

(i) The Contractor shall use, modify, reproduce, perform, or display technical data received from the Government with limited rights legends or computer software received with restricted rights legends only in the performance of this contract. The Contractor shall not, without the express written permission of the party whose name appears in the legend, release or disclose such data or software to any unauthorized person.

(ii) If the Contractor is a covered Government support contractor, the Contractor further agrees and acknowledges that—

(A) The data or software will be accessed and used only for the purposes stated in this contract and shall not be used to compete for any Government or non-Government contract;

(B) The Contractor will take all reasonable steps to protect the technical data or computer software against any unauthorized release or disclosure;

(C) The Contractor will ensure that the party whose name appears in the legend is notified of the Contractor's access or use of such data or software;

(D) The Contractor will enter into a non-disclosure agreement with the party whose name appears in the legend, if required to do so by that party, and that any such non-disclosure agreement will implement the restrictions on the Contractor's use of such data or software as set forth in this clause, and shall not include any additional terms and conditions unless mutually agreed to by the parties to the non-disclosure agreement;

(E) The Contractor shall provide a copy of any such non-disclosure agreement or waiver to the Contracting Officer, upon request; and

(F) That a breach of these obligations or restrictions may subject the Contractor to—

(1) Criminal, civil, administrative, and contractual actions in law and equity for penalties, damages, and other appropriate remedies by the United States; and

(2) Civil actions for damages and other appropriate remedies by the party whose name appears in the legend.

(2) *GFI marked with government purpose rights legends.* The Contractor shall use technical data or computer software received from the Government with government purpose rights legends for government purposes only. The Contractor shall not, without the express written permission of the party whose name appears in the restrictive legend, use, modify, reproduce, release, perform, or display such data or software for any commercial purpose or disclose such data or software to a person other than its subcontractors,

suppliers, or prospective subcontractors or suppliers, who require the data or software to submit offers for, or perform, contracts under this contract. Prior to disclosing the data or software, the Contractor shall require the persons to whom disclosure will be made to complete and sign the non-disclosure agreement at 227.7103-7.

(3) *GFI marked with specially negotiated license rights legends.* The Contractor shall use, modify, reproduce, release, perform, or display technical data or computer software received from the Government with specially negotiated license legends only as permitted in the license. Such data or software may not be released or disclosed to other persons unless permitted by the license and, prior to release or disclosure, the intended recipient has completed the non-disclosure agreement at 227.7103-7. The Contractor shall modify paragraph (1)(c) of the non-disclosure agreement to reflect the recipient's obligations regarding use, modification, reproduction, release, performance, display, and disclosure of the data or software.

(4) *GFI marked with commercial restrictive legends.*

(i) The Contractor shall use, modify, reproduce, perform, or display technical data that is or pertains to a commercial item and is received from the Government with a commercial restrictive legend (i.e., marked to indicate that such data are subject to use, modification, reproduction, release, performance, display, or disclosure restrictions) only in the performance of this contract. The Contractor shall not, without the express written permission of the party whose name appears in the legend, use the technical data to manufacture additional quantities of the commercial items, or release or disclose such data to any unauthorized person.

(ii) If the Contractor is a covered Government support contractor, the Contractor further agrees and acknowledges that—

(A) The data or software will be accessed and used only for the purposes stated in this contract and shall not be used to compete for any Government or non-Government contract;

(B) The Contractor will take all reasonable steps to protect the technical data against any unauthorized release or disclosure;

(C) The Contractor will ensure that the party whose name appears in the legend is or has been notified of the Contractor's access or use of such data;

(D) The Contractor will enter into a non-disclosure agreement with the party whose name appears in the legend, if

required to do so by that party, and that any such non-disclosure agreement will implement the restrictions on the Contractor's use of such data as set forth in this clause, and shall not include any additional terms and conditions unless mutually agreed to by the parties to the non-disclosure agreement;

(E) The Contractor shall provide a copy of any such non-disclosure agreement or waiver to the Contracting Officer, upon request; and

(F) That a breach of these obligations or restrictions may subject the Contractor to—

(1) Criminal, civil, administrative, and contractual actions in law and equity for penalties, damages, and other appropriate remedies by the United States; and

(2) Civil actions for damages and other appropriate remedies by the contractor or subcontractor whose technical data is affected by the breach.

