SUBCHAPTER E—GENERAL CONTRACTING REQUIREMENTS

PART 27—PATENTS, DATA, AND COPYRIGHTS

AUTHORITY: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

SOURCE: 72 FR 63049, Nov. 7, 2007, unless otherwise noted.

27.000 Scope of part.

This part prescribes the policies, procedures, solicitation provisions, and contract clauses pertaining to patents, data, and copyrights.

27.001 Definition.

United States, as used in this part, means the 50 States and the District of Columbia, U.S. territories and possessions, Puerto Rico, and the Northern Mariana Islands.

Subpart 27.1—General

27.101 Applicability.

This part applies to all agencies. However, agencies are authorized to adopt alternative policies, procedures, solicitation provisions, and contract clauses to the extent necessary to meet the specific requirements of laws, executive orders, treaties, or international agreements. Any agency adopting alternative policies, procedures, solicitation provisions, and contract clauses should include them in the agency's published regulations.

27.102 General guidance.

(a) The Government encourages the maximum practical commercial use of inventions made under Government contracts.

(b) Generally, the Government will not refuse to award a contract on the grounds that the prospective contractor may infringe a patent. The Government may authorize and consent to the use of inventions in the performance of certain contracts, even though the inventions may be covered by U.S. patents.

(c) Generally, contractors providing commercial items should indemnify the Government against liability for the infringement of U.S. patents.

(d) The Government recognizes rights in data developed at private expense, and limits its demands for delivery of that data. When such data is delivered, the Government will acquire only those rights essential to its needs.

(e) Generally, the Government requires that contractors obtain permission from copyright owners before including copyrighted works, owned by others, in data to be delivered to the Government.

Subpart 27.2—Patents and Copyrights

27.200 Scope of subpart.

This subpart prescribes policies and procedures with respect to—

(a) Patent and copyright infringement liability;

(b) Royalties;

(c) Security requirements for patent applications containing classified subject matter; and

(d) Patented technology under trade agreements.

27.201 Patent and copyright infringement liability.

27.201–1 General.

(a) Pursuant to 28 U.S.C. 1498, the exclusive remedy for patent or copyright infringement by or on behalf of the Government is a suit for monetary damages against the Government in the Court of Federal Claims. There is no injunctive relief available, and there is no direct cause of action against a contractor that is infringing a patent or copyright with the authorization or consent of the Government (*e.g.*, while performing a contract).

(b) The Government may expressly authorize and consent to a contractor's use or manufacture of inventions covered by U.S. patents by inserting the clause at 52.227–1, Authorization and Consent.

(c) Because of the exclusive remedies granted in 28 U.S.C. 1498, the Government requires notice and assistance from its contractors regarding any claims for patent or copyright infringement by inserting the clause at 52.227–2, Notice and Assistance, Regarding Patent and Copyright Infringement.

(d) The Government may require a contractor to reimburse it for liability for patent infringement arising out of a contract for commercial items by inserting the clause at FAR 52.227–3, Patent Indemnity.

27.201–2 Contract clauses.

(a)(1) Insert the clause at 52.227–1, Authorization and Consent, in solicitations and contracts except that use of the clause is—

(i) Optional when using simplified acquisition procedures; and

(ii) Prohibited when both complete performance and delivery are outside the United States.

(2) Use the clause with its Alternate I in all R&D solicitations and contracts for which the primary purpose is R&D work, except that this alternate shall

not be used in construction and architect-engineer contracts unless the contract calls exclusively for R&D work.

(3) Use the clause with its Alternate II in solicitations and contracts for communication services with a common carrier and the services are unregulated and not priced by a tariff schedule set by a regulatory body.

(b) Insert the clause at 52.227–2, Notice and Assistance Regarding Patent and Copyright Infringement, in all solicitations and contracts that include the clause at 52.227–1, Authorization and Consent.

(c)(1) Insert the clause at 52.227–3, Patent Indemnity, in solicitations and contracts that may result in the delivery of commercial items, unless—

(i) Part 12 procedures are used;

(ii) The simplified acquisition procedures of Part 13 are used;

(iii) Both complete performance and delivery are outside the United States; or

(iv) The contracting officer determines after consultation with legal counsel that omission of the clause would be consistent with commercial practice.

(2) Use the clause with either its Alternate I (identification of excluded items) or II (identification of included items) if—

(i) The contract also requires delivery of items that are not commercial items; or

(ii) The contracting officer determines after consultation with legal counsel that limitation of applicability of the clause would be consistent with commercial practice.

(3) Use the clause with its Alternate III if the solicitation or contract is for communication services and facilities where performance is by a common carrier, and the services are unregulated and are not priced by a tariff schedule set by a regulatory body.

(d)(1) Insert the clause at 52.227–4, Patent Indemnity—Construction Contracts, in solicitations and contracts for construction or that are fixed-price for dismantling, demolition, or removal of improvements. Do not insert the clause in contracts solely for architect-engineer services.

(2) If the contracting officer determines that the construction will necessarily involve the use of structures, products, materials, equipment, processes, or methods that are nonstandard, noncommercial, or special, the contracting officer may expressly exclude them from the patent indemnification by using the clause with its Alternate I. Note that this exclusion is for items, as distinguished from identified patents (see paragraph (e) of this subsection).

(e) It may be in the Government's interest to exempt specific U.S. patents from the patent indemnity clause. Exclusion from indemnity of identified patents, as distinguished from items, is the prerogative of the agency head. Upon written approval of the agency head, the contracting officer may insert the clause at 52.227–5, Waiver of Indemnity, in solicitations and contracts in addition to the appropriate patent indemnity clause.

(f) If a patent indemnity clause is not prescribed, the contracting officer may include one in the solicitation and contract if it is in the Government's interest to do so.

(g) The contracting officer shall not include in any solicitation or contract any clause whereby the Government agrees to indemnify a contractor for patent infringement.

27.202 Royalties.

27.202–1 Reporting of royalties.

(a) To determine whether royalties anticipated or actually paid under Government contracts are excessive, improper, or inconsistent with Government patent rights the solicitation provision at 52.227–6 requires prospective contractors to furnish royalty information. The contracting officer shall take appropriate action to reduce or eliminate excessive or improper royalties.

