

of a contract with a value not greater than \$100,000 under Subpart 19.8, Contracting with the Small Business Administration, under 19.1007(c), Solicitations equal to or less than the ESB reserve amount, or under 19.1305, HUBZone set-aside procedures.

\* \* \* \* \*

3. Amend section 19.1001 by revising the introductory paragraph to read as follows:

**19.1001 General.**

The Small Business Competitiveness Demonstration Program was established by the Small Business Competitiveness Demonstration Program Act of 1988, Public Law 100-656 (15 U.S.C. 644 note). The program is implemented by a joint OFPP and SBA Policy Directive and Implementation Plan, dated May 25, 1999. The program consists of two major components—

\* \* \* \* \*

4. Amend section 19.1002 by revising the section heading and adding, in alphabetical order, the definition “Emerging small business reserve amount” to read as follows:

**19.1002 Definitions.**

\* \* \* \* \*

*Emerging small business reserve amount*, for the designated groups described in 19.1005, means a threshold established by the Office of Federal Procurement Policy of—

(1) \$25,000 for construction, refuse systems and related services, and nonnuclear ship repair; and

(2) \$50,000 for architectural and engineering services.

**19.1003 [Amended]**

5. Amend section 19.1003 by redesignating paragraphs (b) and (c) as (c) and (b), respectively.

6. Amend section 19.1005 by redesignating paragraphs (a)(3) and (a)(4) as (a)(4) and (a)(3), respectively, and revising newly designated (a)(4); and in paragraph (b) by removing “shall designate” and adding “designates” in its place. The revised text reads as follows:

**19.1005 Applicability.**

(a) \* \* \*

(4) Architectural and engineering services (including surveying and mapping) under SIC code 7389, 8711, 8712, or 8713 (limited to FPDS service codes C111 through C216, C219, T002, T004, T008, T009, T014, and R404), which are awarded under the qualification-based selection procedures required by 40 U.S.C. 541, *et seq.* (the “Brooks A–E Act”) (see Subpart 36.6).

\* \* \* \* \*

**19.1006 and 19.1007 [Redesignated as 19.1007 and 19.1008, respectively] [New 19.1006 added]**

7a. Redesignate sections 19.1006 and 19.1007 as 19.1007 and 19.1008, respectively; and add a new section 19.1006 to read as follows:

**19.1006 Exclusions.**

This subpart does not apply to—

(a) Orders placed against Federal Supply Schedules;

(b) Contract awards to educational and nonprofit organizations; or

(c) Contract awards to governmental entities.

7b. Revise the newly designated 19.1007 to read as follows:

**19.1007 Procedures.**

(a) *General.* (1) All solicitations must include the applicable SIC code and size standards.

(2) The face of each award made pursuant to the program must contain a statement that the award is being issued pursuant to the Small Business Competitiveness Demonstration Program.

(b) *Solicitations greater than the ESB reserve amount.* (1) Solicitations for acquisitions in any of the four designated industry groups that have an anticipated dollar value greater than the emerging small business reserve amount must not be considered for small business set-asides under subpart 19.5. However, agencies may reinstate the use of small business set-asides as necessary to meet their assigned goals, but only within organizational units that failed to meet the small business participation goal.

(2) Acquisitions in the designated industry groups must continue to be considered for placement under the 8(a) Program (see subpart 19.8) and the HUBZone Program (see subpart 19.13).

(c) *Solicitations equal to or less than the ESB reserve amount.* (1) Solicitations for acquisitions in the four designated industry groups with an estimated value equal to or less than the emerging small business reserve amount must be set aside for ESBs, provided that the contracting officer determines that there is a reasonable expectation of obtaining offers from two or more responsible ESBs that will be competitive in terms of market price, quality, and delivery. If no such reasonable expectation exists, the contracting officer must—

(i) For acquisitions \$25,000 or less, proceed in accordance with subpart 19.5, 19.8, or 19.13; or

(ii) For acquisitions greater than \$25,000 and less than or equal to the ESB reserve amount, proceed in

accordance with paragraph (b) of this section.

(2) If the contracting officer proceeds with the ESB set-aside and receives a quotation from only one ESB at a reasonable price, the contracting officer must make the award. If there is no quote from an ESB, or the quote is not at a reasonable price, then the contracting officer must cancel the ESB set-aside and proceed in accordance with paragraph (c)(1)(i) or (ii) of this section.

(d) *Expanding small business participation in targeted industry categories.* Each participating agency must develop and implement a time-phased strategy with incremental goals, including reporting on goal attainment. To the extent practicable, provisions that encourage and promote teaming and joint ventures must be considered. These provisions should permit small business firms to effectively compete for contracts that individual small businesses would be ineligible to compete for because of lack of production capacity or capability.

**19.1008 [Amended]**

7c. Amend the newly designated 19.1008 in paragraphs (a), (b), and (c) by removing “The contracting officer shall insert” and adding “Insert” in their place; and in paragraph (b) by removing “19.1006(c)” and adding “19.1007(c)” in its place.

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**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES  
ADMINISTRATION**

**NATIONAL AERONAUTICS AND  
SPACE ADMINISTRATION**

**48 CFR Parts 32 and 52**

[FAC 97-16; FAR Case 1998-400 (98-400);  
Item II]

RIN 9000-AI27

**Federal Acquisition Regulation;  
Progress Payments and Related  
Financing Policies**

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

**ACTION:** Final rule.

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule

amending the Federal Acquisition Regulation (FAR) to reduce the burdens imposed on contractors and contracting officers by the progress payment type of financing; to permit the use of performance-based payments in contracts for research and development, and contracts awarded through competitive negotiation procedures; to expand the use of subcontractor performance-based and commercial financing payments; and to simplify and clarify related provisions.

**DATES:** *Effective Date:* March 27, 2000.

*Applicability Date:* The FAR, as amended by this rule, is mandatory for solicitations issued on or after May 26, 2000. Contracting officers may, at their discretion, include the clauses and provisions in this rule in solicitations issued before May 26, 2000.

**FOR FURTHER INFORMATION CONTACT:** The FAR Secretariat, Room 4035, GS Building, Washington, DC, 20405, (202) 501-4755, for information pertaining to status or publication schedules. For clarification of content, contact Mr. Jeremy Olson, at (202) 501-0692. Please cite FAC 97-16, FAR case 1998-400.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

The Director of Defense Procurement at the Department of Defense established a special interagency team to review existing policies and procedures related to progress payments to make them easier to understand and to minimize the burdens imposed on contractors and contracting officers. This Progress Payment Rewrite Team considered for revision or elimination those regulatory requirements pertaining to progress payments that were not required by statute, required to ensure adequately standardized Government business practices, or required to protect the public interest.

The Progress Payment Rewrite Team published an advance notice of proposed rulemaking (ANPR) in the *Federal Register* on May 1, 1997 (62 FR 23740). The ANPR solicited comments from industry and Government personnel on how the FAR could be revised to result in a simplified and streamlined process of applying for and administering progress payments.