\* \* \* \* \*

[FR Doc. 2011-4531 Filed 3-1-11; 8:45 am]

BILLING CODE 5001-08-P

## DEPARTMENT OF DEFENSE

### Defense Acquisition Regulations System

#### 48 CFR Parts 212, 232, and 252

RIN 0750-AG56

#### Defense Federal Acquisition Regulation Supplement; Payments in Support of Emergencies and Contingency Operations (DFARS Case 2009-D020)

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

**ACTION:** Final rule.

**SUMMARY:** DoD is adopting as a final rule, with minor changes, an interim rule that amended the Defense Federal Acquisition Regulation Supplement (DFARS) to implement exemptions from the Prompt Payment Act. The interim rule exempted military payments related to contingencies and certain payments related to emergencies and the release or threatened release of hazardous substances.

**DATES:** *Effective date:* March 2, 2011.

**FOR FURTHER INFORMATION CONTACT:** Mr. Julian E. Thrash, 703-602-0310.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

5 CFR part 1315 exempts from Prompt Payment Act compliance payments related to emergencies (defined in the

Disaster Relief Act of 1974, Pub. L. 93–288, as amended (42 U.S.C. 5121, *et seq.*); contingency operations (as defined in 10 U.S.C. 101(a)(13)); and the release/threatened release of hazardous substances (as defined in 4 U.S.C. 9606, Section 106). DoD requires the flexibility provided by 5 CFR part 1315, Exemption from the Prompt Payment Act, because of the potential for unstable environments during emergencies and contingency operations.

DoD published an interim rule in the Federal Register (75 FR 40712) on July 13, 2010, to implement the full authority granted by 5 CFR 1315.1 for payments covered by 5 CFR 1315.1(b)(2) that are either certified for payment in an operational area, or are contingent upon the receipt of necessary supporting documentation (*i.e.*, contract, invoice, receiving report) emanating from an operational area. The public comment period closed September 13, 2010.

## II. Analysis of Public Comments

One respondent provided comments on the interim rule. A discussion of the comments follows:

### A. Applicability of FAR Subpart 32.9

*Comment.* The respondent notes that DFARS 232.901, Applicability, states that FAR subpart 32.9 does not apply when the conditions therein are listed. However, DFARS 232.908, Contract clauses, states that the appropriate FAR Prompt Payment clause prescribed at FAR 32.908 should be included in the contract in addition to DFARS 252.232–7011, Payments in Support of Emergencies and Contingency Operations. Thus, FAR 32.908 still applies when the conditions at DFARS 232.901 are met. According to the respondent, the statement that “FAR subpart 32.9, Prompt Payment, does not apply when—” needs to be qualified to state that FAR 32.908 still applies.

*Response.* DoD concurs and the text has been revised accordingly.

### B. Inclusion of Two Payment Clauses

*Comment.* The respondent states that it would be less confusing if the contract just contained either DFARS 252.232–7011, Payments in Support of Emergencies and Contingency Operations, or a FAR Prompt Payment clause. According to the respondent, if the environment became more stable or less stable, the contracting officer could bilaterally modify the contract to remove one clause and add the other. The respondent states that including both clauses and notifying the contractor which one applies by

contract modification is an unusual, and unnecessary, way to administer a contract.

*Response.* DoD does not concur as the Government requires the maximum flexibility provided by DFARS subpart 232.9, Prompt Payment, in order to operate in such austere environments as Iraq and Afghanistan. This flexibility requires the ability to move from the appropriate FAR Prompt Payment clause when normal business conditions are possible, to the clause at DFARS 252.232–7011, Payments in Support of Emergencies and Contingency Operations, when an austere environment exists. The conditions described at 232.901, Applicability, provide guidelines for when austere operations are present. Contractors that operate in potential environments that may go back and forth from stable to unstable operations are given the opportunity to price such conditions into their proposals. The Government reserves the right to structure such contracts for this flexibility, and to convert the appropriate FAR or DFARS clause for the given situation, rather than depending upon a bilateral modification, to which the contractor might not agree, and which would require negotiation of consideration. As currently stated, the contracting officer can issue a unilateral contract modification notifying the contractor which clause is active.