(b) If the response to a solicitation includes a charge for royalties, the contracting officer shall, before award of the contract, forward the information to the office having cognizance of patent matters for the contracting activity. The cognizant office shall promptly advise the contracting officer of appropriate action.

(c) The contracting officer, when considering the approval of a subcontract,

shall require royalty information if it is required under the prime contract. The contracting officer shall forward the information to the office having cognizance of patent matters. However, the contracting officer need not delay consent while awaiting advice from the cognizant office.

(d) The contracting officer shall forward any royalty reports to the office having cognizance of patent matters for the contracting activity.

27.202–2 Notice of Government as a licensee.

(a) When the Government is obligated to pay a royalty on a patent because of an existing license agreement and the contracting officer believes that the licensed patent will be applicable to a prospective contract, the Government should furnish the prospective offerors with—

(1) Notice of the license;

(2) The number of the patent; and

(3) The royalty rate cited in the license.

(b) When the Government is obligated to pay such a royalty, the solicitation should also require offerors to furnish information indicating whether or not each offeror is the patent owner or a licensee under the patent. This information is necessary so that the Government may either—

(1) Evaluate an offeror's price by adding an amount equal to the royalty; or

(2) Negotiate a price reduction with an offeror when the offeror is licensed under the same patent at a lower royalty rate.

27.202–3 Adjustment of royalties.

(a) If at any time the contracting officer believes that any royalties paid, or to be paid, under a contract or subcontract are inconsistent with Government rights, excessive, or otherwise improper, the contracting officer shall promptly report the facts to the office having cognizance of patent matters for the contracting activity concerned.

(b) In coordination with the cognizant office, the contracting officer shall promptly act to protect the Government against payment of royalties—

(1) With respect to which the Government has a royalty-free license;

(2) At a rate in excess of the rate at which the Government is licensed; or

(3) When the royalties in whole or in part otherwise constitute an improper charge.

(c) In appropriate cases, the contracting officer in coordination with the cognizant office shall demand a refund pursuant to any refund of royalties clause in the contract (see 27.202–4) or negotiate for a reduction of royalties.

(d) For guidance in evaluating information furnished pursuant to 27.202–1, see 31.205–37. See also 31.109 regarding advance understandings on particular cost items, including royalties.

27.202–4 Refund of royalties.

The clause at 52.227–9, Refund of Royalties, establishes procedures to pay the contractor royalties under the contract and recover royalties not paid by the contractor when the royalties were included in the contractor's fixed price.

27.202–5 Solicitation provisions and contract clause.

(a)(1) Insert a solicitation provision substantially the same as the provision at 52.227–6, Royalty Information, in—

(i) Any solicitation that may result in a negotiated contract for which royalty information is desired and for which certified cost or pricing data are obtained under 15.403; or

(ii) Sealed bid solicitations only if the need for such information is approved at a level above the contracting officer as being necessary for proper protection of the Government's interests.

(2) If the solicitation is for communication services and facilities by a common carrier, use the provision with its Alternate I.

(b) If the Government is obligated to pay a royalty on a patent involved in the prospective contract, insert in the solicitation a provision substantially the same as the provision at 52.227–7, Patents—Notice of Government Licensee. If the clause at 52.227–6 is not included in the solicitation, the contracting officer may require offerors to provide information sufficient to provide this notice to the other offerors.

(c) Insert the clause at 52.227–9, Refund of Royalties, in negotiated fixed-

price solicitations and contracts when royalties may be paid under the contract. If a fixed-price incentive contract is contemplated, change ''price'' to ''target cost and target profit'' wherever it appears in the clause. The clause may be used in cost-reimbursement contracts where agency approval of royalties is necessary to protect the Government's interests.

[72 FR 63049, Nov. 7, 2007, as amended at 75 FR 53149, Aug. 30, 2010]

27.203 Security requirements for patent applications containing classified subject matter.

27.203–1 General.

(a) Unauthorized disclosure of classified subject matter, whether in patent applications or resulting from the issuance of a patent, may be a violation of 18 U.S.C. 792, *et seq.* (Chapter 37—Espionage and Censorship), and related statutes, and may be contrary to the interests of national security.

(b) Upon receipt of a patent application under paragraph (a) or (b) of the clause at 52.227–10, Filing of Patent Applications—Classified Subject Matter, the contracting officer shall ascertain the proper security classification of the patent application. If the application contains classified subject matter, the contracting officer shall inform the contractor how to transmit the application to the United States Patent Office in accordance with procedures provided by legal counsel. If the material is classified ''Secret'' or higher, the contracting officer shall make every effort to notify the contractor within 30 days of the Government's determination, pursuant to paragraph (a) of the clause.

(c) Upon receipt of information furnished by the contractor under paragraph (d) of the clause at 52.227–10, the contracting officer shall promptly submit that information to legal counsel in order that the steps necessary to ensure the security of the application will be taken.

(d) The contracting officer shall act promptly on requests for approval of foreign filing under paragraph (c) of the clause at 52.227–10 in order to avoid the loss of valuable patent rights of the Government or the contractor.

27.203–2 Contract clause.

Insert the clause at 52.227–10, Filing of Patent Applications—Classified Subject Matter, in all classified solicitations and contracts and in all solicitations and contracts where the nature of the work reasonably might result in a patent application containing classified subject matter.

27.204 Patented technology under trade agreements.

27.204–1 Use of patented technology under the North American Free Trade Agreement.

(a) The requirements of this section apply to the use of technology covered by a valid patent when the patent holder is from a country that is a party to the North American Free Trade Agreement (NAFTA).

(b) Article 1709(10) of NAFTA generally requires a user of technology covered by a valid patent to make a reasonable effort to obtain authorization prior to use of the patented technology. However, NAFTA provides that this requirement for authorization may be waived in situations of national emergency or other circumstances of extreme urgency, or for public noncommercial use.

(c) Section 6 of Executive Order 12889, ''Implementation of the North American Free Trade Act,'' of December 27, 1993, waives the requirement to obtain advance authorization for an invention used or manufactured by or for the Federal Government. However, the patent owner shall be notified in advance whenever the agency or its contractor knows or has reasonable grounds to know, without making a patent search, that an invention described in and covered by a valid U.S. patent is or will be used or manufactured without a license. In cases of national emergency or other circumstances of extreme urgency, this notification need not be made in advance, but shall be made as soon as reasonably practicable.

