows:

Subpart 242.75—Contractor Accounting Systems

6. Revise section 242.7501 to read as follows:

242.7501 Policy.

(a) Contractors receiving cost-reimbursement, incentive type, time-and-materials, or labor-hour contracts, or contracts which provide for progress payments based on costs or on a percentage or stage of completion, shall maintain an acceptable accounting system as defined in the clause at 252.242-7YYY, Accounting System Administration.

(b) The ACO is responsible for approving a contractor's accounting system.

7. Revise section 242.7502 to read as follows:

242.7502 Procedures.

(a) *Definitions.* "Acceptable accounting system," and "accounting system" are defined in the clause at 252.242-7YYY, Accounting System Administration.

(b) The ACO shall determine whether the accounting system contains deficiencies that need to be corrected in accordance with the clause 252.242-7YYY, Accounting System Administration.

(c) *Disposition of audit findings—(1) Reporting of audit findings.* The auditor shall document findings and recommendations in a report to the ACO. The report shall describe the deficiencies in sufficient detail to allow the contracting officer to understand what the contractor would need to correct to comply with the applicable standard or system requirement, and the potential magnitude of the risk to the Government posed by the deficiency. Follow the procedures at PGI

242.70X1(b) for reporting of deficiencies.

(2) *Notification of initial determination.* The ACO shall—

(i) Provide a notification of system deficiencies to the contractor, evaluate contractor responses, and make determinations to disapprove the system in accordance with the clause at 252.242-XXXX, Accounting System Administration;

(ii) Withhold payments in accordance with 252.242-7XXX, Business Systems, if applicable; and

(iii) Follow the procedures at 252.242-7XXX(e), Accounting System Administration, and PGI 242.7502(c)(2) for disposition of accounting system deficiencies.

(d) *Withdrawal of accounting system disapproval.* The ACO shall approve the accounting system when the ACO determines that the contractor has substantially corrected the system deficiencies. The ACO shall notify the contractor, auditor, payment office, and affected contracting and contract administration activities of the system approval and the ACO's decision, as appropriate, to reduce or discontinue the withholding of payments in accordance with 252.242-7XXX, Business Systems.

8. Add section 242.7503 to read as follows:

242.7503 Contract clause.

Use the clause at 252.242-7YYY, Accounting System Administration, in solicitations and contracts when contemplating—

(a) A cost-reimbursement, incentive type, time-and-materials, or labor-hour contract;

(b) A fixed-price contract with progress payments made on the basis of costs incurred by the contractor or on a percentage or stage of completion;

(c) A construction contract that includes the clause 52.232-27, Prompt Payment for Construction Contracts.

PART 244—SUBCONTRACTING POLICIES AND PROCEDURES

9. Revise section 244.305-70 to read as follows:

244.305-70 Granting, withholding, or withdrawing approval.

Use this subsection instead of FAR 44.305-2(c) and 44.305-3(b).

(a) The ACO, in consultation with the purchasing system analyst (PSA) or auditor, shall—

(1) Grant, withhold, or withdraw system approval; and

(2) Pursue correction of any system deficiencies.

(b) *Disposition of system deficiencies—(1) Reporting of*

deficiencies. The PSA or auditor shall document findings and recommendations in a report to the ACO.

(2) *Notification of initial determination.* The ACO shall—

(i) Provide a notification of system deficiencies to the contractor, evaluate contractor responses, and make determinations to disapprove the system in accordance with the clause at 252.242-XXXX, Purchasing System Administration, and follow the procedures at PGI 244.305-70; and

(ii) Withhold payments in accordance with 252.242-7XXX, Business Systems, if applicable.

(3) The ACO shall approve the purchasing system when the ACO determines that the contractor has substantially corrected the system deficiencies. The ACO shall notify the contractor, auditor, payment office, and affected contracting and contract administration activities of the system approval and the ACO's decision, as appropriate, to reduce or discontinue the withholding of payments in accordance with 252.242-7XXX, Business Systems.

