

Dated: April 20, 2009.

Walter W. Kovalick, Jr.,

Acting Regional Administrator, Region 5.

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 52

[FAR Case 2008-015; Docket 2009-0015;
Sequence 1]

RIN: 9000-AL26

Federal Acquisition Regulation; FAR Case 2008-015, Payments Under Fixed-Price Architecture and Engineering Contracts

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

ACTION: Proposed rule with request for comments.

SUMMARY: The Civilian Agency Acquisition Council (CAAC) and the Defense Acquisition Regulations Council (DARC) propose to amend the Federal Acquisition Regulation (FAR) to revise the withholding-of-payment requirements under FAR clause 52.232-10, Payments Under Fixed-Price Architect-Engineer Contracts.

DATES: Interested parties should submit written comments to the Regulatory Secretariat on or before July 6, 2009 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAR case 2008-015 by any of the following methods:

- Regulations.gov: <http://www.regulations.gov>.

Submit comments via the Federal eRulemaking portal by inputting "FAR Case 2008-015" under the heading "Comment or Submission". Select the link "Send a Comment or Submission" that corresponds with FAR Case 2008-015. Follow the instructions provided to complete the "Public Comment and Submission Form". Please include your name, company name (if any), and "FAR Case 2008-015" on your attached document.

- Fax: 202-501-4067.
- Mail: General Services Administration, Regulatory Secretariat (VPR), 1800 F Street NW, Room 4041,

Washington, DC 20405, ATTN: Hada Flowers.

Instructions: Please submit comments only and cite FAR case 2008-015 in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any

personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT Ms. Meredith Murphy, Procurement Analyst, at (202) 208-6925 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501-4755. Please cite FAR case 2008-015.

SUPPLEMENTARY INFORMATION:

A. Background

The Federal Acquisition Regulation (FAR) 52.232-10, Payments under Fixed-Price Architecture-Engineer Contracts, currently requires the contracting officer to withhold 10% of the amounts due on each voucher; however, payment may be made in full during any month in which the contracting officer determines the performance to be satisfactory. The Government retains the withhold amount until the contracting officer determines that the work has been satisfactorily completed. The contracting officer may release excess withhold amounts to the contractor when it is determined that work is substantially complete and when the contracting officer determines that the amount retained is in excess of the amount adequate for the protection of the Government's interests.

This rule proposes to revise FAR 52.232-10 to permit contracting officers to use their judgment regarding the amount of payment withhold to apply under fixed-price architecture-engineer contracts (based on an assessment of the contractor's performance under the contract) so that the withhold amount will be applied at the level necessary to protect the Government's interests. This is in contrast to the current requirement that contracting officers withhold 10 percent on all payments. Thus, the rule proposes to revise paragraphs (b) and (c) of the contract clause at FAR 52.232-10 to state that the contracting officer may (rather than shall) withhold up to 10 percent of the payment amount due and that the amount of withhold shall be determined based upon the contractor's performance record. The rule also makes several related editorial changes including one that clarifies that the contractor will be paid any unpaid balance due to include withhold

amounts at the successful completion of the design work.

This case originated from a recommendation in the Small Business Administration's Regulatory Review and Reform (r3) initiative. The current withholding provisions negatively impact the cash flow of architect-engineer contractors and may, in some instances, result in the withholding of amounts that exceed reasonable amounts to protect the Government's interests.

This is not a significant regulatory action and, therefore, is 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 Councils do 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, at 5 U.S.C. 601, *et seq.*, because the rule does not impose any additional requirements on small businesses. There are approximately 230,000 architect-engineer firms, many of which are small businesses. This rule actually eases the impact on such firms. Therefore, an Initial Regulatory Flexibility Analysis has not been performed. We invite comments from small businesses and other interested parties. The Councils will consider comments from small entities concerning the affected FAR Part 52 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (FAR Case 2008-015) in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed 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 Part 52

Government Procurement.

Dated: April 28, 2009.

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Director, Office of Acquisition Policy.

Therefore, DoD, GSA, and NASA propose to amend 48 CFR part 52 as set forth below:

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

1. The authority citation for 48 CFR part 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).

2. Amend section 52.232–10 by revising the date of the clause; by revising the last sentence or paragraph (a), and by revising paragraphs (b) and (c) to read as follows:

52.232–10 Payments under Fixed-Price Architect-Engineer Contracts.

* * * * *

PAYMENTS UNDER FIXED-PRICE ARCHITECT-ENGINEER CONTRACTS (DATE)

(a) * * * The estimates, along with any supporting data required by the Contracting Officer, shall be prepared by the Contractor and submitted along with its voucher.