(d) The contracting officer, in consultation with the office having cognizance of patent matters, shall ensure compliance with the notice requirements of NAFTA Article 1709(10) and Executive Order 12889. A contract

award should not be suspended pending notification to the patent owner.

(e) Section 6(c) of Executive Order 12889 provides that the notice to the patent owner does not constitute an admission of infringement of a valid privately-owned patent.

(f) When addressing issues regarding compensation for the use of patented technology, Government personnel should be advised that NAFTA uses the term ''adequate remuneration.'' Executive Order 12889 equates ''remuneration'' to ''reasonable and entire compensation'' as used in 28 U.S.C. 1498, the statute that gives jurisdiction to the U.S. Court of Federal Claims to hear patent and copyright cases involving infringement by the Government.

(g) When questions arise regarding the notice requirements or other matters relating to this section, the contracting officer should consult with legal counsel.

27.204–2 Use of patented technology under the General Agreement on Tariffs and Trade (GATT).

Article 31 of Annex 1C, Agreement on Trade-Related Aspects of Intellectual Property Rights, to GATT (Uruguay Round) addresses situations where the law of a member country allows for use of a patent without authorization, including use by the Government.

Subpart 27.3—Patent Rights under Government Contracts

27.300 Scope of subpart.

This subpart prescribes policies, procedures, solicitation provisions, and contract clauses pertaining to inventions made in the performance of work under a Government contract or subcontract for experimental, developmental, or research work. Agency policies, procedures, solicitation provisions, and contract clauses may be specified in agency supplemental regulations as permitted by law, including 37 CFR 401.1.

27.301 Definitions.

As used in this subpart—

Invention means any invention or discovery that is or may be patentable or otherwise protectable under title 35 of the U.S. Code, or any variety of plant that is or may be protectable under the Plant Variety Protection Act (7 U.S.C. 2321, *et seq.*)

Made means—

(1) When used in relation to any invention other than a plant variety, means the conception or first actual reduction to practice of the invention; or

(2) When used in relation to a plant variety, means that the contractor has at least tentatively determined that the variety has been reproduced with recognized characteristics.

Nonprofit organization means a university or other institution of higher education or an organization of the type described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)) and exempt from taxation under section 501(a) of the Internal Revenue Code (26 U.S.C. 501(a)), or any nonprofit scientific or educational organization qualified under a State nonprofit organization statute.

Practical application means to manufacture, in the case of a composition or product; to practice, in the case of a process or method; or to operate, in the case of a machine or system; and, in each case, under such conditions as to establish that the invention is being utilized and that its benefits are, to the extent permitted by law or Government regulations, available to the public on reasonable terms.

Subject invention means any invention of the contractor made in the performance of work under a Government contract.

27.302 Policy.

(a) *Introduction*. In accordance with chapter 18 of title 35, U.S.C. (as implemented by 37 CFR part 401), Presidential Memorandum on Government Patent Policy to the Heads of Executive Departments and Agencies dated February 18, 1983, and Executive Order 12591, Facilitating Access to Science and Technology dated April 10, 1987, it is the policy and objective of the Government to—

(1) Use the patent system to promote the use of inventions arising from federally supported research or development;

(2) Encourage maximum participation of industry in federally supported research and development efforts;

(3) Ensure that these inventions are used in a manner to promote free competition and enterprise without unduly encumbering future research and discovery;

(4) Promote the commercialization and public availability of the inventions made in the United States by United States industry and labor;

(5) Ensure that the Government obtains sufficient rights in federally supported inventions to meet the needs of the Government and protect the public against nonuse or unreasonable use of inventions; and

(6) Minimize the costs of administering patent policies.

(b) *Contractor right to elect title.* (1) Generally, pursuant to 35 U.S.C. 202 and the Presidential Memorandum and Executive order cited in paragraph (a) of this section, each contractor may, after required disclosure to the Government, elect to retain title to any subject invention.

(2) A contract may require the contractor to assign to the Government title to any subject invention—

(i) When the contractor is not located in the United States or does not have a place of business located in the United States or is subject to the control of a foreign government (see 27.303(e)(1)(i));

(ii) In exceptional circumstances, when an agency determines that restriction or elimination of the right to retain title in any subject invention will better promote the policy and objectives of chapter 18 of title 35, U.S.C. and the Presidential Memorandum;

(iii) When a Government authority, that is authorized by statute or executive order to conduct foreign intelligence or counterintelligence activities, determines that the restriction or elimination of the right to retain title to any subject invention is necessary to protect the security of such activities;

(iv) When the contract includes the operation of a Government-owned, contractor-operated facility of the Department of Energy (DOE) primarily dedicated to the Department's naval nuclear propulsion or weapons related programs and all funding agreement limitations under 35 U.S.C. 202(a)(iv) for agreements with small business concerns and nonprofit organizations are limited to inventions occurring under the above two programs; or

(v) Pursuant to statute or in accordance with agency regulations.

(3) When the Government has the right to acquire title to a subject invention, the contractor may, nevertheless, request greater rights to a subject invention (see 27.304–1(c)).

(4) Consistent with 37 CFR part 401, when a contract with a small business concern or nonprofit organization requires assignment of title to the Government based on the exceptional circumstances enumerated in paragraph (b)(2)(ii) or (iii) of this section for reasons of national security, the contract shall still provide the contractor with the right to elect ownership to any subject invention that—

(i) Is not classified by the agency; or

(ii) Is not limited from dissemination by the DOE within 6 months from the date it is reported to the agency.

(5) Contracts in support of DOE's naval nuclear propulsion program are exempted from this paragraph (b).

(6) When a contract involves a series of separate task orders, an agency may structure the contract to apply the exceptions at paragraph (b)(2)(ii) or (iii) of this section to individual task orders.

(c) *Government license.* The Government shall have at least a nonexclusive, nontransferable, irrevocable, paid-up license to practice, or have practiced for or on behalf of the United States, any subject invention throughout the world. The Government may require additional rights in order to comply with treaties or other international agreements. In such case, these rights shall be made a part of the contract (see 27.303).