After reviewing progress payment policies and public comments received in response to the ANPR, the team identified potential changes to the FAR. They published a second ANPR in the *Federal Register* on March 5, 1998 (63 FR 11074), that solicited comments on the potential changes identified in the notice. The ANPR also announced a public meeting, that was subsequently

held on April 23, 1998. After considering written comments received in response to the two notices, and verbal comments provided during the public meeting, the Progress Payment Rewrite Team submitted a report including a draft proposed rule for consideration by the Councils.

The Councils reviewed the team's recommendations and published a proposed rule in the *Federal Register* on February 10, 1999 (64 FR 6758). Fifteen respondents submitted public comments to the proposed rule. Several respondents expressed concern that the use of performance-based payments in competitive negotiations may lengthen the competitive process and complicate proposal evaluation. The Councils believe that potential procedural impacts are among the factors (along with such issues as the potential impact on small business competitiveness) that the contracting officer may consider when assessing the practicality of the use of performance-based payments under FAR 32.1001. However, the Councils also believe that performance-based payments can be used effectively in competitive negotiations, and that their use may attract new sources, including small businesses, whose accounting systems do not support cost-based financing. Consequently, the Councils concluded the existing FAR prohibition against use of performance-based payments in competitive negotiations is inappropriate. The final rule differs from the proposed rule by making a number of nonsubstantive, clarifying changes.

The final rule revises the FAR to:

1. *Ensure consideration of performance-based payments.* The rule emphasizes that—

(a) Performance-based payments are the preferred method of financing;

(b) Their use should be considered and deemed impracticable by the contracting officer before a decision is made to provide customary progress payments; and

(c) Each payment amount should represent what the contractor could reasonably be expected to incur to achieve the payment event rather than resemble an advance payment or a reward to the contractor for achieving performance levels over and above what is required for successful completion of the contract.

2. *Increase the threshold for contract financing and establish a threshold for individual progress payment requests.* To reduce the administrative burden that small dollar actions place on the contract administration and payment process, the final rule—

(a) Raises the dollar threshold for use of contract financing with large businesses from \$1 million to \$2 million; and

(b) Adds a minimum dollar threshold of \$2,500 for individual progress payment requests, unless a lower amount is authorized in accordance with agency procedures.

3. *Eliminate the "paid cost rule."* Prior to implementation of this final rule, a large business was required to pay a subcontractor before including the payment in its billings to the Government. This is referred to as the "paid cost rule." The final FAR rule allows a large business to include, in its billings, subcontract costs that it has incurred but not actually paid, provided the payment to the subcontractor will be made in accordance with the terms and conditions of a subcontract or invoice, and ordinarily prior to the submission of the contractor's next payment request to the Government.

4. *Permit subcontractor performance-based payments or commercial financing payments under prime contracts that have progress payments or cost-reimbursement type of financing.* The final rule permits prime contractors that receive progress payments or cost-reimbursement type of payments to use performance-based payments or commercial financing payments with their subcontractors.

5. *Eliminate the limitation on general and administrative expenses.* The rule removes the limitation at FAR 32.503-7, which applies to only those contractors that have established an inventory suspense account under 48 CFR 9904.410, Allocation of Business Unit General and Administrative Expenses to Final Cost Objectives. This provision dates from 1979 and currently applies to very few remaining contractors.

6. *Eliminate the contracting officer review of quarterly statements.* The rule removes the requirement for the contracting officer to review quarterly statements under price revision or redeterminable contracts. This requirement is unnecessary, as the Government's interests are protected adequately by the contracting officer that has the responsibility for administering progress payments.

7. *Permit the use of performance-based payments in contracts for research and development, and in contracts awarded through competitive negotiation procedures.* The rule removes the prohibition against using performance-based payments type of financing in contracts for research and development, and contracts awarded

through competitive negotiation procedures.

8. *Simplify and clarify.* The rule also simplifies and clarifies the concept that, on a loss contract, application of the loss ratio constitutes the adjustment that ensures progress payments do not exceed the value of work performed; deletes the authorization for the Department of Defense to establish customary progress payment rates for foreign military sales (FMS) and flexible progress payments that differ from the customary rates cited in FAR 32.501-1(a) (DoD no longer uses flexible progress payments and does not intend to establish alternate rates for FMS); and makes a number of editorial changes.

This rule was not subject to Office of Management and Budget 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 Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration stated in the proposed rule that the rule was not expected 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 most contracts awarded to small entities have a dollar value less than the simplified acquisition threshold, and, therefore, do not require the progress payment or performance-based payment type of financing. However, some of the commentators expressed the concern that elimination of the "paid cost rule" may have a significant impact on a substantial number of small entities. Accordingly, even though an Initial Regulatory Flexibility Analysis had not been done, the Councils prepared a Final Regulatory Flexibility Analysis (FRFA) as a result of those comments. The FRFA is summarized as follows:

The small entities that may be impacted by elimination of the "paid cost rule" are subcontractors to large businesses. That is, the current FAR requires large businesses to pay its subcontractors by cash or check before the large business can request payment from the Government under cost reimbursement contracts or progress payments for amounts owed to subcontractors. The final rule will permit prime contractors to request payment of those amounts from the Government when it incurs a cost based on a request for payment from its subcontractors.

We do not have any reporting mechanisms or central data collections that reveal how many subcontractors may be impacted by

this rule. However, we have concluded that the number may be substantial.

In order to mitigate any potential impact this portion of the rule may have on small businesses, the Councils adopted a range of safeguards to provide further assurances that payments to subcontractors will not be delayed. These safeguards were adopted rather than merely applying the policies previously used for small businesses that permitted small business prime contractors to recognize subcontract costs immediately after they were incurred, even if they were not yet paid to the subcontractor. This final rule requires that both large and small business prime contractors pay these incurred subcontract amounts in accordance with the terms of the subcontract and ordinarily before submittal of the next payment request sent to the Government.

The FAR Secretariat has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

## C. Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 104-13) applies because the final rule contains information collection requirements.

1. *Office of Management and Budget (OMB) Control Number 9000-0010.* The final rule decreases the collection requirements under the previously approved OMB Control No. 9000-0010, since the rule raises the threshold for permitting contract financing in the form of progress payments based on costs, and establishes a dollar threshold for contractor requests for progress payments. OMB approved the revised information collection requirement through September 30, 2002. Estimated number of respondents: reduced from 27,000 to 18,090; yearly responses per respondent: 32 (unchanged); average time per response: 33 minutes (unchanged); total yearly burden hours: reduced from 475,000 to 318,384; frequency of report; on occasion.

2. *Office of Management and Budget (OMB) Control Number 9000-0138.* There is no net impact to the collection requirements currently approved under OMB Control No. 9000-0138. The increase in hours associated with the addition of the provision at FAR 52.232-28, Invitation to Propose Performance-Based Payments, is offset by the decrease in hours resulting from raising the contract dollar threshold for permitting performance-based payments.

## List of Subjects in 48 CFR Parts 32 and 52

Government procurement.

Dated: March 20, 2000.

