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 2011–D052), in correspondence.

## IV. Paperwork Reduction Act

This rule contains information collection requirements in the clause at DFARS 252.247–70XX, Application for U.S. Government Shipping Documentation/Instructions, and the associated form, DD Form 1659, Application for U.S. Government Shipping Documentation/Instructions (previously, the clause at DFARS 252.242–7003), currently approved through March 31, 2013, under OMB Control Number 0704–0250, titled DFARS part 242, Contract Administration and Audit Services, in accordance with the Paperwork Reduction Act (44 U.S.C. chapter 35). The reduction in paperwork burden realized through use of electronic request systems is negligible because preparation of the DD Form 1659, a common practice since 1991, is not a significant administrative burden. Additionally, there is a negligible impact on paperwork burden resulting from revisions to the DD form, because only the single word ''Government,'' in front of ''Bill(s) of Lading'' is being revised, and two terms are being updated. There are no substantive changes being made either to the form or to the associated clause at DFARS 252.247–70XX.

## List of Subjects in 48 CFR Parts 212, 242, 247, 252, and 253

Accounting, Government procurement.

**Ynette R. Shelkin,**

*Editor, Defense Acquisition Regulations System.*

Therefore, DoD proposes to amend 48 CFR parts 212, 242, 247, 252, and 253 as follows:

1. The authority citation for 48 CFR parts 212, 242, 247, 252, and 253 is revised to read as follows:

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

## PART 212—ACQUISITION OF COMMERCIAL ITEMS

2. In section 212.301, add paragraph (f)(iv)(N) to read as follows:

### 212.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

(f) * * *

(iv) * * *

(N) Use the clause at 252.247–70XX, Application for U.S. Government Shipping Documentation/Instructions, as prescribed in 247.207.

* * * * *

## PART 242—CONTRACT ADMINISTRATION AND AUDIT SERVICES

### Subpart 242.14—[Removed]

3. Remove subpart 242.14.

## PART 247—TRANSPORTATION

4. Add subpart 247.1, consisting of section 247.101, to read as follows:

### Subpart 247.1—General

### 247.101 Policies

(h) *Shipping documents covering f.o.b. origin shipments.* (i) Procedures for the contractor to obtain bills of lading are in the clause at 252.247–70XX, Application for U.S. Government Shipping Documentation/Instructions.

(ii) The term ''commercial bills of lading'' includes the use of any commercial form or procedure.

5. Revise section 247.207 to read as follows:

### 247.207 Solicitation provisions, contract clauses, and special requirements.

(1) Use the clause at 252.247–7003, Pass-Through of Motor Carrier Fuel Surcharge Adjustment to the Cost Bearer, in solicitations and contracts for carriage, including acquisitions of commercial items, in which a motor carrier, broker, or freight forwarder will provide or arrange truck transportation services that provide for a fuel-related adjustment.

(2) Use the clause at 252.247–70XX, Application for U.S. Government Shipping Documentation/Instructions, in solicitations and contracts, including acquisitions of commercial items, when shipping under Bills of Lading and Domestic Route Order under f.o.b. origin contracts, Export Traffic Release regardless of f.o.b. terms, or foreign military sales shipments.

6. In subpart 247.2, add sections 247.207–11 and 247.207–70 to read as follows:

### 247.207–11 Volume movements within the contiguous United States.

For reporting of volume movements within the contiguous United States, follow the procedures at PGI 247.207–11.

### 247.207–70 Demurrage and detention charges.

Follow the procedures for demurrage and detention charges at PGI 247.207–70.

## PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

### 252.242–7003 [Removed and Reserved]

7. Section 252.242–7003 is removed and reserved.

8. Section 252.247–70XX is added to read as follows:

### 252.247–70XX Application for U.S. Government Shipping Documentation/Instructions.

As prescribed in 247.207, use the following clause:

**APPLICATION FOR U.S. GOVERNMENT SHIPPING DOCUMENTATION/INSTRUCTIONS (DATE)**

(a) Except as provided in paragraph (b) of this clause, the Contractor shall request bills of lading by submitting a DD Form 1659, Application for U.S. Government Shipping Documentation/Instructions, to the—

(1) Transportation Officer, if named in the contract schedule; or

(2) Contract administration office.

(b) If an automated system is available for shipment requests, use service/agency systems (e.g., Navy's Global Freight Management–Electronic Transportation Acquisition (GFM–ETA) and Financial Air Clearance Transportation System (FACTS) Shipment Processing Module, Air Force's Cargo Movement Operations System, DCMA's Shipment Instruction Request (SIR) e-Tool application, and DLA's Distribution Standard System Vendor Shipment Module) in lieu of DD Form 1659.