(d) *Government right to receive title.* (1) In addition to the right to obtain title to subject inventions pursuant to paragraph (b)(2)(i) through (v) of this section, the Government has the right to receive title to an invention—

(i) If the contractor has not disclosed the invention within the time specified in the clause; or

(ii) In any country where the contractor—

(A) Does not elect to retain rights or fails to elect to retain rights to the invention within the time specified in the clause;

(B) Has not filed a patent or plant variety protection application within the time specified in the clause;

(C) Decides not to continue prosecution of a patent or plant variety protection application, pay maintenance fees, or defend in a reexamination or opposition proceeding on the patent; or

(D) No longer desires to retain title.

(2) For the purposes of this paragraph, filing in a European Patent Office Region or under the Patent Cooperation Treaty constitutes election in the countries selected in the application(s).

(e) *Utilization reports.* The Government has the right to require periodic reporting on how any subject invention is being used by the contractor or its licensees or assignees. In accordance with 35 U.S.C. 202(c)(5) and 37 CFR part 401, agencies shall not disclose such utilization reports to persons outside the Government without permission of the contractor. Contractors should mark as confidential/proprietary any utilization report to help prevent inadvertent release outside the Government.

(f) *March-in rights.* (1) Pursuant to 35 U.S.C. 203, agencies have certain march-in rights that require the contractor, an assignee, or exclusive licensee of a subject invention to grant a nonexclusive, partially exclusive, or exclusive license in any field of use to responsible applicants, upon terms that are reasonable under the circumstances. If the contractor, assignee or exclusive licensee of a subject invention refuses to grant such a license, the agency can grant the license itself. March-in rights may be exercised only if the agency determines that this action is necessary—

(i) Because the contractor or assignee has not taken, or is not expected to take within a reasonable time, effective steps to achieve practical application of the subject invention in the field(s) of use;

(ii) To alleviate health or safety needs that are not reasonably satisfied by the contractor, assignee, or their licensees;

(iii) To meet requirements for public use specified by Federal regulations and these requirements are not reasonably satisfied by the contractor, assignee, or licensees; or

(iv) Because the agreement required by paragraph (g) of this section has neither been obtained nor waived, or because a licensee of the exclusive right to use or sell any subject invention in the United States is in breach of its agreement obtained pursuant to paragraph (g) of this section.

(2) The agency shall not exercise its march-in rights unless the contractor has been provided a reasonable time to present facts and show cause why the proposed agency action should not be taken. The agency shall provide the contractor an opportunity to dispute or appeal the proposed action, in accordance with 27.304–1(g).

(g) *Preference for United States industry.* In accordance with 35 U.S.C. 204, no contractor that receives title to any subject invention and no assignee of the contractor shall grant to any person the exclusive right to use or sell any subject invention in the United States unless that person agrees that any products embodying the subject invention or produced through the use of the subject invention will be manufactured substantially in the United States. However, in individual cases, the requirement for this agreement may be waived by the agency upon a showing by the contractor or assignee that reasonable but unsuccessful efforts have been made to grant licenses on similar terms to potential licensees that would be likely to manufacture substantially in the United States or that under the circumstances domestic manufacture is not commercially feasible.

(h) *Special conditions for nonprofit organizations' preference for small business concerns.* (1) Nonprofit organization contractors are expected to use reasonable efforts to attract small business licensees (see paragraph (i)(4) of the clause at 52.227–11, Patent Rights—Ownership by the Contractor). What constitutes reasonable efforts to attract small business licensees will vary with the circumstances and the nature, duration, and expense of efforts needed to bring the invention to the market.

(2) Small business concerns that believe a nonprofit organization is not meeting its obligations under the clause may report the matter to the Secretary of Commerce. To the extent deemed appropriate, the Secretary of Commerce will undertake informal investigation of the matter, and may discuss or negotiate with the nonprofit organization ways to improve its efforts to meet its obligations under the clause. However, in no event will the Secretary of Commerce intervene in ongoing negotiations or contractor decisions concerning the licensing of a specific subject invention. These investigations, discussions, and negotiations involving the Secretary of Commerce will be in coordination with other interested agencies, including the Small Business Administration. In the case of a contract for the operation of a Government-owned, contractor-operated research or production facility, the Secretary of Commerce will coordinate with the agency responsible for the facility prior to any discussions or negotiations with the contractor.

(i) *Minimum rights to contractor.* (1) When the Government acquires title to a subject invention, the contractor is normally granted a revocable, nonexclusive, paid-up license to that subject invention throughout the world. The contractor's license extends to any of its domestic subsidiaries and affiliates within the corporate structure of which the contractor is a part and includes the right to grant sublicenses to the extent the contractor was legally obligated to do so at the time of contract award. The contracting officer shall approve or disapprove, in writing, any contractor request to transfer its licenses. No approval is necessary when the transfer is to the successor of that part of the contractor's business to which the subject invention pertains.

(2) In response to a third party's proper application for an exclusive license, the contractor's domestic license may be revoked or modified to the extent necessary to achieve expeditious practical application of the subject invention. The application shall be submitted in accordance with the applicable provisions in 37 CFR part 404 and agency licensing regulations. The contractor's license will not be revoked in that field of use or the geographical areas in which the contractor has achieved practical application and continues to make the benefits of the subject invention reasonably accessible to the public. The license in any foreign country may be revoked or modified to the extent the contractor, its licensees, or its domestic subsidiaries or affiliates have failed to achieve practical application in that country. (See the procedures at 27.304–1(f).)

(j) *Confidentiality of inventions.* Publishing information concerning an invention before a patent application is filed on a subject invention may create a bar to a valid patent. To avoid this bar, agencies may withhold information from the public that discloses any invention in which the Government owns or may own a right, title, or interest (including a nonexclusive license) (see 35 U.S.C. 205 and 37 CFR part 401). Agencies may only withhold information concerning inventions for a reasonable time in order for a patent application to be filed. Once filed in any patent office, agencies are not required to release copies of any document that is a part of a patent application for those subject inventions. (See also 27.305–4.)

27.303 Contract clauses.

(a)(1) Insert a patent rights clause in all solicitations and contracts for experimental, developmental, or research work as prescribed in this section.

(2) This section also applies to solicitations or contracts for construction work or architect-engineer services that include—

(i) Experimental, developmental, or research work;

(ii) Test and evaluation studies; or

(iii) The design of a Government facility that may involve novel structures, machines, products, materials, processes, or equipment (including construction equipment).