10. Add section 244.305-7X to read as follows:

244.305-7X Contract clause.

Use the clause at 252.244-7XXX, Contractor Purchasing System-Administration, in solicitations and contracts containing the clause at FAR 52.244-2, Subcontracts.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

11. Amend section 252.215-7002 by:

- a. Revising the clause date;
- b. Revising the definition of "acceptable estimating system" in paragraph (a);
- c. Adding new paragraph (d)(4);
- d. Revising paragraph (e); and
- e. Adding new paragraph (f) to read as follows:

252.215-7002 Cost estimating system requirements.

* * * * *

Cost Estimating System Requirements (Date)

(a) *Definitions.*

Acceptable estimating system means an estimating system that complies with, but is not limited to, the system requirements in paragraph (d) of this clause, and provides for a system that—

(1) Is maintained, reliable, and consistently applied;

(2) Produces verifiable, supportable, and documented cost estimates that are an acceptable basis for negotiation of fair and reasonable prices;

(3) Is consistent with and integrated with the Contractor's related management systems; and

(4) Is subject to applicable financial control systems.

* * * * *

(d) * * *

(4) The Contractor's estimating system shall provide for the use of appropriate source data, utilize sound estimating techniques and good judgment, maintain a consistent approach, and adhere to established policies and procedures. An acceptable estimating system shall accomplish, but not be limited to, the following functions—

(i) Establish clear responsibility for preparation, review, and approval of cost estimates;

(ii) Provide a written description of the organization and duties of the personnel responsible for preparing, reviewing, and approving cost estimates;

(iii) Assure that relevant personnel have sufficient training, experience, and guidance to perform estimating tasks in accordance with the Contractor's established procedures;

(iv) Identify the sources of data and the estimating methods and rationale used in developing cost estimates;

(v) Provide for appropriate supervision throughout the estimating process;

(vi) Provide for consistent application of estimating techniques;

(vii) Provide for detection and timely correction of errors;

(viii) Protect against cost duplication and omissions;

(ix) Provide for the use of historical experience, including historical vendor pricing information, where appropriate;

(x) Require use of appropriate analytical methods;

(xi) Integrate information available from other management systems, where appropriate;

(xii) Require management review including verification that the company's estimating policies, procedures, and practices comply with this regulation;

(xiii) Provide for internal review of and accountability for the acceptability of the estimating system, including the comparison of projected results to actual results and an analysis of any differences;

(xiv) Provide procedures to update cost estimates in a timely manner throughout the negotiation process; and

(xv) Address responsibility for review and analysis of the reasonableness of subcontract prices.

(e) *System deficiencies.*

(1) The ACO will provide an initial notification to the Contractor of system deficiencies. The initial notification will describe the deficiency in sufficient detail to allow the Contractor to understand what actions are necessary to correct the deficiencies.

(2) The Contractor shall respond within 30 days to a written initial notification from the ACO that identifies deficiencies in the Contractor's estimating system. If the Contractor disagrees with the initial notification, the Contractor shall state in writing its rationale for disagreeing.

(3) The ACO will evaluate the Contractor's response and notify the Contractor of the determination concerning remaining deficiencies, the adequacy of any proposed or completed corrective action, and system disapproval, if applicable.

(f) *Withholding payments.* If the ACO determines the Contractor's estimating system contains one or more deficiencies, and the contract includes the clause at 252.242-7XXX, Business Systems, the ACO will withhold payments in accordance with that clause.

(End of clause)

12. Amend section 252.234-7002 by:

a. Revising the clause date;

b. Redesignating existing paragraph

(h) as paragraph (j);

c. Adding new paragraphs (h) and (i) to read as follows:

252.234-7002 Earned Value Management System.

* * * * *

Earned Value Management System
(Date)

* * * * *

(h) *System deficiencies.* (1) The ACO will provide an initial notification to the Contractor of system deficiencies. The initial notification will describe the deficiency in sufficient detail to allow the Contractor to understand what actions are necessary to correct the deficiencies.

