

DEPARTMENT OF DEFENSE**48 CFR Part 228****[DFARS Case 2002–D030]****Defense Federal Acquisition Regulation Supplement; Payment Bonds on Cost-Reimbursement Contracts****AGENCY:** 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 permit the use of alternative payment protections for fixed-price construction subcontracts between \$25,000 and \$100,000 issued under cost-reimbursement contracts. This change is consistent with the corresponding Federal Acquisition Regulation (FAR) policy applicable to fixed-price construction contracts.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before April 15, 2003, to be considered in the formation of the final rule.

ADDRESSES: Respondents may submit comments directly on the World Wide Web at <http://emissary.acq.osd.mil/dar/dfars.nsf/pubcomm>. As an alternative, respondents may e-mail comments to: dfars@acq.osd.mil. Please cite DFARS Case 2002–D030 in the subject line of e-mailed comments.

Respondents that cannot submit comments using either of the above methods may submit comments to: Defense Acquisition Regulations Council, Attn: Mr. Euclides Barrera, OUSD(AT&L)DPAP(DAR), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301–3062; facsimile (703) 602–0350. Please cite DFARS Case 2002–D030.

At the end of the comment period, interested parties may view public comments on the World Wide Web at <http://emissary.acq.osd.mil/dar/dfars.nsf>.

FOR FURTHER INFORMATION CONTACT: Mr. Euclides Barrera, (703) 602–0296.

SUPPLEMENTARY INFORMATION:**A. Background**

This proposed 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

(Pub. L. 103–355), FAR 28.102–1(b) permits alternative payment protections for construction contracts between \$25,000 and \$100,000. DFARS 228.102–1(a) presently 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 proposed 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 proposed 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 (Pub. L. 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 to a new section 228.102–70, as its present location and numbering has led to confusion regarding its relationship with the subsequent text.

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 does not expect this 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 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. Therefore, DoD has not performed an initial regulatory flexibility analysis. DoD invites comments from small businesses and other interested parties. DoD also will consider comments from small entities concerning the affected DFARS subpart in accordance with 5 U.S.C. 610. Such comments should be submitted separately and should cite DFARS Case 2002–D030.

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, DoD proposes to amend 48 CFR Part 228 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,