(3) The contracting officer shall not include a patent rights clause in solicitations or contracts for construction work or architect-engineer services that call for or can be expected to involve only ''standard types of construction.'' ''Standard types of construction'' are those involving previously developed equipment, methods, and

processes and in which the distinctive features include only—

(i) Variations in size, shape, or capacity of conventional structures; or

(ii) Purely artistic or aesthetic (as distinguished from functionally significant) architectural configurations and designs of both structural and nonstructural members or groupings, whether or not they qualify for design patent protection.

(b)(1) Unless an alternative patent rights clause is used in accordance with paragraph (c), (d), or (e) of this section, insert the clause at 52.227–11, Patent Rights—Ownership by the Contractor.

(2) To the extent the information is not required elsewhere in the contract, and unless otherwise specified by agency supplemental regulations, the contracting officer may modify 52.227–11(e) or otherwise supplement the clause to require the contractor to do one or more of the following:

(i) Provide periodic (but not more frequently than annually) listings of all subject inventions required to be disclosed during the period covered by the report.

(ii) Provide a report prior to the closeout of the contract listing all subject inventions or stating that there were none.

(iii) Provide the filing date, serial number, title, patent number and issue date for any patent application filed on any subject invention in any country or, upon request, copies of any patent application so identified.

(iv) Furnish the Government an irrevocable power to inspect and make copies of the patent application file when a Government employee is a coinventor.

(3) Use the clause with its Alternate I if the Government must grant a foreign government a sublicense in subject inventions pursuant to a specified treaty or executive agreement. The contracting officer may modify Alternate I, if the agency head determines, at contract award, that it would be in the national interest to sublicense foreign governments or international organizations pursuant to any existing or future treaty or agreement. When necessary to effectuate a treaty or agreement, Alternate I may be appropriately modified.

(4) Use the clause with its Alternate II in contracts that may be affected by existing or future treaties or agreements.

(5) Use the clause with its Alternate III in contracts with nonprofit organizations for the operation of a Government-owned facility.

(6) If the contract is for the operation of a Government-owned facility, the contracting officer may use the clause with its Alternate IV.

(7) If the contract is for the performance of services at a Government owned and operated laboratory or at a Government owned and contractor operated laboratory directed by the Government to fulfill the Government's obligations under a Cooperative Research and Development Agreement (CRADA) authorized by 15 U.S.C. 3710a, the contracting officer may use the clause with its Alternate V. Since this provision is considered an exercise of an agency's ''exceptional circumstances'' authority, the contracting officer must comply with 37 CFR 401.3(e) and 401.4.

(c) Insert a patent rights clause in accordance with the procedures at 27.304–2 if the solicitation or contract is being placed on behalf of another Government agency.

(d) Insert a patent rights clause in accordance with agency procedures if the solicitation or contract is for DoD, DOE, or NASA, and the contractor is other than a small business concern or nonprofit organization.

(e)(1) Except as provided in paragraph (e)(2) of this section, and after compliance with the applicable procedures in 27.304–1(b), the contracting officer may insert the clause at 52.227–13, Patent Rights—Ownership by the Government, or a clause prescribed by agency supplemental regulations, if—

(i) The contractor is not located in the United States or does not have a place of business located in the United States or is subject to the control of a foreign government;

(ii) There are exceptional circumstances and the agency head determines that restriction or elimination of the right to retain title to any subject invention will better promote the

policy and objectives of chapter 18 of title 35 of the United States Code;

(iii) A Government authority that is authorized by statute or executive order to conduct foreign intelligence or counterintelligence activities, determines that restriction or elimination of the right to retain any subject invention is necessary to protect the security of such activities; or

(iv) The contract includes the operation of a Government-owned, contractor-operated facility of DOE primarily dedicated to that Department's naval nuclear propulsion or weapons related programs.

(2) If an agency exercises the exceptions at paragraph (e)(1)(ii) or (iii) of this section in a contract with a small business concern or a nonprofit organization, the contracting officer shall use the clause at 52.227–11 with only those modifications necessary to address the exceptional circumstances and shall include in the modified clause greater rights determinations procedures equivalent to those at 52.227–13(b)(2).

(3) When using the clause at 52.227–13, Patent Rights—Ownership by the Government, the contracting officer may supplement the clause to require the contractor to—

(i) Furnish a copy of each subcontract containing a patent rights clause (but if a copy of a subcontract is furnished under another clause, a duplicate shall not be requested under the patent rights clause);

(ii) Submit interim and final invention reports listing subject inventions and notifying the contracting officer of all subcontracts awarded for experimental, developmental, or research work;

(iii) Provide the filing date, serial number, title, patent number, and issue date for any patent application filed on any subject invention in any country or, upon specific request, copies of any patent application so identified; and

(iv) Submit periodic reports on the utilization of a subject invention.

(4) Use the clause at 52.227–13 with its Alternate I if—

(i) The Government must grant a foreign government a sublicense in subject inventions pursuant to a treaty or executive agreement; or

(ii) The agency head determines, at contract award, that it would be in the national interest to sublicense foreign governments or international organizations pursuant to any existing or future treaty or agreement. If other rights are necessary to effectuate any treaty or agreement, Alternate I may be appropriately modified.

(5) Use the clause at 52.227–13 with its Alternate II in the contract when necessary to effectuate an existing or future treaty or agreement.

27.304 Procedures.

27.304–1 General.

(a) *Status as small business concern or nonprofit organization.* If an agency has reason to question the size or nonprofit status of the prospective contractor, the agency may require the prospective contractor to furnish evidence of its nonprofit status or may file a size protest in accordance with FAR 19.302.

(b) *Exceptions.* (1) Before using any of the exceptions under 27.303(e)(1) in a contract with a small business concern or a nonprofit organization and before using the exception of 27.303(e)(1)(ii) for any contractor, the agency shall follow the applicable procedures at 37 CFR 401.

(2) A small business concern or nonprofit organization is entitled to an administrative review of the use of the exceptions at 27.303(e)(1)(i) through (e)(1)(iv) in accordance with agency procedures and 37 CFR part 401.