This final rule provides DoD the needed flexibility in limited circumstances. The head of the contracting activity shall make subsequent determinations, after consultation with the cognizant comptroller, as the operational area evolves into a more stable business environment to enable the provisions of FAR 32.9 to apply.

## III. Executive Order 12866

This regulatory action was 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.

## IV. Regulatory Flexibility Act

DoD does not expect this final rule to have a significant economic impact on small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* However, DoD has prepared a final regulatory flexibility analysis consistent with 5 U.S.C. 604 which is summarized below. A copy of the analysis may be obtained from the point of contact.

On May 22, 2008, the DoDIG issued the results of an audit Report No. D–

2008–098, entitled “Internal Controls Over Payments Made in Iraq, Kuwait, and Egypt.” The audit cited inconsistencies in FAR 32.9, DFARS 232.9, and 5 CFR in regard to compliance with the Prompt Payment Act for military contingency operations. The audit further recommended that DoD establish procedures to address contingency operations.

During emergencies and contingency operations, the operational area can be so fluid and dynamic that carrying out normal business practices can be extremely challenging. It is necessary for the Head of the Contracting Activity (HCA) to have the authority to appropriately respond to emergency and contingency operations accordingly whenever limited operational conditions exist. This includes the payment of contractors.

This final rule takes advantage of the exemption provided by OMB implementation of the Prompt Payment Act, which exempts military contingencies. This rule allows the HCA to make a determination of whether or not stable business operations exist in theater to allow the Prompt Payment Act to apply in an emergency and contingency operation. If stable conditions don't exist, then the HCA is authorized to apply the clause at 252.232–7011, Payments in Support of Emergencies and Contingency Operations. When this clause is invoked, it will be used instead of one of the payment clauses at FAR 52.232–25, 52.232–26, or 52.232–27. DFARS 232.901 will require the HCA to make subsequent determinations as the operational area evolves into a more stable environment to enable the provisions of the Prompt Payment Act to apply. It will also require the contracting officer to notify, by contract modification, each contractor that has a contract containing DFARS clause 252.232.7011, that it is no longer applicable, and the applicable FAR Prompt Payment clause in the contract applies.

No significant issues were raised by the public in response to the initial regulatory flexibility analysis.

This rule is expected to have a minimal economic impact on a relatively small number of small business entities. It is anticipated that the rule could initially be applied to contracts supporting Afghanistan. As of today, normal business operations are hindered in Afghanistan due to the uncertain environment and instability in the region. It may be impractical for U.S. forces to adequately match receipt of necessary supporting documentation (*i.e.*, contract, invoice, and receiving

report) in such an operational area. It is expected the HCA for Afghanistan could exempt "payments made in the theater of operations" from Prompt Payment Act interest and interest penalties.

In the preparation of the interim rule, a review of Federal Procurement Data Systems data for FY08 showed that of the 140 awards made to U.S. firms, only 21 were made to small business entities. This total represents 15 percent of all awards made during this time period. Therefore, the overall impact of the rule is not expected to have a significant aggregate economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* However, a regulatory flexibility analysis was completed because there is an economic impact to consider.

There is no reporting requirement established by this rule. There are no significant alternatives which accomplish the stated objectives. This rule will allow DoD to utilize the exemptions provided by OMB implementation of the Prompt Payment Act, which exempts military contingencies.

## V. Paperwork Reduction Act

The rule does not impose any 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).

### List of Subjects in 48 CFR Parts 212, 232, and 252

Government procurement.

