

cost-reimbursement contracts. This change is consistent with the corresponding Federal Acquisition Regulation (FAR) policy applicable to fixed-price construction contracts.

EFFECTIVE DATE: June 20, 2003.

FOR FURTHER INFORMATION CONTACT: Mr. Euclides Barrera, Defense Acquisition Regulations Council, OUSD(AT&L)DPAP(DAR), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301-3062. Telephone (703) 602-0296; facsimile (703) 602-0350. Please cite DFARS Case 2002-D030.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule updates DFARS policy on performance and payment bonds for construction contracts. In accordance with the Miller Act (40 U.S.C. 270a-270f), FAR 28.102-1(a) requires performance and payment bonds for construction contracts exceeding \$100,000. In accordance with Section 4104(b)(2) of the Federal Acquisition Streamlining Act of 1994 (Public Law 103-355), FAR 28.102-1(b) permits alternative payment protections for construction contracts between \$25,000 and \$100,000. DFARS 228.102-1 waives the requirement for performance and payment bonds for cost-reimbursement contracts, but requires the prime contractor to obtain bonds for its fixed-price subcontracts exceeding \$25,000. This DFARS rule authorizes the use of alternative payment protections for subcontracts between \$25,000 and \$100,000, for consistency with the corresponding FAR policy applicable to prime contracts.

In addition, this rule updates text implementing 10 U.S.C. 2701(h) and (i), pertaining to bonds under Defense Environmental Restoration Program contracts. 10 U.S.C. 2701(h) and (i) were to expire on December 31, 1999; however, Section 314 of the National Defense Authorization Act for Fiscal Year 2002 (Public Law 107-107) removed this expiration date. Therefore, the corresponding DFARS text has been amended to remove the expiration date. Additionally, the text has been relocated from 228.102-1 to a new section at 228.102-70, to identify the subject matter as DoD-unique.

DoD published a proposed rule at 68 FR 7490 on February 14, 2003. DoD received no comments on the proposed rule. Therefore, DoD has adopted the proposed rule as a final rule without change.

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

B. Regulatory Flexibility Act

DoD certifies 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 still requires payment protections for fixed-price construction subcontracts exceeding \$25,000, while providing flexibility for subcontractors to choose the type of protection to be provided for subcontracts between \$25,000 and \$100,000.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the rule does not impose any 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 Part 228

Government procurement.

Michele P. Peterson,
Executive Editor, Defense Acquisition Regulations Council.

■ Therefore, 48 CFR part 228 is amended as follows:

■ 1. The authority citation for 48 CFR part 228 continues to read as follows:

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

PART 228—BONDS AND INSURANCE

■ 2. Section 228.102-1 is revised to read as follows:

228.102-1 General.

The requirement for performance and payment bonds is waived for cost-reimbursement contracts. However, for cost-type contracts with fixed-price construction subcontracts over \$25,000, require the prime contractor to obtain from each of its construction subcontractors performance and payment protections in favor of the prime contractor as follows:

(1) For fixed-price construction subcontracts over \$25,000, but not exceeding \$100,000, payment protection sufficient to pay labor and material costs, using any of the alternatives listed at FAR 28.102-1(b)(1).

(2) For fixed-price construction subcontracts over \$100,000—

(i) A payment bond sufficient to pay labor and material costs; and

(ii) A performance bond in an equal amount if available at no additional cost.

■ 3. Section 228.102-70 is added to read as follows:

228.102-70 Defense Environmental Restoration Program construction contracts.

For Defense Environmental Restoration Program construction contracts entered into pursuant to 10 U.S.C. 2701—

(a) Any rights of action under the performance bond shall only accrue to, and be for the exclusive use of, the obligee named in the bond;

(b) In the event of default, the surety's liability on the performance bond is limited to the cost of completion of the contract work, less the balance of unexpended funds. Under no circumstances shall the liability exceed the penal sum of the bond;

(c) The surety shall not be liable for indemnification or compensation of the obligee for loss or liability arising from personal injury or property damage, even if the injury or damage was caused by a breach of the bonded contract; and

(d) Once it has taken action to meet its obligations under the bond, the surety is entitled to any indemnification and identical standard of liability to which the contractor was entitled under the contract or applicable laws and regulations.

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DEPARTMENT OF DEFENSE

48 CFR Part 253

[DFARS Case 2003-D002]

Defense Federal Acquisition Regulation Supplement; Reporting Requirements Update

AGENCY: Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to update contract action reporting requirements for Fiscal Year 2004. The rule makes changes to instructions for completion of the Individual Contracting Action Report.

EFFECTIVE DATE: October 1, 2003.

FOR FURTHER INFORMATION CONTACT: Mr. Euclides Barrera, Defense Acquisition Regulations Council, OUSD(AT&L)DPAP(DAR), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301-3062. Telephone (703) 602-0296; facsimile (703) 602-0350. Please cite DFARS Case 2003-D002.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule contains instructions for contracting officers to use in