(c) *Greater rights determinations.* Whenever the contract contains the clause at 52.227–13, Patent Rights—Ownership by the Government, or a patent rights clause modified pursuant to 27.303(e)(2), the contractor (or an employee-inventor of the contractor after consultation with the contractor) may request greater rights to an identified invention within the period specified in the clause. The contracting officer may grant requests for greater rights if the contracting officer determines that the interests of the United States and the general public will be better served. In making these determinations, the contracting officer shall consider at least the following objectives (see 37 CFR 401.3(b) and 401.15):

(1) Promoting the utilization of inventions arising from federally supported research and development.

(2) Ensuring that inventions are used in a manner to promote full and open competition and free enterprise without unduly encumbering future research and discovery.

(3) Promoting public availability of inventions made in the United States by United States industry and labor.

(4) Ensuring that the Government obtains sufficient rights in federally supported inventions to meet the needs of the Government and protect the public against nonuse or unreasonable use of inventions.

(d) *Retention of rights by inventor.* If the contractor elects not to retain title to a subject invention, the agency may consider and, after consultation with the contractor, grant requests for retention of rights by the inventor. Retention of rights by the inventor will be subject to the conditions in paragraphs (d) (except paragraph (d)(1)(i)), (e)(4), (f), (g), and (h) of the clause at 52.227–11, Patent Rights—Ownership by the Contractor.

(e) *Government assignment to contractor of rights in Government employees' inventions.* When a Government employee is a co-inventor of an invention made under a contract with a small business concern or nonprofit organization, the agency employing the co-inventor may license or assign whatever rights it may acquire in the subject invention from its employee to the contractor, subject at least to the conditions of 35 U.S.C. 202–204.

(f) *Revocation or modification of contractor's minimum rights.* Before revoking or modifying the contractor's license in accordance with 27.302(i)(2), the contracting officer shall furnish the contractor a written notice of intention to revoke or modify the license. The agency shall allow the contractor at least 30 days (or another time as may be authorized for good cause by the contracting officer) after the notice to show cause why the license should not be revoked or modified. The contractor has the right to appeal, in accordance with applicable regulations in 37 CFR part 404 and agency licensing regulations, any decisions concerning the revocation or modification.

(g) *Exercise of march-in rights.* When exercising march-in rights, agencies shall follow the procedures set forth in 37 CFR 401.6.

(h) *Licenses and assignments under contracts with nonprofit organizations.* If the contractor is a nonprofit organization, paragraph (i) of the clause at 52.227–11 provides that certain contractor actions require agency approval.

27.304–2 Contracts placed by or for other Government agencies.

The following procedures apply unless an interagency agreement provides otherwise:

(a) When a Government agency requests another Government agency to award a contract on its behalf, the request should explain any special circumstances surrounding the contract and specify the patent rights clause to be used. The clause should be selected and modified, if necessary, in accordance with the policies and procedures of this subpart. If, however, the request states that a clause of the requesting agency is required (*e.g.*, because of statutory requirements, a deviation, or exceptional circumstances), the awarding agency shall use that clause rather than those of this subpart.

(1) If the request states that an agency clause is required and the work to be performed under the contract is not severable and is funded wholly or in part by the requesting agency, then include the requesting agency clause and no other patent rights clause in the contract.

(2) If the request states that an agency clause is required, and the work to be performed under the contract is severable, then the contracting officer shall assure that the requesting agency clause applies only to that severable portion of the work and that the work for the awarding agency is subject to the appropriate patent rights clause.

(3) If the request states that a requesting agency clause is not required in any resulting contract, the awarding agency shall use the appropriate patent rights clause, if any.

(b) Any action requiring an agency determination, report, or deviation involved in the use of the requesting agency's clause is the responsibility of the requesting agency unless the agencies agree otherwise. However, the awarding agency may not alter the requesting agency's clause without prior approval of the requesting agency.

(c) The requesting agency may require, and provide instructions regarding, the forwarding or handling of any invention disclosures or other reporting requirements of the specified clauses. Normally, the requesting agency is responsible for the administration of any subject inventions. This responsibility shall be established in advance of awarding any contracts.

27.304–3 Subcontracts.

(a) The policies and procedures in this subpart apply to all subcontracts at any tier.

(b) Whenever a prime contractor or a subcontractor considers including a particular clause in a subcontract to be inappropriate or a subcontractor refuses to accept the clause, the contracting officer, in consultation with counsel, shall resolve the matter.

(c) It is Government policy that contractors shall not use their ability to award subcontracts as economic leverage to acquire rights for themselves in inventions resulting from subcontracts.

27.304–4 Appeals.

(a) The designated agency official shall provide the contractor with a written statement of the basis, including any relevant facts, for taking any of the following actions:

(1) A refusal to grant an extension to the invention disclosure period under paragraph (c)(4) of the clause at 52.227–11;

(2) A demand for a conveyance of title to the Government under 27.302(d)(1)(i) and (ii);

(3) A refusal to grant a waiver under 27.302(g), Preference for United States industry; or

(4) A refusal to approve an assignment under 27.304–1(h).

(b) Each agency may establish and publish procedures under which any of these actions may be appealed. These appeal procedures should include administrative due process procedures and standards for fact-finding. The resolution of any appeal shall consider both the factual and legal basis for the action and its consistency with the policy and objectives of 35 U.S.C. 200–206 and 210.

(c) To the extent that any of the actions described in paragraph (a) of this section are subject to appeal under the Contract Disputes statute, the procedures under that statute will satisfy the requirements of paragraph (b).

[72 FR 63049, Nov. 7, 2007, as amended at 79 FR 24210, Apr. 29, 2014]

27.305 Administration of patent rights clauses.

27.305–1 Goals.

(a) Contracts having a patent rights clause should be so administered that—

(1) Inventions are identified, disclosed, and reported as required by the contract, and elections are made;

(2) The rights of the Government in subject inventions are established;

(3) When patent protection is appropriate, patent applications are timely filed and prosecuted by contractors or by the Government;

(4) The rights of the Government in filed patent applications are documented by formal instruments such as licenses or assignments; and

(5) Expeditious commercial utilization of subject inventions is achieved.

(b) If a subject invention is made under a contract funded by more than one agency, at the request of the contractor or on their own initiative, the agencies shall designate one agency as responsible for administration of the rights of the Government in the invention.