(2) The Contractor shall respond within 30 days to a written initial notification from the ACO that identifies deficiencies in the Contractor's EVMS. If the Contractor disagrees with the initial notification, the Contractor shall state in writing its rationale for disagreeing.

(3) The ACO will evaluate the Contractor's response and notify the Contractor of the determination concerning remaining deficiencies, the adequacy of any proposed or completed corrective action, and any portions of the system that are noncompliant with ANSI/EIA-748.

(i) *Withholding payments.* If the ACO determines the Contractor's EVMS contains one or more deficiencies, and the contract includes the clause at 252.242-7XXX, Business Systems, the ACO will withhold payments in accordance with that clause.

* * * * *

(End of clause)

13. Amend section 252.242-7004 by:

a. Revising the clause date;

b. Revising paragraph (d);

c. Redesignating existing paragraph

(e) as paragraph (f); and

d. Adding new paragraph (e) to read as follows:

252.242-7004 Material management and accounting system.

* * * * *

Material Management and Accounting System (Date)

* * * * *

(d) *System deficiencies.* (1) The ACO will provide an initial notification to the Contractor of system deficiencies. The initial notification will describe the deficiency in sufficient detail to allow the Contractor to understand what actions are necessary to correct the deficiencies.

(2) The Contractor shall respond within 30 days to a written initial notification from the ACO that identifies deficiencies in the Contractor's accounting system. If the Contractor disagrees with the initial notification, the Contractor shall state in writing its rationale for disagreeing.

(3) The ACO will evaluate the Contractor's response and notify the Contractor of the determination concerning remaining deficiencies, the adequacy of any proposed or completed corrective action, and system disapproval if applicable.

(e) *Withholding payments.* If the ACO determines the Contractor's MMAS contains one or more deficiencies, and this contract includes the clause at 252.242-7XXX, Business Systems, the ACO will withhold payments in accordance with that clause.

* * * * *

14. Add section 252.242-7XXX to read as follows:

252.242-7XXX Business systems.

As prescribed in 242.70X2, use the following clause:

Business Systems (Date)

(a) *Definitions.* As used in this clause—
Acceptable business systems means business systems that comply with the terms and conditions of this contract.

Business systems means—

(1) Accounting system, if this contract includes the clause at 252.242-7YYY, Accounting System Administration;

(2) Earned value management system, if this contract includes the clause at 252.234-7002, Earned Value Management System;

(3) Estimating system, if this contract includes the clause at 252.215-7002, Cost Estimating System Requirements;

(4) Material management and accounting system, if this contract includes the clause at 252.242-7004, Material Management and Accounting System;

(5) Property management system, if this contract includes the clause at 52.245-1, Government Property; and

(6) Purchasing system, if this contract includes the clause at 52.244-2, Subcontracts.

(b) *General.* The Contractor shall establish and maintain acceptable business systems in accordance with the terms and conditions of this contract.

(c) *System deficiencies.* (1) The Contractor shall respond in writing within 30 days to an initial determination of deficiencies from the ACO that identifies deficiencies in any of the Contractor's business system.

(2) The ACO will evaluate the Contractor's response and notify the Contractor in writing of the final determination as to whether the business system contains deficiencies. If the ACO determines that the Contractor's business system contains deficiencies, the final determination will include a notice of a decision to withhold payments.

(d) *Withholding payments.* (1) If the Contractor receives a final determination with a notice of the ACO's decision to withhold payments for deficiencies in a business system required under this contract, the ACO will immediately withhold ten percent of each of the Contractor's payments under this contract. The Contractor shall, within 45 days of receipt of the notice, either correct the deficiencies or submit an acceptable corrective action plan showing milestones and actions to eliminate the deficiencies.

(2) If the Contractor submits an acceptable corrective action plan within 45 days of receipt of a notice of the ACO's intent to withhold, but has not completely corrected the identified deficiencies, the ACO will reduce the amount withheld to an amount equal to five percent of each payment until the ACO determines that the Contractor has corrected the deficiencies in the business system. However, if at any time the ACO determines that the Contractor fails to follow the accepted corrective action, the ACO will increase the amount of payment withheld to ten percent of each payment under this contract until the ACO determines that the Contractor has completely corrected the deficiencies in the business system.