**Edward C. Loeb,**

*Director, Federal Acquisition Policy Division.*

Therefore, DoD, GSA, and NASA amend 48 CFR parts 32 and 52 as set forth below:

1. The authority citation for 48 CFR parts 32 and 52 continues to read as follows:

**Authority:** 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

## PART 32—CONTRACT FINANCING

2. Revise section 32.104 to read as follows:

### 32.104 Providing contract financing.

(a) Prudent contract financing can be a useful working tool in Government acquisition by expediting the performance of essential contracts. Contracting officers must consider the criteria in this part in determining whether to include contract financing in solicitations and contracts. Resolve reasonable doubts by including contract financing in the solicitation. The contracting officer must—

(1) Provide Government financing only to the extent actually needed for prompt and efficient performance, considering the availability of private financing and the probable impact on working capital of the predelivery expenditures and production lead-times associated with the contract, or groups of contracts or orders (*e.g.*, issued under indefinite-delivery contracts, basic ordering agreements, or their equivalent);

(2) Administer contract financing so as to aid, not impede, the acquisition;

(3) Avoid any undue risk of monetary loss to the Government through the financing;

(4) Include the form of contract financing deemed to be in the Government's best interest in the solicitation (see 32.106 and 32.113); and

(5) Monitor the contractor's use of the contract financing provided and the contractor's financial status.

(b) If the contractor is a small business concern, the contracting officer must give special attention to meeting the contractor's contract financing need. However, a contractor's receipt of a certificate of competency from the Small Business Administration has no bearing on the contractor's need for or entitlement to contract financing.

(c) Subject to specific agency regulations and paragraph (d) of this section, the contracting officer—

(1) May provide customary contract financing in accordance with 32.113; and

(2) Must not provide unusual contract financing except as authorized in 32.114.

(d) Unless otherwise authorized by agency procedures, the contracting officer may provide contract financing in the form of performance-based payments (see subpart 32.10) or customary progress payments (see subpart 32.5) if the following conditions are met:

(1) The contractor—

(i) Will not be able to bill for the first delivery of products for a substantial time after work must begin (normally 4 months or more for small business concerns, and 6 months or more for others), and will make expenditures for contract performance during the pre-delivery period that have a significant impact on the contractor's working capital; or

(ii) Demonstrates actual financial need or the unavailability of private financing.

(2) If the contractor is not a small business concern—

(i) For an individual contract, the contract price is \$2 million or more; or

(ii) For an indefinite-delivery contract, a basic ordering agreement or a similar ordering instrument, the contracting officer expects the aggregate value of orders or contracts that individually exceed the simplified acquisition threshold to have a total value of \$2 million or more. The contracting officer must limit financing to those orders or contracts that exceed the simplified acquisition threshold.

(3) If the contractor is a small business concern—

(i) For an individual contract, the contract price exceeds the simplified acquisition threshold; or

(ii) For an indefinite-delivery contract, a basic ordering agreement or a similar ordering instrument, the contracting officer expects the aggregate value of orders or contracts to exceed the simplified acquisition threshold.

3. Amend section 32.106 in the introductory paragraph by removing "shall" and adding "must" in its place; and by revising paragraphs (a) and (b) to read as follows:

**32.106 Order of preference.**

\* \* \* \* \*

(a) Private financing without Government guarantee. It is not intended, however, that the contracting officer require the contractor to obtain private financing—

- (1) At unreasonable terms; or
- (2) From other agencies.

(b) Customary contract financing other than loan guarantees and certain advance payments (see 32.113).

\* \* \* \* \*

4. Add section 32.110 to read as follows:

**32.110 Payment of subcontractors under cost-reimbursement prime contracts.**

If the contractor makes financing payments to a subcontractor under a cost-reimbursement prime contract, the contracting officer should accept the financing payments as reimbursable costs of the prime contract only under the following conditions:

(a) The payments are made under the criteria in subpart 32.5 for customary progress payments based on costs, 32.202-1 for commercial item purchase financing, or 32.1003 for performance-based payments, as applicable.

(b) If customary progress payments are made, the payments do not exceed the progress payment rate in 32.501-1, unless unusual progress payments to the subcontractor have been approved in accordance with 32.501-2.

(c) If customary progress payments are made, the subcontractor complies with the liquidation principles of 32.503-8, 32.503-9, and 32.503-10.

(d) If performance-based payments are made, the subcontractor complies with the liquidation principles of 32.1004(d).

(e) The subcontract contains financing payments terms as prescribed in this part.

5. Revise the section heading at 32.112 to read as follows:

**32.112 Nonpayment of subcontractors under contracts for noncommercial items.**

\* \* \* \* \*

6. Revise section 32.113 to read as follows:

**32.113 Customary contract financing.**

The solicitation must specify the customary contract financing offerors may propose. The following are customary contract financing when provided in accordance with this part and agency regulations:

(a) Financing of shipbuilding, or ship conversion, alteration, or repair, when agency regulations provide for progress payments based on a percentage or stage of completion.

(b) Financing of construction or architect-engineer services purchased under the authority of part 36.

(c) Financing of contracts for supplies or services awarded under the sealed bid method of procurement in accordance with part 14 through progress payments based on costs in accordance with subpart 32.5.

(d) Financing of contracts for supplies or services awarded under the

competitive negotiation method of procurement in accordance with part 15, through either progress payments based on costs in accordance with subpart 32.5, or performance-based payments in accordance with subpart 32.10 (but not both).

(e) Financing of contracts for supplies or services awarded under a sole-source acquisition as defined in part 6 and using the procedures of part 15, through either progress payments based on costs in accordance with subpart 32.5, or performance-based payments in accordance with subpart 32.10 (but not both).

(f) Financing of contracts for supplies or services through advance payments in accordance with subpart 32.4.

(g) Financing of contracts for supplies or services through guaranteed loans in accordance with subpart 32.3.

(h) Financing of contracts for supplies or services through any appropriate combination of advance payments, guaranteed loans, and either performance-based payments or progress payments (but not both) in accordance with their respective subparts.

7. Amend section 32.205 in the introductory text of paragraph (b) by removing "shall" each time it is used (twice) and adding "must" in its place; and by revising the first sentence of paragraph (c)(4) to read as follows:

**32.205 Procedures for offeror-proposed commercial contract financing.**

\* \* \* \* \*

(c) \* \* \*

(4) The contracting officer must calculate the time value of proposal-specified contract financing arrangements using as the interest rate the nominal discount rate specified in Appendix C of the Office of Management and Budget (OMB) Circular A-94, "Guidelines and Discount Rates for Benefit-Cost Analysis of Federal Programs", appropriate to the period of contract financing. \* \* \*

8. Amend section 32.500 by revising paragraph (a) to read as follows:

**32.500 Scope of subpart.**

\* \* \* \* \*

(a) Payments under cost-reimbursement contracts, but see 32.110 for progress payments made to subcontractors under cost-reimbursement prime contracts; or

\* \* \* \* \*

9. Revise section 32.501-1 to read as follows:

**32.501-1 Customary progress payment rates.**

(a) The customary progress payment rate is 80 percent, applicable to the total

costs of performing the contract. The customary rate for contracts with small business concerns is 85 percent.