27.305–2 Administration by the Government.

(a) Agencies should establish and maintain appropriate follow-up procedures to protect the Government's interest and to check that subject inventions are identified and disclosed, and when appropriate, patent applications are filed, and that the Government's rights therein are established and protected. Follow-up activities for contracts that include a clause referenced

in 27.304–2 should be coordinated with the appropriate agency.

(b)(1) The contracting officer administering the contract (or other representative specifically designated in the contract for this purpose) is responsible for receiving invention disclosures, reports, confirmatory instruments, notices, requests, and other documents and information submitted by the contractor pursuant to a patent rights clause.

(i) For other than confirmatory instruments, if the contractor fails to furnish documents or information as called for by the clause within the time required, the contracting officer shall promptly request the contractor to supply the required documents or information. If the failure persists, the contracting officer shall take appropriate action to secure compliance.

(ii) If the contractor does not furnish confirmatory instruments within 6 months after filing each patent application, or within 6 months after submitting the invention disclosure if the application has been previously filed, the contracting officer shall request the contractor to supply the required documents.

(2) The contracting officer shall promptly furnish all invention disclosures, reports, confirmatory instruments, notices, requests, and other documents and information relating to patent rights clauses to legal counsel.

(c) Contracting activities should establish appropriate procedures to detect and correct failures by the contractor to comply with its obligations under the patent rights clauses, such as failures to disclose and report subject inventions, both during and after contract performance. Government effort to review and correct contractor compliance with its patent rights obligations should be directed primarily toward contracts that are more likely to result in subject inventions significant in number or quality. These contracts include contracts of a research, developmental, or experimental nature; contracts of a large dollar amount; and any other contracts when there is reason to believe the contractor may not be complying with its contractual obligations. Other contracts may be reviewed using a spot-check method, as feasible. Appropriate follow-up procedures and activities may include the investigation or review of selected contracts or contractors by those qualified in patent and technical matters to detect failures to comply with contract obligations.

(d) Follow-up activities should include, where appropriate, use of Government patent personnel—

(1) To interview agency technical personnel to identify novel developments made in contracts;

(2) To review technical reports submitted by contractors with cognizant agency technical personnel;

(3) To check the Official Gazette of the United States Patent and Trademark Office and other sources for patents issued to the contractor in fields related to its Government contracts; and

(4) To have cognizant Government personnel interview contractor personnel regarding work under the contract involved, observe the work on site, and inspect laboratory notebooks and other records of the contractor related to work under the contract.

(e) If a contractor or subcontractor does not have a clear understanding of its obligations under the clause, or its procedures for complying with the clause are deficient, the contracting officer should explain to the contractor its obligations. The withholding of payments provision (if any) of the patent rights clause may be invoked if the contractor fails to meet the obligations required by the patents rights clause. Significant or repeated failures by a contractor to comply with the patent rights obligation in its contracts shall be documented and made a part of the general file (see 4.801(c)(3)).

27.305–3 Securing invention rights acquired by the Government.

(a) Agencies are responsible for implementing procedures necessary to protect the Government's interest in subject inventions. When the Government acquires the entire right, title, and interest in an invention by contract, the chain of title from the inventor to the Government shall be clearly established. This is normally accomplished by an assignment either from each inventor to the contractor and

from the contractor to the Government, or from the inventor to the Government with the consent of the contractor. When the Government's rights are limited to a license, there should be a confirmatory instrument to that effect.

(b) Agencies may, by supplemental instructions, develop suitable assignments, licenses, and other papers evidencing any rights of the Government in patents or patents applications. These instruments should be recorded in the U.S. Patent and Trademark Office (see Executive Order 9424, Establishing in the United States Patent Office a Register of Government Interests in Patents and Applications for Patents, (February 18, 1944).

27.305–4 Protection of invention disclosures.

(a) The Government will, to the extent authorized by 35 U.S.C. 205, withhold from disclosure to the public any invention disclosures reported under the patent rights clauses of 52.227–11 or 52.227–13 for a reasonable time in order for patent applications to be filed. The Government will follow the policy in 27.302(j) regarding protection of confidentiality.

(b) The Government should also use reasonable efforts to withhold from disclosure to the public for a reasonable time other information disclosing a subject invention. This information includes any data delivered pursuant to contract requirements provided that the contractor notifies the agency as to the identity of the data and the subject invention to which it relates at the time of delivery of the data. This notification shall be provided to both the contracting officer and to any patent representative to which the invention is reported, if other than the contracting officer.

(c) For more information on protection of invention disclosures, also see 37 CFR 401.13.

27.306 Licensing background patent rights to third parties.

(a) A contract with a small business concern or nonprofit organization shall not contain a provision allowing the Government to require the licensing to third parties of inventions owned by the contractor that are not subject inventions unless the agency head has approved and signed a written justification in accordance with paragraph (b) of this section. The agency head may not delegate this authority and may exercise the authority only if it is determined that the—

(1) Use of the invention by others is necessary for the practice of a subject invention or for the use of a work object of the contract; and

(2) Action is necessary to achieve the practical application of the subject invention or work object.

(b) Any determination will be on the record after an opportunity for a hearing, and the agency shall notify the contractor of the determination by certified or registered mail. The notification shall include a statement that the contractor must bring any action for judicial review of the determination within 60 days after the notification.

Subpart 27.4—Rights in Data and Copyrights

27.400 Scope of subpart.

This subpart sets forth policies and procedures regarding rights in data and copyrights, and acquisition of data. The policy statement in 27.402 applies to all executive agencies. The remainder of the subpart applies to all executive agencies except the Department of Defense.

27.401 Definitions.

As used in this subpart—

Data means recorded information, regardless of form or the media on which it may be recorded. The term includes technical data and computer software. The term does not include information incidental to contract administration, such as financial, administrative, cost or pricing, or management information.

Form, fit, and function data means data relating to items, components, or processes that are sufficient to enable physical and functional interchangeability, and data identifying source, size, configuration, mating and attachment characteristics, functional characteristics, and performance requirements. For computer software it means data identifying source, functional

characteristics, and performance requirements, but specifically excludes the source code, algorithms, processes, formulas, and flow charts of the software.