(3) If the ACO is withholding payments for deficiencies in more than one business system, the cumulative percentage of payments withheld shall not exceed fifty percent on this contract.

(4) Notwithstanding any other rights or remedies of the Government under this contract, including paragraphs (d)(1) through (d)(3) of this clause, if the ACO determines that there are one or more system deficiencies that are highly likely to lead to improper contract payments being made, or represent an unacceptable risk of loss to the Government, then the ACO will withhold up to one-hundred percent of payments until the ACO determines that the Contractor has corrected the deficiencies.

(5) For the purpose of this clause, payment means any of the following payments authorized under this contract:

- (i) Interim payments under—
 - (A) Cost reimbursement contracts;
 - (B) Incentive type contracts;
 - (C) Time-and-materials contracts;
 - (D) Labor-hour contracts.
- (ii) Progress payments.
- (iii) Performance-based payments.

(6) The withholding of any amount or subsequent payment to the Contractor shall not be construed as a waiver of any rights or remedies the Government has under this contract.

(7) Notwithstanding the provisions of any clause in this contract providing for interim, partial, or other payment on any basis, the ACO may withhold payment in accordance with the provisions of this clause.

(8) The payment withholding authorized in this clause is not subject to the interest-penalty provisions of the Prompt Payment Act.

(e) *Correction of deficiencies.* (1) The Contractor shall notify the ACO in writing when the Contractor has corrected the business system's deficiencies.

(2) Once the Contractor has notified the ACO that deficiencies have been corrected,

the ACO will take one of the following actions:

(i) If the ACO determines the Contractor has corrected all deficiencies in a business system, the ACO will discontinue the payment withholding under this contract associated with that business system and release any monies previously withheld that are not also being withheld due to deficiencies on other business systems under this contract. Any payment withholding in effect on other business systems under this contract will remain in effect until the deficiencies for those business systems are corrected.

(ii) If the ACO determines the Contractor has not corrected all deficiencies, the ACO will continue the withholding payments in accordance with paragraph (d) of this clause and not release any monies previously withheld.

(End of clause)

15. Add section 252.242–7YYY to read as follows:

252.242–7YYY Accounting system administration.

As prescribed in 242.7503, use the following clause:

Accounting System Administration (Date)

(a) *Definitions.* As used in this clause—

(1) *Acceptable accounting system* means a system that complies with the requirements under paragraph (d) of this clause to provide reasonable assurance that—

- (i) Applicable laws and regulations are complied with;
- (ii) The accounting system and cost data are reliable;
- (iii) Risk of misallocations and mischarges are minimized; and
- (iv) Contract allocations and charges are consistent with invoice procedures.

(2) *Accounting system* means the Contractor's system or systems for accounting methods, procedures, and controls established to gather, record, classify, analyze, summarize, interpret, and present accurate and timely financial data for reporting data in compliance with applicable laws, regulations, and management decisions.

(3) *Deficiency* means a failure to maintain an element of an acceptable accounting system.

(b) *General.* The Contractor shall establish and maintain an acceptable accounting system. Failure to maintain an acceptable accounting system, as defined in this clause, may result in disapproval of the system by the ACO and/or withholding of payments.