(b) The contracting officer must—

(1) Consider any rate higher than those permitted in paragraph (a) of this section an unusual progress payment; and

(2) Not include a higher rate in a contract unless advance agency approval is obtained as prescribed in 32.501-2.

(c) When advance payments and progress payments are authorized under the same contract, the contracting officer must not authorize a progress payment rate higher than the customary rate.

(d) In accordance with 10 U.S.C. 2307(e)(2) and 41 U.S.C. 255, the limit for progress payments is 80 percent on work accomplished under undefinitized contract actions. The contracting officer must not authorize a higher rate under unusual progress payments or other customary progress payments for the undefinitized actions.

10. Revise section 32.502-1 to read as follows:

**32.502-1 Use of customary progress payments.**

The contracting officer may use a Progress Payments clause in solicitations and contracts, in accordance with this subpart. The contracting officer must reject as nonresponsive bids conditioned on progress payments when the solicitation did not provide for progress payments.

11. Revise section 32.502-4 to read as follows:

**32.502-4 Contract clauses.**

(a)(1) Insert the clause at 52.232-16, Progress Payments, in—

(i) Solicitations that may result in contracts providing for progress payments based on costs; and

(ii) Fixed-price contracts under which the Government will provide progress payments based on costs.

(2) If advance agency approval has been given in accordance with 32.501-1, the contracting officer may substitute a different customary rate for other than small business concerns for the progress payment and liquidation rate indicated.

(3) If an unusual progress payment rate is approved for the prime contractor (see 32.501-2), substitute the approved rate for the customary rate in paragraphs (a)(1), (a)(5), and (b) of the clause.

(4) If the liquidation rate is changed from the customary progress payment rate (see 32.503-8 and 32.503-9), substitute the new rate for the rate in paragraphs (a)(1), (a)(5), and (b) of the clause.

(5) If an unusual progress payment rate is approved for a subcontract (see 32.504(c) and 32.501-2), modify paragraph (j)(6) of the clause to specify the new rate, the name of the subcontractor, and that the new rate shall be used for that subcontractor in lieu of the customary rate.

(b) If the contractor is a small business concern, use the clause with its Alternate I.

(c) If the contract is a letter contract, use the clause with its Alternate II.

(d) If the contractor is not a small business concern, and progress payments are authorized under an indefinite-delivery contract, basic ordering agreement, or their equivalent, use the clause with its Alternate III.

(e) If the nature of the contract necessitates separate progress payment rates for portions of work that are clearly severable and accounting segregation would be maintained (e.g., annual production requirements), describe the application of separate progress payment rates in a supplementary special provision within the contract. The contractor must submit separate progress payment requests and subsequent invoices for the severable portions of work in order to maintain accounting integrity.

12. Revise section 32.503-1 to read as follows:

**32.503-1 Contractor requests.**

Each contractor request for progress payment must—

(a) Be submitted on Standard Form 1443, Contractor's Request for Progress Payment, in accordance with the form instructions and the contract terms;

(b) Include any additional information reasonably requested by the contracting officer; and

(c) Be \$2,500 or more, unless agency procedures authorize a lower amount.

13. Amend section 32.503-5 by revising paragraph (c) to read as follows:

**32.503-5 Administration of progress payments.**

\* \* \* \* \*

(c) Under indefinite-delivery contracts, the contracting officer should administer progress payments made under each individual order as if the order constituted a separate contract, unless agency procedures provide otherwise.

14. Amend section 32.503-6 in paragraph (e)(3) by removing "paragraph (a)(2)" and adding "paragraph (a)(3)" in its place; and by revising paragraphs (f) and (g)(4) to read as follows:

**32.503-6 Suspension or reduction of payments.**

\* \* \* \* \*

(f) *Fair value of undelivered work.* Progress payments must be commensurate with the fair value of work accomplished in accordance with contract requirements. Governed by the principles of paragraphs (c) and (e) of this subsection, the contracting officer must adjust progress payments when necessary to ensure that the fair value of undelivered work equals or exceeds the amount of unliquidated progress payments. On loss contracts, the application of a loss ratio as described in paragraph (g) of this subsection constitutes this adjustment.

(g) \* \* \*

(4) The following is an example of the supplementary analysis required in paragraph (g)(3) of this subsection:

Section I	
Contract price .....	\$2,850,000
Change orders and unpriced orders (to extent funds have been obligated) .....	150,000
Revised contract price .....	3,000,000
Section II	
Total costs incurred to date .....	2,700,000
Estimated additional costs to complete .....	900,000
Total costs to complete .....	3,600,000

$$\text{Loss ratio factor } \frac{\$3,000,000}{\$3,600,000} = 83.3\%$$

Total costs eligible for progress payments .....	2,700,000
Loss ratio factor .....	×83.3%
Recognized costs for progress payments .....	2,249,100
Progress payment rate .....	×80.0%
Alternate amount to be used .....	1,799,280

Section III	
Factored costs of items delivered* .....	750,000
Recognized costs applicable to undelivered items (\$2,249,100-750,000) .....	1,499,100

\*This amount must be the same as the contract price of the items delivered.

**32.503-7 [Reserved]**

15. Remove and reserve section 32.503-7.

16. Revise section 32.503-8 to read as follows:

**32.503-8 Liquidation rates—ordinary method.**

The Government recoups progress payments through the deduction of liquidations from payments that would otherwise be due to the contractor for completed contract items. To determine the amount of the liquidation, the contracting officer applies a liquidation rate to the contract price of contract

items delivered and accepted. The ordinary method is that the liquidation rate is the same as the progress payment rate. At the beginning of a contract, the contracting officer must use this method.

17. Amend section 32.503-10 in the introductory text of paragraph (a) by removing "shall" and adding "must" in its place; by revising paragraph (b)(1); in paragraph (b)(2) by removing "shall" and adding "must" in its place; and by revising paragraph (b)(3) to read as follows:

**32.503-10 Establishing alternate liquidation rates.**

\* \* \* \* \*

(b) \* \* \*

(1) The contracting officer must compute the expected progress payments by multiplying the estimated cost of performing the contract by the progress payment rate.

\* \* \* \* \*

(3) The following are examples of the computation. Assuming an estimated price of \$2,200,000 and total estimated costs eligible for progress payments of \$2,000,000:

(i) If the progress payment rate is 80 percent, the minimum liquidation rate should be 72.7 percent, computed as follows:

$$\frac{\$2,000,000 \times 80\%}{\$2,200,000} = 72.7\%$$

(ii) If the progress payment rate is 85 percent, the minimum liquidation rate should be 77.3 percent, computed as follows:

$$\frac{\$2,000,000 \times 85\%}{\$2,200,000} = 77.3\%$$

\* \* \* \* \*

**32.503-13 [Reserved]**

18. Remove and reserve section 32.503-13.

19. Revise the section heading and text of section 32.504 to read as follows:

**32.504 Subcontracts under prime contracts providing progress payments.**

(a) Subcontracts may include either performance-based payments, provided they meet the criteria in 32.1003, or progress payments, provided they meet the criteria in subpart 32.5 for customary progress payments, but not both. Subcontracts for commercial purchases may include commercial item purchase financing terms, provided they meet the criteria in 32.202-1.