(End of clause)

[FR Doc. 2012–1494 Filed 1–27–12; 8:45 am]

BILLING CODE 5001–06–P

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## DEPARTMENT OF DEFENSE

### Defense Acquisition Regulations System

### 48 CFR Parts 232 and 252

**RIN 0750–AH54**

### Defense Federal Acquisition Regulation Supplement; Performance-Based Payments (DFARS Case 2011–D045)

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

**ACTION:** Proposed rule.

**SUMMARY:** DoD is proposing to amend the Defense Federal Acquisition

Regulation Supplement (DFARS) to provide detailed guidance and instructions on the use of the performance-based payments analysis tool.

**DATES:** Comments on the proposed rule should be submitted in writing to the address shown below on or before March 30, 2012, to be considered in the formation of the final rule.

**ADDRESSES:** You may submit comments, identified by DFARS Case 2011–D045, using any of the following methods:

*Regulations.gov: http://www.regulations.gov.*

Submit comments via the Federal eRulemaking portal by inserting ''DFARS Case 2011–D045'' under the heading ''Enter keyword or ID'' and selecting ''Search.'' Select the link ''Submit a Comment'' that corresponds with ''DFARS Case 2011–D045.'' Follow the instructions provided at the ''Submit a Comment'' screen. Please include your name, company name (if any), and ''DFARS Case 2011–D045'' on your attached document. Follow the instructions for submitting comments.

*Email: dfars@osd.mil.* Include DFARS Case 2011–D045 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), Room 3B855, 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:** Mr. Mark Gomersall, telephone (703) 602–0302.

**SUPPLEMENTARY INFORMATION:**

## I. Background

This rule proposes to provide requirements for the use of the performance-based payments (PBP) analysis tool. The PBP analysis tool is a cash-flow model for evaluating alternative financing arrangements, and is required to be used by all contracting officers contemplating the use of performance-based payments on new fixed-price type contract awards resulting from solicitations issued on or after July 1, 2011.

## II. 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 a 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 not a major rule under 5 U.S.C. 804.

## III. 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:

This rule proposes to provide detailed guidance and instructions on the use of the performance-based payments (PBP) analysis tool. The objective of the rule is to amend the DFARS to provide requirements for the use of the PBP analysis tool. The PBP analysis tool is a cash-flow model for evaluating alternative financing arrangements, and is required to be used by all contracting officers contemplating the use of performance-based payments on new fixed-price type contract awards resulting from solicitations issued on or after July 1, 2011.

DoD does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* because requiring the use of the PBP analysis tool by all contracting officers contemplating the use of performance-based payments on new fixed-price type contract awards does not require contractors to expend significant effort or cost. Since performance-based payments are already the preferred Government financing method, this rule is not expected to increase the frequency of use of such financing situations. No known alternatives to the rule have been identified.

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 2011–D045) in correspondence.

## IV. Paperwork Reduction Act

The proposed rule contains new 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). DoD invites public comments on the following aspects of the proposed rule: (a) Whether the proposed 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 proposed 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.

*Title:* Defense Federal Acquisition Regulation Supplement (DFARS) Part 232, Contract Financing.

*Type of Request:* New collection.

*Number of Respondents:* 570.

*Responses per Respondent:* 1.

*Annual Responses:* 570.

*Average Burden per Response:* 1.0 hours.

*Annual Burden Hours:* 570.

*Needs and Uses:* This information collection is necessary in order to use the PBP analysis tool, required by all contracting officers contemplating the use of performance-based payments on new fixed-price type contract awards.

*Affected Public:* Businesses or other for-profit 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, or email *Jasmeet_K._Seehra@omb.eop.gov,* with a copy to the Defense Acquisition Regulations System, Attn: Mr. Mark Gomersall, OUSD (AT&L) DPAP (DARS), Room 3B855, 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.

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), Room 3B855, 3060 Defense Pentagon, Washington, DC 20301–3060, or email *dfars@osd.mil.* Include DFARS Case 2011–D045 in the subject line of the message.

**List of Subjects in 48 CFR Parts 232 and 252**

Government procurement.

**Ynette R. Shelkin,**

*Editor, Defense Acquisition Regulations System.*

Therefore, 48 CFR parts 232 and 252 are proposed for amendment as follows:

1. The authority citation for 48 CFR parts 232 and 252 is revised to read as follows:

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

## PART 232—CONTRACT FINANCING

2. In section 232.1001, add paragraph (a) to read as follows:

### 232.1001 Policy.

(a) As with all contract financing, the purpose of performance-based payments is to assist the contractor in the payment of costs incurred during the performance of the contract. Therefore, performance-based payments should never exceed total cost incurred at any point during the contract. See PGI 232.1001 for additional information on use of performance-based payments.

3. In section 232.1004, revise the section heading and add paragraph (b) to read as follows:

### 232.1004 Procedures.

(b) Prior to using performance-based payments, the contracting officer shall—

(i) Agree with the offeror on price using customary progress payments before negotiation begins on the use of performance-based payments, except for modifications to contracts that already use performance-based payments;

(ii) Analyze the performance-based payments schedule using the performance-based payments (PBP) analysis tool. The PBP analysis tool is on the DPAP Web site in the Cost, Pricing, and Finance section, performance-based payments analysis tool, at *http://www.acq.osd.mil/dpap/cpf/Performance_based_payments.html.*

(A) If performance-based payments are desired, the contractor shall submit a proposed performance-based payments schedule which includes all performance-based payments events, completion criteria, and event values, along with the expected expenditure profile. If performance-based payments are deemed practical, the Government will evaluate and negotiate the details of the performance-based payments schedule.