#### Mary Overstreet,

*Editor, Defense Acquisition Regulations System.*

Therefore, the Defense Acquisition Regulations System confirms as final the interim rule published at 75 FR 40712, July 13, 2010, with the following changes:

- 1. The authority citation for 48 CFR part 232 continues to read as follows:

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

### PART 232—CONTRACT FINANCING

- 2. Section 232.901 is amended by—
  - a. Revising the first sentence of paragraph (1) introductory text to read as set forth below;
  - b. Amending paragraph (1)(i)(C) by removing "Section" and adding in its place "section".

#### 232.901 Applicability.

(1) Except for FAR 32.908, FAR subpart 32.9, Prompt Payment, does not apply when—

\* \* \* \* \*

[FR Doc. 2011-4526 Filed 3-1-11; 8:45 am]

BILLING CODE 5001-08-P

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 648

[Docket No. 080513659-1114-03]

RIN 0648-AW75

### Fisheries of the Northeastern United States; Atlantic Herring; Amendment 4

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Final rule.

**SUMMARY:** This rule implements approved measures in Amendment 4 to the Atlantic Herring (Herring) Fishery Management Plan (FMP). Amendment 4 was developed by the New England Fishery Management Council (Council) to bring the FMP into compliance with new Magnuson-Stevens Fishery Conservation and Management Act (MSA) requirements by: Revising definitions and the specifications-setting process, consistent with annual catch limit (ACL) requirements; and establishing fishery closure thresholds, a haddock incidental catch cap, and overage paybacks as accountability measures (AMs). In addition, the amendment designates herring as a "stock in the fishery;" establishes an interim acceptable biological catch (ABC) control rule; and makes adjustments to the specification process by eliminating consideration of total foreign processing (JVPt), including joint venture processing (JVP) and internal waters processing (IWP), and reserve from the specification process, and eliminates the Council's consideration of total allowable level of foreign fishing (TALFF).

**DATES:** Effective April 1, 2011.

**ADDRESSES:** An environmental assessment (EA) was prepared for Amendment 4 that describes the proposed action and other considered alternatives and provides a thorough analysis of the impacts of the proposed measures and alternatives. Copies of Amendment 4, including the EA, the Regulatory Impact Review (RIR), and the

Initial Regulatory Flexibility Analysis (IRFA), are available from: Paul J. Howard, Executive Director, New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950, telephone (978) 465-0492. The EA/RIR/IRFA is also accessible via the Internet at <http://www.nero.nmfs.gov>.

#### FOR FURTHER INFORMATION CONTACT:

Carrie Nordeen, Fishery Policy Analyst, 978-281-9272, fax 978-281-9135.

#### SUPPLEMENTARY INFORMATION:

##### Background

This amendment brings the Herring FMP into compliance with requirements of the reauthorization of the MSA in 2006, specifically ACLs and AMs. Because herring is not subject to overfishing, the MSA requires the Herring FMP to be in compliance with ACL and AM requirements by 2011. In addition to the public meetings at which Amendment 4 was developed, the Council held three public meetings on the draft Amendment 4 and its EA during January 2010. Following the public comment period that ended on January 12, 2010, the Council adopted Amendment 4 on January 26, 2010, and submitted the amendment to NMFS on April 22, 2010. The Notice of Availability (NOA) for Amendment 4 was published on August 12, 2010, with a comment period ending October 12, 2010. A proposed rule for Amendment 4 was published on October 18, 2010, with a comment period ending December 2, 2010. On November 9, 2010, NMFS approved Amendment 4 on behalf of the Secretary of Commerce.

Initially, the Council intended for Amendment 4 to also consider the issues of catch monitoring and reporting, interactions with river herring, access by midwater trawl vessels to groundfish closed areas, and interactions with the Atlantic mackerel fishery. In June 2009, the Council determined there was not sufficient time to develop and implement all the measures originally contemplated in Amendment 4 by 2011, so it decided that Amendment 4 would only address ACL and AM requirements and specification issues. The other issues (e.g., catch monitoring and reporting, interactions with river herring and Atlantic mackerel, access to groundfish closed areas) are currently being considered in Amendment 5 to the Herring FMP (Amendment 5). NMFS has the independent authority to revise reporting requirements, and has informed the Council that it will be developing a rulemaking to establish