(b) The contractor's requests for progress payments may include the full amount of commercial item purchase financing payments, performance-based

payments, or progress payments to a subcontractor, whether paid or unpaid, provided that unpaid amounts are limited to amounts that the contractor will pay—

(1) In accordance with the terms and conditions of a subcontract or invoice; and

(2) Ordinarily prior to the submission of the contractor's next progress payment request to the Government.

(c) If the contractor is considering making unusual progress payments to a subcontractor, the parties will be guided by the policies in 32.501-2. If the Government approves unusual progress payments for the subcontract, the contracting officer must issue a contract modification to specify the new rate in paragraph (j)(6) of the clause at 52.232-16, Progress Payments, in the prime contract. This will allow the contractor to include the progress payments to the subcontractor in the cost basis for progress payments by the Government. This modification is not a deviation and does not require the clearance prescribed in 32.502-2(b).

(d) The contractor has a duty to ensure that financing payments to subcontractors conform to the standards and principles prescribed in paragraph (j) of the Progress Payments clause in the prime contract. Although the contracting officer should, to the extent appropriate, review the subcontract as part of the overall administration of progress payments in the prime contract, there is no special requirement for contracting officer review or consent merely because the subcontract includes financing payments, except as provided in paragraph (c) of this section. However, the contracting officer must ensure that the contractor has installed the necessary management control systems, including internal audit procedures.

(e) When financing payments are in the form of progress payments, the Progress Payments clause at 52.232-16 requires that the subcontract include the substance of the Progress Payments clause in the prime contract, modified to indicate that the contractor, not the Government, awards the subcontract and administers the progress payments. The following exceptions apply to wording modifications:

(1) The subcontract terms on title to property under progress payments shall provide for vesting of title in the Government, not the contractor, as in paragraph (d) of the Progress Payments clause in the prime contract. A reference to the contractor may, however, be substituted for "Government" in paragraph (d)(2)(iv) of the clause.

(2) In the subcontract terms on reports and access to records, the contractor shall not delete the references to "Contracting Officer" and "Government" in adapting paragraph (g) of the Progress Payments clause in the contract, but may expand the terms as follows:

(i) The term "Contracting Officer" may be changed to "Contracting Officer or Prime Contractor."

(ii) The term "the Government" may be changed to "the Government or Prime Contractor."

(3) The subcontract special terms regarding default shall include paragraph (h) of the Progress Payments clause in the contract through its subdivision (i). The rest of paragraph (h) is optional.

(f) When financing payments are in the form of performance-based payments, the Performance-Based Payments clause at 52.232-32 requires that the subcontract terms include the substance of the Performance-Based Payments clause, modified to indicate that the contractor, not the Government, awards the subcontract and administers the performance-based payments, and include appropriately worded modifications similar to those noted in paragraph (e) of this section.

(g) When financing payments are in the form of commercial item purchase financing, the subcontract must include a contract financing clause structured in accordance with 32.206.

**20. Amend section 32.1000—**

a. In the introductory paragraph by removing the word "non-commercial" and adding "noncommercial" in its place;

b. At the end of paragraph (b) by adding "or" after the semicolon;

c. By removing paragraph (c) and redesignating paragraph

(d) as paragraph (c); and

d. By revising newly designated (c) to read as follows:

**32.1000 Scope of subpart.**

\* \* \* \* \*

(c) Contracts awarded through sealed bid procedures.

21. Revise section 32.1001 to read as follows:

**32.1001 Policy.**

(a) Performance-based payments are the preferred Government financing method when the contracting officer finds them practical, and the contractor agrees to their use.

(b) Performance-based payments are contract financing payments that are not payment for accepted items.

(c) Performance-based payments are fully recoverable, in the same manner as

progress payments, in the event of default. Except as provided in 32.1003(c), the contracting officer must not use performance-based payments when other forms of contract financing are provided.

(d) For Government accounting purposes, the Government should treat performance-based payments like progress payments based on costs under subpart 32.5.

(e) Performance-based payments are contract financing payments and, therefore, are not subject to the interest-penalty provisions of prompt payment (see subpart 32.9). However, each agency must make these payments in accordance with the agency's policy for prompt payment of contract financing payments.

### 32.1003 [Amended]

22. Amend section 32.1003 in paragraph (b) by removing "(but see 32.1005(b))".

23. Revise the section headings and text of sections 32.1004 and 32.1005 to read as follows:

### 32.1004 Procedures.

Performance-based payments may be made either on a whole contract or on a deliverable item basis, unless otherwise prescribed by agency regulations. Financing payments to be made on a whole contract basis are applicable to the entire contract, and not to specific deliverable items. Financing payments to be made on a deliverable item basis are applicable to a specific individual deliverable item. (A deliverable item for these purposes is a separate item with a distinct unit price. Thus, a contract line item for 10 airplanes, with a unit price of \$1,000,000 each, has 10 deliverable items—the separate planes. A contract line item for 1 lot of 10 airplanes, with a lot price of \$10,000,000, has only one deliverable item—the lot.)

(a) *Establishing performance bases.* (1) The basis for performance-based payments may be either specifically described events (e.g., milestones) or some measurable criterion of performance. Each event or performance criterion that will trigger a finance payment must be an integral and necessary part of contract performance and must be identified in the contract, along with a description of what constitutes successful performance of the event or attainment of the performance criterion. The signing of contracts or modifications, the exercise of options, or other such actions must not be events or criteria for performance-based payments. An event need not be a critical event in order to

trigger a payment, but the Government must be able to readily verify successful performance of each such event or performance criterion.

(2) Events or criteria may be either severable or cumulative. The successful completion of a severable event or criterion is independent of the accomplishment of any other event or criterion. Conversely, the successful accomplishment of a cumulative event or criterion is dependent upon the previous accomplishment of another event. A contract may provide for more than one series of severable and/or cumulative performance events or criteria performed in parallel. The contracting officer must include the following in the contract:

(i) The contract must not permit payment for a cumulative event or criterion until the dependent event or criterion has been successfully completed.

(ii) The contract must specifically identify severable events or criteria.

(iii) The contract must identify which events or criteria are preconditions for the successful achievement of each cumulative event or criterion.

(iv) Because performance-based payments are contract financing, events or criteria must not serve as a vehicle to reward the contractor for completion of performance levels over and above what is required for successful completion of the contract.

(v) If payment of performance-based finance amounts is on a deliverable item basis, each event or performance criterion must be part of the performance necessary for that deliverable item and must be identified to a specific contract line item or subtitle item.

(b) *Establishing performance-based finance payment amounts.* (1) The contracting officer must establish a complete, fully defined schedule of events or performance criteria and payment amounts when negotiating contract terms. If a contract action significantly affects the price, or event or performance criterion, the contracting officer responsible for pricing the contract modification must adjust the performance-based payment schedule appropriately.

