



May 2, 2003

Defense Acquisition Regulations Council  
Attn: Ms. Sandra Haberlin  
OUSD(AT&L)DPAP(DAR)  
IMD 3C 132  
3062 Defense Pentagon  
Washington, D.C. 20301-3062

Re: DFARS Case 2002-D017 -- Payment Withholding

Dear Ms. Haberlin:

The Professional Services Council (PSC) is pleased to submit comments in support of the DFARS proposed rule published in the Federal Register on February 28, 2003 (68 F.R. 9627). The rule would remove the requirement that a contracting officer withhold five percent of the payments due under a time-and-materials or labor-hour contract unless otherwise prescribed in the contract Schedule.

## **BACKGROUND**

1. PSC is the leading national trade association representing the professional and technical services industry doing business with the Federal Government. PSC's approximately 145 member companies provide a wide range of services to all agencies of the Department of Defense, from information technology to high-end consulting, engineering, scientific and environmental services.
2. We concur with the Department's Supplemental Information that revisions are appropriate because the current withholding provisions are administratively burdensome and may, in some situations, result in the withholding of amounts that exceed reasonable amounts needed to protect the Government's interest.

## **DFARS 232.111**

1. We strongly support the addition of the new policy in DFARS 232.111 (b)(ii) that withholding should not be required where a contractor has demonstrated a record of timely submittal of the release discharging the Government from all liabilities. However, there are other circumstances when the withholding may not be necessary, such as where the contractor has demonstrated a satisfactory accounting and billing system and is determined to

be eligible for direct billings by the Defense Contract Audit Agency. Therefore, we recommend that section 232.111(b)(ii) be amended by adding a comma after the phrase “no need to withhold payment for a contractor when” and the phrase “such as”. The Supplemental Information accompanying the final rule should note that the contracting officer is in the best position to determine whether to withhold funds, and if so, how much to withhold up to the ceiling amount, and under what circumstances.

2. In addition, while 232.111(b)(iii) properly permits the ACO to issue written direction to withhold funds, the withholding should be referred to as “five percent up to a maximum of \$50,000” of the amounts due until a sufficient reserve is established; this maximum amount of the coverage is addressed properly in the contract clause. We recommend two additional modifications to this paragraph. First, the ACO should be authorized to establish an administrative mechanism for holding contractor funds that does not require the withholding of funds on each invoice. As the Supplemental Information properly noted, the current system creates unnecessary administrative burdens on both the government and the contractor when alternatives are clearly available. This alternative mechanism may facilitate contract administration, payment reconciliation, and contract closeout of the instant contract. Secondly, the paragraph should be modified to provide authority for the ACO to issue additional written direction to the contractor when the ACO determines that no further withholding is necessary (and possibly even no reserve is necessary).
3. We are concerned, however, with the subtle change in language that shifts the burden of withholding from the government to the contractor. Under the current clause, and as properly referenced in (b)(i) of 232.111, it is the ACO that is required to withhold the funds. Under new (b)(iii) and the clause at 252.232-7xxx(a)(2), the language shifts the burden to the contractor to withhold funds (presumably from otherwise appropriate billings). We oppose the shift of responsibility from the government to the contractor. While we recognize the frequent practice of having the contractor take such action, we believe it important that the responsibility for withholding remain with the government. PSC recently raised similar concerns with a proposed DCAA policy letter on audit coverage of fee withholdings.

### **DFARS 252.232-7XXX**

We support the general thrust of the revised clause. As noted above, we offer several suggestions for revisions to the clause. First, the ACO should have flexibility to adopt an alternative mechanism to payment withholding that will protect the government’s interest without the administrative burden on both the government and the contractor. Second, the burden of making the withholding should be on the government, not the contractor. Finally, the last sentence should be modified to permit the ACO to release the withholding upon written direction to the contractor without having only the final release serving as the condition precedent for the termination of the withholding.

## CONCLUSION

PSC supports the revision of the policy and the clause that permits, but does require, the ACO to withhold payment amounts if the ACO determines that the withholding is necessary to protect the government. By the same token, the ACO should have the flexibility to develop alternative mechanisms that can reduce or eliminate the administrative burdens on both the government and the contractor. The policy and clause should not shift the burden of withholding from the government to the contractor. Finally, making the minor revisions to the policy and the clause we recommend will add clarity and improve the coverage of the rule.

PSC appreciates the opportunity to comment on the proposed rule. If you have any questions or need any additional information, please do not hesitate to let me know. I can be reached at (703) 875-8059, or by email at [Chvotkin@pscouncil.org](mailto:Chvotkin@pscouncil.org).

Sincerely,

A handwritten signature in black ink, appearing to read "Alan Chvotkin". The signature is fluid and cursive, with the first name "Alan" and last name "Chvotkin" clearly distinguishable.

Alan Chvotkin  
Senior Vice President and Counsel