(b) After receipt of each substantiated voucher the Government shall pay the voucher as approved by the Contracting Officer or authorized representative. The Contracting Officer may require a withhold of up to 10 percent of the amounts due under paragraph (a) of this clause in order to protect the Government's interest and ensure satisfactory completion of the contract. The amount of withhold shall be determined based upon the contractor's performance record under this contract. Whenever the Contracting Officer determines that the work is substantially complete and that the amount retained is in excess of the amount adequate for the protection of the Government, the Contracting Officer may release the excess amount to the Contractor.

(c) Upon satisfactory completion by the Contractor and final acceptance by the Contracting Officer of all design work done by the Contractor under the "Statement of Architect-Engineer Services", the Contractor will be paid the unpaid balance of any money due for design work under the statement, including all withheld amounts.

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(End of clause)

[FR Doc. E9–10351 Filed 5–4–09; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 222 and 223

[Docket No. 0809121212–81515–01]

RIN 0648–AX20

Endangered and Threatened Wildlife; Sea Turtle Conservation

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and

Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule; request for comments.

SUMMARY: The National Marine Fisheries Service (NMFS) currently requires the use of chain-mat modified dredge gear in the Atlantic sea scallop fishery south of 41°9.0' North latitude from May 1 through November 30 each year. This gear is necessary to help reduce mortality and injury to endangered and threatened sea turtles captured in this fishery and to conserve sea turtles listed under the Endangered Species Act (ESA). This proposed action would make minor modifications to the current requirements by clarifying where on the dredge the chain mat should be hung; by excluding the sweep from the requirement that the side of each opening in the chain mat be less than or equal to 14 inches (35.5 cm); and by adding definitions of the sweep and the diamonds, which are terms used to describe parts of the scallop dredge gear. Any incidental take of threatened sea turtles in Atlantic sea scallop dredge gear in compliance with the gear modification requirements and all other applicable requirements will be exempted from the ESA prohibition against takes. NMFS is requesting public comment on this action, the focus of which is the minor modifications described here. NMFS is not accepting public comment on the existing chain mat requirements through this proposed rule.

DATES: Comments on the proposed rule must be received by 5 p.m. EST on June 4, 2009.

ADDRESSES: Written comments on this action, identified by RIN 0648–AX20, may be submitted by any one of the following methods:

- *Electronic submissions:* Submit all electronic public comments via the Federal eRulemaking portal at <http://www.regulations.gov>.
- *Fax:* 978–281–9394, ATTN: Sea Turtle Conservation Measures, Proposed Rule.
- *Mail:* Mary A. Colligan, Assistant Regional Administrator for Protected Resources, NMFS, Northeast Region, 55 Great Republic Drive, Gloucester, MA 01930, Attn: Sea Turtle Conservation Measures, Proposed Rule.

Instructions: All comments received are a part of the public record and will generally be posted to <http://www.regulations.gov> without change. All personal identifying information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not

submit confidential business information or otherwise sensitive or protected information.

NMFS will accept anonymous comments (enter "N/A" in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

Copies of the Draft Supplemental Environmental Assessment/Regulatory Impact Review can be obtained from <http://www.nero.noaa.gov/nero/regs/com.html> listed under the Electronic Access portion of this document or by writing to Pasquale Scida, NMFS, Northeast Region, 55 Great Republic Drive, Gloucester, MA 01930.

FOR FURTHER INFORMATION CONTACT:

Pasquale Scida (ph. 978–281–9208, fax 978–281–9394, e-mail pasquale.scida@noaa.gov).

SUPPLEMENTARY INFORMATION:

Background

All sea turtles that occur in U.S. waters are listed as either endangered or threatened under the Endangered Species Act of 1973 (ESA). The Kemp's ridley (*Lepidochelys kempii*), leatherback (*Dermochelys coriacea*), and hawksbill (*Eretmochelys imbricata*) sea turtles are listed as endangered. The loggerhead (*Caretta caretta*) and green (*Chelonia mydas*) sea turtles are listed as threatened, except for breeding populations of green turtles in Florida and on the Pacific coast of Mexico that are listed as endangered. Kemp's ridley, hawksbill, loggerhead, and green sea turtles are hard-shelled sea turtles.

Under the ESA and its implementing regulations, taking sea turtles under NMFS's jurisdiction, even incidentally, is prohibited, with exceptions identified at 50 CFR 223.206. The incidental take, both lethal and non-lethal, of loggerhead, Kemp's ridley, and unidentified hard-shelled sea turtles as a result of scallop dredging has been observed in the Atlantic sea scallop fishery (Northeast Fisheries Science Center (NEFSC) Fisheries Sampling Branch (FSB), Observer Database). In addition, a non-lethal take of a green sea turtle has been observed in this fishery (NEFSC FSB, Observer Database) and one unconfirmed take of a leatherback sea turtle was reported during the experimental fishery to test the chain-mat modified gear (DuPaul *et al.*, 2004).

Sea turtles caught in scallop dredge gear often suffer injuries. The most commonly observed injury is damage to the carapace. The exact causes of these injuries are unknown, but most likely appear to be from being struck by the