(2) Total performance-based payments must—

(i) Reflect prudent contract financing provided only to the extent needed for contract performance (see 32.104(a)); and

(ii) Not exceed 90 percent of the contract price if on a whole contract basis, or 90 percent of the delivery item price if on a delivery item basis.

(3) The contract must specifically state the amount of each performance-based payment either as a dollar amount or as a percentage of a specifically identified price (e.g., contract price, or unit price of the deliverable item). The payment of contract financing has a cost to the Government in terms of interest paid by the Treasury to borrow funds to make the payment. Because the contracting officer has wide discretion as to the timing and amount of the performance-based payments, the contracting officer must ensure that—

(i) The total contract price is fair and reasonable, all factors considered; and

(ii) Performance-based payment amounts are commensurate with the value of the performance event or performance criterion, and are not expected to result in an unreasonably low or negative level of contractor investment in the contract. To confirm sufficient investment, the contracting officer may request expenditure profile information from offerors, but only if other information in the proposal, or information otherwise available to the contracting officer, is expected to be insufficient.

(4) Unless agency procedures prescribe the bases for establishing performance-based payment amounts, contracting officers may establish them on any rational basis, including (but not limited to)—

(i) Engineering estimates of stages of completion;

(ii) Engineering estimates of hours or other measures of effort to be expended in performance of an event or achievement of a performance criterion; or

(iii) The estimated projected cost of performance of particular events.

(5) When subsequent contract modifications are issued, the contracting officer must adjust the performance-based payment schedule as necessary to reflect the actions required by those contract modifications.

(c) *Instructions for multiple appropriations.* If there is more than one appropriation account (or subaccount) funding payments on the contract, the contracting officer must provide instructions to the Government payment office for distribution of financing payments to the respective funds accounts. Distribution instructions must be consistent with the contract's liquidation provisions.

(d) *Liquidating performance-based finance payments.* Performance-based amounts must be liquidated by deducting a percentage or a designated dollar amount from the delivery payments. The contracting officer must specify the liquidation rate or



designated dollar amount in the contract. The method of liquidation must ensure complete liquidation no later than final payment.

(1) If the contracting officer establishes the performance-based payments on a delivery item basis, the liquidation amount for each line item is the percent of that delivery item price that was previously paid under performance-based finance payments or the designated dollar amount.

(2) If the performance-based finance payments are on a whole contract basis, liquidation is by predesignated liquidation amounts or liquidation percentages.

(e) *Competitive negotiated solicitations.* (1) If a solicitation requests offerors to propose performance-based payments, the solicitation must specify—

(i) What, if any, terms must be included in all offers; and  
 (ii) The extent to which and how offeror-proposed performance-based payment terms will be evaluated. Unless agencies prescribe other evaluation procedures, if the contracting officer anticipates that the cost of providing performance-based payments would have a significant impact on determining the best value offer, the solicitation should include an adjustment of proposed prices to reflect the estimated cost to the Government of providing each offeror's proposed performance-based payments (see Alternate I to the provision at 52.232-28).

(2) The contracting officer must—  
 (i) Review the proposed terms to ensure they comply with this section; and  
 (ii) Use the adjustment method in 32.205(c) if the price is to be adjusted for evaluation purposes in accordance with paragraph (e)(1)(ii) of this section.

**32.1005 Solicitation provision and contract clause.**

(a) Insert the clause at 52.232-32, Performance-Based Payments, with the description of the basis for payment and liquidation as required in 32.1004 in—

(1) Solicitations that may result in contracts providing for performance-based payments; and  
 (2) Fixed-price contracts under which the Government will provide performance-based payments.

(b)(1) Insert the solicitation provision at 52.232-28, Invitation to Propose Performance-Based Payments, in negotiated solicitations that invite offerors to propose performance-based payments.

(2) Use the provision with its Alternate I in competitive negotiated

solicitations if the Government intends to adjust proposed prices for proposal evaluation purposes (see 32.1004(e)).

**32.1006 [Removed and Reserved]**

24. Remove and reserve section 32.1006.

**PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

25. Amend section 52.216-7 by—  
 a. Revising the date of the clause;  
 b. In the introductory text of paragraph (b)(1) by removing “subparagraph (2) below” and adding “paragraph (b)(2) of the clause” in its place;

c. Redesignating paragraphs (b)(1)(ii)(A) through (b)(1)(ii)(E) as (b)(1)(ii)(B) through (b)(1)(ii)(F);

d. Adding a new paragraph (b)(1)(ii)(A); and  
 e. Revising paragraphs (b)(1)(iii), (b)(2), and (c) to read as follows:

**52.216-7 Allowable Cost and Payment.**

\* \* \* \* \*  
 ALLOWABLE COST AND PAYMENT (MAR 2000)

\* \* \* \* \*  
 (b) \* \* \*  
 (1) \* \* \*  
 (ii) \* \* \*

(A) Supplies and services purchased directly for the contract and associated financing payments to subcontractors, provided payments will be made—

(1) In accordance with the terms and conditions of a subcontract or invoice; and  
 (2) Ordinarily prior to the submission of the Contractor's next payment request to the Government;

\* \* \* \* \*  
 (iii) The amount of financing payments that have been paid by cash, check, or other forms of payment to subcontractors.

(2) Accrued costs of Contractor contributions under employee pension plans shall be excluded until actually paid unless—

(i) The Contractor's practice is to make contributions to the retirement fund quarterly or more frequently; and

(ii) The contribution does not remain unpaid 30 days after the end of the applicable quarter or shorter payment period (any contribution remaining unpaid shall be excluded from the Contractor's indirect costs for payment purposes).

\* \* \* \* \*  
 (c) *Small business concerns.* A small business concern may receive more frequent payments than every 2 weeks.

\* \* \* \* \*  
 26. Amend section 52.216-26 by—  
 a. Revising the introductory paragraph and the date of the clause;

b. Removing “shall” and adding “will” in the introductory text of paragraph (a) of the clause; and

c. Revising paragraphs (a)(1), (d)(2), (d)(3), and (e) of the clause to read as follows:

**52.216-26 Payments of Allowable Costs Before Definitization.**

As prescribed in 16.603-4(c), insert the following clause:

**PAYMENTS OF ALLOWABLE COSTS BEFORE DEFINITIZATION (MAR 2000)**

\* \* \* \* \*

(a) \* \* \*  
 (1) One hundred percent of approved costs representing financing payments to subcontractors under fixed-price subcontracts, provided that the Government's payments to the Contractor will not exceed 80 percent of the allowable costs of those subcontractors.

\* \* \* \* \*

(d) \* \* \*  
 (2) When the Contractor is not delinquent in payment of costs of contract performance in the ordinary course of business, costs incurred, but not necessarily paid, for—  
 (i) Supplies and services purchased directly for the contract, provided payments will be made—

(A) In accordance with the terms and conditions of a subcontract or invoice; and  
 (B) Ordinarily prior to the submission of the Contractor's next payment request to the Government;

(ii) Materials issued from the Contractor's stores inventory and placed in the production process for use on the contract;  
 (iii) Direct labor;  
 (iv) Direct travel;  
 (v) Other direct in-house costs; and  
 (vi) Properly allocable and allowable indirect costs as shown on the records maintained by the Contractor for purposes of obtaining reimbursement under Government contracts; and

(3) The amount of financing payments that the Contractor has paid by cash, check, or other forms of payment to subcontractors.