(c) *System requirements.* The Contractor's accounting system shall be in compliance with applicable laws and ensure the proper recording, accumulating, and billing of costs on Government contracts, including but not limited to providing, as applicable—

(1) A basic structure that defines the form and nature of the organization as well as the management functions and reporting relationships;

(2) Proper segregation of direct costs from indirect costs;

(3) Identification and accumulation of direct costs by contract;

(4) A logical and consistent method for the accumulation and allocation of indirect costs to intermediate and final cost objectives;

(5) Accumulation of costs under general ledger control;

(6) Reconciliation of subsidiary cost ledgers and cost objectives to general ledger;

(7) Approval and documentation of adjusting entries;

(8) Periodic monitoring of the system, as appropriate;

(9) A timekeeping system that identifies employees' labor by intermediate or final cost objectives;

(10) A labor distribution system that charges direct and indirect labor to the appropriate cost objectives;

(11) Interim (at least monthly) determination of costs charged to a contract through routine posting of books of account;

(12) Exclusion from costs charged to Government contracts of amounts which are not allowable in terms of FAR Part 31, Contract Cost Principles and Procedures, and other contract provisions;

(13) Identification of costs by contract line item and by units (as if each unit or line item were a separate contract) if required by the contract;

(14) Segregation of preproduction costs from production costs;

(15) Cost accounting information as required:

(i) By contract clauses concerning limitation of cost (FAR 52.232–20) or limitation on payments (FAR 52.216–16); and

(ii) To readily calculate indirect cost rates from the books of accounts;

(16) Billings that can be reconciled to the cost accounts for both current and cumulative amounts claimed and comply with contract terms; and

(17) Adequate, reliable data for use in pricing follow-on acquisitions.

(d) *System deficiencies.* (1) The ACO will provide an initial notification to the Contractor of system deficiencies. The initial notification will describe the deficiency in sufficient detail to allow the Contractor to understand what actions are necessary to correct the deficiencies.

(2) The Contractor shall respond within 30 days to a written initial notification from the ACO that identifies deficiencies in the Contractor's accounting system. If the Contractor disagrees with the initial notification, the Contractor shall state in writing its rationale for disagreeing.

(3) The ACO will evaluate the Contractor's response and notify the Contractor of the determination concerning remaining deficiencies, the adequacy of any proposed or completed corrective action, and system disapproval if applicable.

(e) *Withholding payments.* If the ACO determines the Contractor's accounting system contains one or more deficiencies, and this contract includes the clause at 252.242–7XXX, Business Systems, the ACO will withhold payments in accordance with that clause.

(End of clause)

16. Add section 252.244–7XXX to read as follows:

252.244-7XXX Contractor purchasing system administration.

As prescribed in 244.305-7X, insert the following clause:

Contractor Purchasing System Administration (Date)

(a) *Definitions.* As used in this clause—
Deficiency means a failure to maintain any element of an acceptable purchasing system.

Purchasing system means the Contractor's system or systems for purchasing and subcontracting including make or buy decisions, the selection of vendors, analysis of quoted prices, negotiation of prices with vendors, placing and administering of orders, and expediting delivery of materials. Purchasing system includes, but is not limited to—

(1) Internal audits or management reviews, training, and policies and procedures for the purchasing department to ensure the integrity of the purchasing system;

(2) Policies and procedures to assure purchase orders and subcontracts contain all flow down clauses, including terms and conditions required by the prime contract and any clauses required to carry out the requirements of the prime contract;

(3) An organizational and administrative structure that ensures effective and efficient procurement of required quality materials and parts at the most economical cost from responsible and reliable sources;

(4) Selection processes to ensure the most responsive and responsible sources for furnishing required quality parts and materials and to promote competitive sourcing among dependable suppliers so that purchases are reasonably priced and from sources that meet contractor quality requirements;

(5) Performance of price or cost analysis on purchasing actions; and

(6) Procedures to ensure that proper types of subcontracts are selected and that there are controls over subcontracting, including oversight and surveillance of subcontracted effort.

(b) *General.* The Contractor shall establish and maintain an acceptable purchasing system. Failure to maintain an acceptable purchasing system, as defined in this clause, may result in disapproval of the system by the ACO and/or withholding of payments.

(c) *System requirements.* (1) Have an adequate system description including policies, procedures, and operating instructions that comply with the FAR and DFARS.

(2) Ensure that all applicable purchase orders and subcontracts contain all flow down clauses, including terms and conditions and any other clauses needed to carry out the requirements of the prime contract.