(B) For modifications to contracts that already use performance-based payments financing, the basis for negotiation must include performance-based payments. The (PBP) analysis tool will be used in the same manner to help determine the price for the modification. The only difference is that the baseline assuming customary progress payments will reflect an objective profit rate instead of a negotiated profit rate;

(iii) Negotiate the consideration to be received by the Government if the performance-based payments payment schedule will be more favorable to the contractor than customary progress payments;

(iv) Obtain the approval of the business clearance approving official, or one level above the contracting officer, whichever is higher, for the negotiated consideration; and

(v) Document in the contract file that the performance-based payments schedule provides a mutually beneficial settlement position that reflects adequate consideration to the Government for the improved contractor cash flow.

* * * * *

4. Add section 232.1005 to read as follows:

### 232.1005 Contract clauses.

The contracting officer shall include the following clauses in contracts that include performance-based payments:

(a) For performance-based payments made on a whole-contract basis, use the clause at 252.232–70XX, Performance-Based Payments—Whole-Contract Basis.

(b) For performance-based payments made on a deliverable-item basis, use the clause at 252.232–70YY, Performance-Based Payments—Deliverable-Item Basis.

## PART 252–SOLICITATION PROVISIONS AND CONTRACT CLAUSES

5. Add sections 252.232–70XX and 252.232–70YY to read as follows:

### 252.232–70XX Performance-Based Payments—Whole-Contract Basis.

As prescribed in 232.1005(a), use the following clause:

**Performance-Based Payments—Whole-Contract Basis (DATE)**

(a) Performance-based payments shall form the basis for the contract financing payments provided under this contract, and shall apply to the whole contract. The performance-based payments schedule (Contract Attachment __) describes the basis for payment, to include identification of the individual payment events, evidence of completion, and amount of payment due upon completion of each event.

(b)(i) At no time shall cumulative performance-based payments exceed cumulative contract cost incurred under this contract. To ensure compliance with this requirement, the Contractor shall, in addition to providing the information required by FAR 52.232–32, submit supporting information for all payment requests using the following format:

| Current performance-based payment(s) events addressed by this request: | | |
|---|---|---|
| Contractor will Identify: | Amount | Totals |
| (1a) Negotiated value of all previously completed performance-based payment(s) event(s) | | |
| (1b) Negotiated value of the current performance-based payment(s) event(s) | | |
| (1c) Cumulative negotiated value of performance-based payment(s) events completed to date (1a) + (1b) | | |
| (2) Total costs incurred to date | | |
| (3) Enter the amount from (1c) or (2), whichever is less | | |
| (4) Cumulative amount of payments previously requested | | |
| (5) Payment amount requested for the current performance-based payment(s) event(s) (3) - (4) | | |

(ii) The Contractor shall not submit payment requests more frequently than monthly.

(iii) Incurred cost is determined by the Contractor's accounting books and records.

(End of clause)

**252.232–70YY Performance-Based Payments—Deliverable-Item Basis.**

As prescribed in 232.1005(b), use the following clause:

**Performance-Based Payments—Deliverable-Item Basis (DATE)**

(a) Performance-based payments shall form the basis for the contract financing payments provided under this contract and shall apply to Contract Line Items (CLINs) ____, ____, and ____. The performance-based payments schedule (Contract Attachment ____) describes the basis for payment, to include identification of the individual payment events, CLINs to which each event applies, evidence of completion, and amount of payment due upon completion of each event.

(b)(i) At no time shall cumulative performance-based payments exceed cumulative contract cost incurred under CLINs ____, ____, and ____. To ensure compliance with this requirement, the Contractor shall, in addition to providing the information required by FAR 52.232–32, submit supporting information for all payment requests using the following format:

| Current performance-based payment(s) event(s) addressed by this request: | | |
|---|---|---|
| Contractor will Identify: | Amount | Totals |
| (1a) Negotiated value of all previously completed performance-based payment(s) event(s) | | |
| (1b) Negotiated value of the current performance-based payment(s) event(s) | | |
| (1c) Cumulative negotiated value of performance-based payment(s) event(s) completed to date (1a) + (1b) | | |
| (2) Total costs incurred to date | | |
| (3) Enter the amount from (1c) or (2), whichever is less | | |
| (4) Cumulative amount of payments previously requested | | |
| (5) Payment amount requested for the current performance-based payment(s) event(s) (3) - (4) | | |

(ii) The Contractor shall not submit payment requests more frequently than monthly.

(iii) Incurred cost is determined by the Contractor's accounting books and records.

(End of clause)

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