(e) *Small business concerns.* A small business concern may receive more frequent payments than every 2 weeks.

\* \* \* \* \*

27. Amend section 52.232-7 by revising the date of the clause; in the introductory paragraph by removing “shall” and adding “will” in its place; and by revising paragraph (b) and Alternate I of the clause to read as follows:

**52.232-7 Payments under Time-and-Materials and Labor-Hour Contracts.**

\* \* \* \* \*

**PAYMENTS UNDER TIME-AND-MATERIALS AND LABOR-HOUR CONTRACTS (MAR 2000)**

\* \* \* \* \*

(b) *Materials and subcontracts.* (1) The Contracting Officer will determine allowable costs of direct materials in accordance with Subpart 31.2 of the Federal Acquisition Regulation (FAR) in effect on the date of this contract. Direct materials, as used in this clause, are those materials that enter directly



into the end product, or that are used or consumed directly in connection with the furnishing of the end product.

(2) The Contractor may include reasonable and allocable material handling costs in the charge for material to the extent they are clearly excluded from the hourly rate.

Material handling costs are comprised of indirect costs, including, when appropriate, general and administrative expense allocated to direct materials in accordance with the Contractor's usual accounting practices consistent with Subpart 31.2 of the FAR.

(3) The Government will reimburse the Contractor for items and services purchased directly for the contract only when payments of cash, checks, or other forms of payment have been made for such purchased items or services.

(4)(i) The Government will reimburse the Contractor for costs of subcontracts that are authorized under the subcontracts clause of this contract, provided that the costs are consistent with paragraph (b)(5) of this clause.

(ii) The Government will limit reimbursable costs in connection with subcontracts to the amounts paid for items and services purchased directly for the contract only when the Contractor has made or will make payments of cash, checks, or other forms of payment to the subcontractor—

(A) In accordance with the terms and conditions of a subcontract or invoice; and

(B) Ordinarily prior to the submission of the Contractor's next payment request to the Government.

(iii) The Government will not reimburse the Contractor for any costs arising from the letting, administration, or supervision of performance of the subcontract, if the costs are included in the hourly rates payable under paragraph (a)(1) of this clause.

(5) To the extent able, the Contractor shall—

(i) Obtain materials at the most advantageous prices available with due regard to securing prompt delivery of satisfactory materials; and

(ii) Take all cash and trade discounts, rebates, allowances, credits, salvage, commissions, and other benefits. When unable to take advantage of the benefits, the Contractor shall promptly notify the Contracting Officer and give the reasons. The Contractor shall give credit to the Government for cash and trade discounts, rebates, scrap, commissions, and other amounts that have accrued to the benefit of the Contractor, or would have accrued except for the fault or neglect of the Contractor. The Contractor shall not deduct from gross costs the benefits lost without fault or neglect on the part of the Contractor, or lost through fault of the Government.

\* \* \* \* \*

(End of clause)

*Alternate I (Mar 2000).* If the nature of the work to be performed requires the Contractor to furnish material that the Contractor regularly sells to the general public in the normal course of business, and the price is under the limitations prescribed in 16.601(b)(3), add the following paragraph (6) to paragraph (b) of the basic clause:

(b)(6) If the nature of the work to be performed requires the Contractor to furnish material that the Contractor regularly sells to the general public in the normal course of business, the price to be paid for such material, notwithstanding the other requirements of this paragraph (b), shall be on the basis of an established catalog or list price, in effect when the material is furnished, less all applicable discounts to the Government, provided that in no event shall such price be in excess of the Contractor's sales price to its most favored customer for the same item in like quantity, or the current market price, whichever is lower.

\* \* \* \* \*

28. Amend section 52.232-16 by—

a. Removing the introductory text, consisting of paragraphs (a) through (e) and adding in its place a prescription;

b. Revising the date of the clause;

c. Revising the introductory text of the clause;

d. Revising paragraphs (a)(1) and (a)(2) of the clause;

e. Redesignating paragraphs (a)(3) through (a)(6) of the clause as (a)(4) through (a)(7) and adding new paragraphs (a)(3) and (a)(8);

f. Revising the introductory text of newly redesignated paragraph (a)(4);

g. Revising paragraph (j) of the clause; and

h. Revising Alternate I and adding Alternate III to read as follows:

**52.232-16 Progress Payments.**

As prescribed in 32.502-4(a), insert the following clause:

**PROGRESS PAYMENTS (MAR 2000)**

The Government will make progress payments to the Contractor when requested as work progresses, but not more frequently than monthly, in amounts of \$2,500 or more approved by the Contracting Officer, under the following conditions:

(a) *Computation of amounts.* (1) Unless the Contractor requests a smaller amount, the Government will compute each progress payment as 80 percent of the Contractor's total costs incurred under this contract whether or not actually paid, plus financing payments to subcontractors (see paragraph (j) of this clause), less the sum of all previous progress payments made by the Government under this contract. The Contracting Officer will consider cost of money that would be allowable under FAR 31.205-10 as an incurred cost for progress payment purposes.

(2) The amount of financing and other payments for supplies and services purchased directly for the contract are limited to the amounts that have been paid by cash, check, or other forms of payment, or that will be paid to subcontractors—

(i) In accordance with the terms and conditions of a subcontract or invoice; and

(ii) Ordinarily prior to the submission of the Contractor's next payment request to the Government.

(3) The Government will exclude accrued costs of Contractor contributions under employee pension plans until actually paid unless—

(i) The Contractor's practice is to make contributions to the retirement fund quarterly or more frequently; and

(ii) The contribution does not remain unpaid 30 days after the end of the applicable quarter or shorter payment period (any contribution remaining unpaid shall be excluded from the Contractor's total costs for progress payments until paid).

(4) The Contractor shall not include the following in total costs for progress payment purposes in paragraph (a)(1) of this clause:

\* \* \* \* \*

(8) Notwithstanding any other terms of the contract, the Contractor agrees not to request progress payments in dollar amounts of less than \$2,500. The Contracting Officer may make exceptions.

\* \* \* \* \*

(j) *Financing payments to subcontractors.* The financing payments to subcontractors mentioned in paragraphs (a)(1) and (a)(2) of this clause shall be all financing payments to subcontractors or divisions, if the following conditions are met:

(1) The amounts included are limited to—

(i) The unliquidated remainder of financing payments made; plus

(ii) Any unpaid subcontractor requests for financing payments.

(2) The subcontract or interdivisional order is expected to involve a minimum of approximately 6 months between the beginning of work and the first delivery; or, if the subcontractor is a small business concern, 4 months.