(3) Maintain an organization plan that establishes clear lines of authority and responsibility.

(4) Purchase orders are based on authorized requisitions and include complete history files.

(5) Establish and maintain adequate documentation to provide a complete and accurate history of purchase transactions to support vendors selected and prices paid.

(6) Apply a consistent make or buy policy that is in the best interest of the Government.

(7) Use competitive sourcing to the maximum extent practicable and ensure debarred or suspended contractors are properly excluded from contract award.

(8) Evaluate price, quality, delivery, technical capabilities, and financial capabilities of competing vendors.

(9) Require management level justification and cost/price analysis as applicable for any sole or single source award.

(10) Perform appropriate cost or price analysis and technical evaluation for each subcontractor and supplier proposal or quote.

(11) Document negotiations in accordance with FAR 15.406-3.

(12) Seek, take, and document appropriate purchase discounts, including cash discounts, trade discounts, quantity discounts, rebates, freight allowances, and company-wide volume discounts.

(13) Ensure proper type of contract selection and prohibit issuance of cost-plus-a-percentage-of-cost subcontracts.

(14) Maintain subcontract surveillance to ensure timely delivery of an acceptable product and procedures to notify the Government of potential subcontract problems that may impact delivery, quantity, or price.

(15) Document and justify reasons for subcontract changes that affect cost or price.

(16) Notify the Government of the award of an auditable subcontract and perform adequate audits of those subcontracts.

(17) Enforce adequate policies on conflict of interest, gifts, and gratuities, including the requirements of the Anti-Kickback Act.

(d) *System deficiencies.* (1) The ACO will provide an initial notification to the Contractor of system deficiencies. The initial notification will describe the deficiency in sufficient detail to allow the contractor to understand what actions are necessary to correct the deficiencies.

(2) The Contractor shall respond within 30 days to a written initial notification from the ACO that identifies deficiencies in the Contractor's purchasing system. If the Contractor disagrees with the initial notification, the Contractor shall state in writing its rationale for disagreeing.

(3) The ACO will evaluate the Contractor's response and notify the Contractor of the determination concerning remaining deficiencies, the adequacy of any proposed or completed corrective action, and system disapproval, if applicable.

(e) *Withholding payments.* If the ACO determines the Contractor's purchasing system contains one or more deficiencies, and the contract includes the clause at 252.242-7XXX, Business Systems, the ACO will withhold payments in accordance with that clause.

(End of clause)

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DEPARTMENT OF DEFENSE**Department of the Army****48 CFR Parts 5132, 5136, and 5152**

RIN 0710-AA69

Continuing Contract for Civil Works Project Managed by the United States Army Corps of Engineers Clauses

AGENCY: U.S. Army Corps of Engineers, Department of the Army, DoD.

ACTION: Proposed rule; request for comments.

SUMMARY: The U.S. Army Corps of Engineers (USACE) is proposing an interim Continuing Contracts clause for use on specifically authorized Civil Works projects only. This proposal is in response to a recurring statutory provision that requires a change to the clause USACE had previously used.

DATES: Comments must be received by March 16, 2010.

ADDRESSES: You may submit comments, identified by docket number COE-2009-0065, by any of the following methods:

Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

E-mail:
contract.policy@usace.army.mil. Include the docket number, COE-2009-0065, in the subject line of the message.

Mail: U.S. Army Corps of Engineers, Attn: CECT-P (Robin A. Baldwin), 441 G Street, NW., Washington, DC 20314-1000.

Hand Delivery/Courier: Due to security requirements, we cannot receive comments by hand delivery or courier.

Instructions: Direct your comments to docket number COE-2009-0065. All comments received will be included in the public docket without change and may be made available on-line at <http://www.regulations.gov>, including any personal information provided, unless the commenter indicates that the comments includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI, or otherwise protected, through www.regulations.gov or e-mail. The www.regulations.gov Web site is an anonymous access system, which means we will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail directly to the U.S. Army Corps of Engineers without going through <http://www.regulations.gov>, your