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## **THE FAR CORNER**

### ***Payment Withholding***

A final rule has been issued removing the mandatory requirement that a contracting officer withhold 5 percent of the payments under time-and-materials and labor-hour contracts, unless it is necessary to withhold payment to protect the Government's interest or otherwise prescribed in the contract schedule. This final rule also amends FAR guidance to require the use of a contract modification to withhold payment, which states that the withholding up to a \$50,000 ceiling is to be made by the contractor prior to the submission of their vouchers and not by the Government payment office. It is noted that this clause does not preclude the Government from withholding other amounts due to non-performance, delivery of non-conforming goods or services, or other failure(s) to comply with contract requirements. The ceiling amount of withholding applies to the entire contract and not to each individual order. This final rule is effective August 26, 2005. The complete text can be found at [www.acqnet.gov/far](http://www.acqnet.gov/far) (FAC 2005-5, FAR Case 2004-003). It impacts FAR 32.111(a)(7)(iii) and FAR 52.232-7(a)(2).

### ***Lump-Sum Relocation Cost Reimbursements***

FAR 31.201-2(d) states "A contractor is responsible for accounting for costs appropriately and for maintaining records, including supporting documentation, adequate to demonstrate that costs claimed have been incurred, are allocable to the contract, and comply with applicable cost principles in the subpart and agency supplements. The contracting officer may disallow all or part of a claimed cost that is inadequately supported."

FAR 31.201-3(a) states in part "No presumption of reasonableness shall be attached to the incurrence of costs by a contractor. If an initial review of the facts results in a challenge of a specific cost by the contracting officer or the contracting officer's representative, the burden of proof shall be upon the contractor to establish that such cost is reasonable."

With this as a regulatory backdrop, FAR Case 2003-002 (Federal Register; December 11, 2003, Volume 68, Number 238) was published offering a proposed rule expanding the use of reimbursements on a lump-sum basis for certain relocation costs. The costs covered included: (1) costs of finding a new home; (2) costs of travel to the new location; and (3) costs of temporary lodging. These three lump-sum reimbursements would be in addition to the currently allowable lump-sum reimbursement for miscellaneous expenses covered under FAR 31.205-35(a)(5) and (b)(4) in the amount of \$5,000. The comment period for this Notice of Proposed Rule Making (NPRM) ended February 9, 2004. It is currently under legal review by the GSA.

Since that time the Federal Travel Regulations (FTR) has been revised to include these lump-sum/fixed reimbursement payments but the FAR, applicable to government contractors, has not.

While individual receipts were not to be required relative to these lump-sum reimbursements, contractors were to have had to demonstrate that the amounts paid were reasonable and appropriate for the circumstances of the relocating employee.

As a standard commercial practice many contractors are providing their relocating employees lump-sum payments for these expenses and recording them as allowable costs on government contracts. To do this the contractor must:

- (1) Establish and consistently follow policies and procedures defining who can receive the lump-sum payments and under what circumstance.
- (2) Define what relocation costs are to be included in the lump-sum amount.
- (3) Develop a logical method for determining the amount of allowable lump sum to be paid based on the unique circumstance of each employees relocation.
- (4) Obtain an advance agreement from the cognizant contracting officer agreeing to the determination of the lump-sum amount and its allowability.

We are presently awaiting word on the status of this proposed rule and will keep you informed as we hear more.



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