(3) If the financing payments are in the form of progress payments, the terms of the subcontract or interdivisional order concerning progress payments—

(i) Are substantially similar to the terms of this clause for any subcontractor that is a large business concern, or this clause with its Alternate I for any subcontractor that is a small business concern;

(ii) Are at least as favorable to the Government as the terms of this clause;

(iii) Are not more favorable to the subcontractor or division than the terms of this clause are to the Contractor;

(iv) Are in conformance with the requirements of FAR 32.504(e); and

(v) Subordinate all subcontractor rights concerning property to which the Government has title under the subcontract to the Government's right to require delivery of the property to the Government if—

(A) The Contractor defaults; or

(B) The subcontractor becomes bankrupt or insolvent.

(4) If the financing payments are in the form of performance-based payments, the terms of the subcontract or interdivisional order concerning payments—

(i) Are substantially similar to the Performance-Based Payments clause at FAR 52.232-32 and meet the criteria for, and definition of, performance-based payments in FAR Part 32;

(ii) Are in conformance with the requirements of FAR 32.504(f); and

(iii) Subordinate all subcontractor rights concerning property to which the Government has title under the subcontract to the Government's right to require delivery of the property to the Government if—

(A) The Contractor defaults; or  
(B) The subcontractor becomes bankrupt or insolvent.

(5) If the financing payments are in the form of commercial item financing payments, the terms of the subcontract or interdivisional order concerning payments—

(i) Are constructed in accordance with FAR 32.206(c) and included in a subcontract for a commercial item purchase that meets the definition and standards for acquisition of commercial items in FAR Parts 2 and 12;

(ii) Are in conformance with the requirements of FAR 32.504(g); and

(iii) Subordinate all subcontractor rights concerning property to which the Government has title under the subcontract to the Government's right to require delivery of the property to the Government if—

(A) The Contractor defaults; or

(B) The subcontractor becomes bankrupt or insolvent.

(6) If financing is in the form of progress payments, the progress payment rate in the subcontract is the customary rate used by the contracting agency, depending on whether the subcontractor is or is not a small business concern.

(7) Concerning any proceeds received by the Government for property to which title has vested in the Government under the subcontract terms, the parties agree that the proceeds shall be applied to reducing any unliquidated financing payments by the Government to the Contractor under this contract.

(8) If no unliquidated financing payments to the Contractor remain, but there are unliquidated financing payments that the Contractor has made to any subcontractor, the Contractor shall be subrogated to all the rights the Government obtained through the terms required by this clause to be in any subcontract, as if all such rights had been assigned and transferred to the Contractor.

(9) To facilitate small business participation in subcontracting under this contract, the Contractor shall provide financing payments to small business concerns, in conformity with the standards for customary contract financing payments stated in FAR 32.113. The Contractor shall not consider the need for such financing payments as a handicap or adverse factor in the award of subcontracts.

\* \* \* \* \*

(End of clause)

*Alternate I (Mar 2000).* If the contract is with a small business concern, change each mention of the progress payment and liquidation rates excepting paragraph (k) to the customary rate of 85 percent for small business concerns (see FAR 32.501-1).

\* \* \* \* \*

*Alternate III (Mar 2000).* As prescribed in 32.502-4(d), add the following paragraph (l) to the basic clause. If Alternate II is also being used, redesignate the following paragraph as paragraph (n):

(l) The provisions of this clause will not be applicable to individual orders at or below the simplified acquisition threshold.

29. Add section 52.232-28 to read as follows:

#### **52.232-28 Invitation to Propose Performance-Based Payments.**

As prescribed in 32.1005(b)(1), insert the following provision:

#### **Invitation to Propose Performance-Based Payments (Mar 2000)**

(a) The Government invites the offeror to propose terms under which the Government will make performance-based contract financing payments during contract performance. The Government will consider performance-based payment financing terms proposed by the offeror in the evaluation of the offeror's proposal. The Contracting Officer will incorporate the financing terms of the successful offeror and the FAR clause, Performance-Based Payments, at FAR 52.232-32, in any resulting contract.

(b) In the event of any conflict between the terms proposed by the offeror and the terms in the clause at FAR 52.232-32, Performance-Based Payments, the terms of the clause at FAR 52.232-32 shall govern.

(c) The Contracting Officer will not accept the offeror's proposed performance-based payment financing if the financing does not conform to the following limitations:

(1) The Government will make delivery payments only for supplies delivered and accepted, or services rendered and accepted in accordance with the payment terms of this contract.

(2) The terms and conditions of the performance-based payments must—

(i) Comply with FAR 32.1004;

(ii) Be reasonable and consistent with all other technical and cost information included in the offeror's proposal; and

(iii) Their total shall not exceed 90 percent of the contract price if on a whole contract basis, or 90 percent of the delivery item price if on a delivery item basis.

(3) The terms and conditions of the performance-based financing must be in the best interests of the Government.

(d) The offeror's proposal of performance-based payment financing shall include the following:

(1) The proposed contractual language describing the performance-based payments (see FAR 32.1004 for appropriate criteria for establishing performance bases and performance-based finance payment amounts).

(2) A listing of—

(i) The projected performance-based payment dates and the projected payment amounts; and

(ii) The projected delivery date and the projected payment amount.

(3) Information addressing the Contractor's investment in the contract.

(e) Evaluation of the offeror's proposed prices and financing terms will include whether the offeror's proposed performance-based payment events and payment amounts are reasonable and consistent with all other terms and conditions of the offeror's proposal.

(End of provision)

*Alternate I (Mar 2000).* As prescribed in FAR 32.1005(b)(2), add the following paragraph (f) to the basic provision:

(f) The Government will adjust each proposed price to reflect the cost of providing

the proposed performance-based payments to determine the total cost to the Government of that particular combination of price and performance-based financing. The Government will make the adjustment using the procedure described in FAR 32.205(c).

[FR Doc. 00-7309 Filed 3-24-00; 8:45 am]

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## **DEPARTMENT OF DEFENSE**

### **GENERAL SERVICES ADMINISTRATION**

### **NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

#### **48 CFR Parts 1, 6, 9, 15, and 52**

[FAC 97-16; Item III]

#### **Federal Acquisition Regulation; Technical Amendments**

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

**ACTION:** Technical amendments.

**SUMMARY:** This document makes amendments to the Federal Acquisition Regulation in order to update references and make editorial changes.

**EFFECTIVE DATE:** March 27, 2000.

**FOR FURTHER INFORMATION CONTACT:** The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405, (202) 501-4755.

#### **List of Subjects in 48 CFR Parts 1, 6, 9, 15, and 52**

Government procurement.

Dated: March 20, 2000.

**Edward C. Loeb,**

*Director, Federal Acquisition Policy Division.*

Therefore, DoD, GSA, and NASA amend 48 CFR Parts 1, 6, 9, 15, and 52 as set forth below:

1. The authority citation for 48 CFR Parts 1, 6, 9, 15, and 52 continues to read as follows:

**Authority:** 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

#### **PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM**

2. Amend section 1.106 in the table following the introductory paragraph by adding entries 23.9, 52.223-13, and 52.223-14, and by revising entry 52.247-64 to read as follows:

#### **1.106 OMB approval under the Paperwork Reduction Act.**

\* \* \* \* \*