Limited rights means the rights of the Government in limited rights data as set forth in a Limited Rights Notice.

Limited rights data means data, other than computer software, that embody trade secrets or are commercial or financial and confidential or privileged, to the extent that such data pertain to items, components, or processes developed at private expense, including minor modifications. (Agencies may, however, adopt the following alternate definition: Limited rights data means data (other than computer software) developed at private expense that embody trade secrets or are commercial or financial and confidential or privileged (see 27.404–2(b)).

Restricted computer software means computer software developed at private expense and that is a trade secret, is commercial or financial and confidential or privileged, or is copyrighted computer software, including minor modifications of the computer software.

Restricted rights means the rights of the Government in restricted computer software as set forth in a Restricted Rights Notice.

Unlimited rights means the rights of the Government to use, disclose, reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, in any manner and for any purpose, and to have or permit others to do so.

27.402 Policy.

(a) To carry out their missions and programs, agencies acquire or obtain access to many kinds of data produced during or used in the performance of their contracts. Agencies require data to—

(1) Obtain competition among suppliers;

(2) Fulfill certain responsibilities for disseminating and publishing the results of their activities;

(3) Ensure appropriate utilization of the results of research, development, and demonstration activities including the dissemination of technical information to foster subsequent technological developments;

(4) Meet other programmatic and statutory requirements; and

(5) Meet specialized acquisition needs and ensure logistics support.

(b) Contractors may have proprietary interests in data. In order to prevent the compromise of these interests, agencies shall protect proprietary data from unauthorized use and disclosure. The protection of such data is also necessary to encourage qualified contractors to participate in and apply innovative concepts to Government programs. In light of these considerations, agencies shall balance the Government's needs and the contractor's legitimate proprietary interests.

27.403 Data rights—General.

All contracts that require data to be produced, furnished, acquired, or used in meeting contract performance requirements, must contain terms that delineate the respective rights and obligations of the Government and the contractor regarding the use, reproduction, and disclosure of that data. Data rights clauses do not specify the type, quantity or quality of data that is to be delivered, but only the respective rights of the Government and the contractor regarding the use, disclosure, or reproduction of the data. Accordingly, the contract shall specify the data to be delivered.

27.404 Basic rights in data clause.

This section describes the operation of the clause at 52.227–14, Rights in Data—General, and also the use of the provision at 52.227–15, Representation of Limited Rights Data and Restricted Computer Software.

27.404–1 Unlimited rights data.

The Government acquires unlimited rights in the following data except for copyrighted works as provided in 27.404–3:

(a) Data first produced in the performance of a contract (except to the extent the data constitute minor modifications to data that are limited rights data or restricted computer software).

(b) Form, fit, and function data delivered under contract.

(c) Data (except as may be included with restricted computer software) that constitute manuals or instructional and training material for installation, operation, or routine maintenance and repair of items, components, or processes delivered or furnished for use under a contract.

(d) All other data delivered under the contract other than limited rights data or restricted computer software (see 27.404–2).

27.404–2 Limited rights data and restricted computer software.

(a) *General.* The basic clause at 52.227–14, Rights in Data—General, enables the contractor to protect qualifying limited rights data and restricted computer software by withholding the data from the Government and instead delivering form, fit, and function data.

(b) *Alternate definition of limited rights data.* For contracts that do not require the development, use, or delivery of items, components, or processes that are intended to be acquired by or for the Government, an agency may adopt the alternate definition of limited rights data set forth in Alternate I to the clause at 52.227–14. The alternate definition does not require that the data pertain to items, components, or processes developed at private expense; but rather that the data were developed at private expense and embody a trade secret or are commercial or financial and confidential or privileged.

(c) *Protection of limited rights data specified for delivery.* (1) The clause at 52.227–14 with its Alternate II enables the Government to require delivery of limited rights data rather than allow the contractor to withhold the data. To obtain delivery, the contract may identify and specify data to be delivered, or the contracting officer may require, by written request during contract performance, the delivery of data that has been withheld or identified to be withheld under paragraph (g)(1) of the clause. In addition, the contract may specifically identify data that are not to be delivered under Alternate II or which, if delivered, will be delivered with limited rights. The limited rights obtained by the Government are set forth in the Limited Rights Notice contained in paragraph (g)(3) of Alternate II. Agencies shall not, without permission of the contractor, use limited rights data for purposes of manufacture or disclose the data outside the Government except as set forth in the Notice. Any disclosure by the Government shall be subject to prohibition against further use and disclosure by the recipient. The following are examples of specific purposes that may be adopted by an agency in its supplement and added to the Limited Rights Notice of paragraph (g)(3) of Alternate II of the clause:

(i) Use (except for manufacture) by support service contractors.

(ii) Evaluation by nongovernment evaluators.

(iii) Use (except for manufacture) by other contractors participating in the Government's program of which the specific contract is a part.

(iv) Emergency repair or overhaul work.

(v) Release to a foreign government, or its instrumentalities, if required to serve the interests of the U.S. Government, for information or evaluation, or for emergency repair or overhaul work by the foreign government.

(2) The provision at 52.227–15, Representation of Limited Rights Data and Restricted Computer Software, helps the contracting officer to determine whether the clause at 52.227–14 should be used with its Alternate II. This provision requests that an offeror state whether limited rights data are likely to be delivered. Where limited rights data are expected to be delivered, use Alternate II. Where negotiations are based on an unsolicited proposal, the need for Alternate II of the clause at 52.227–14 should be addressed during negotiations or discussions, and if Alternate II was not included initially it may be added by modification, if needed, during contract performance.

(3) If data that would otherwise qualify as limited rights data is delivered as a computer database, the data shall be treated as limited rights data, rather than restricted computer software, for the purposes of paragraph (g) of the clause at 52.227–14.

(d) *Protection of restricted computer software specified for delivery.* (1) Alternate III of the clause at 52.227–14, enables the Government to require delivery of restricted computer software rather than allow the contractor to withhold such restricted computer software. To obtain delivery of restricted computer software the contracting officer shall—

(i) Identify and specify the deliverable computer software in the contract; or

(ii) Require by written request during contract performance, the delivery of computer software that has been withheld or identified to be withheld under paragraph (g)(1) of the clause.

(2) In considering whether to use Alternate III, contracting officers should note that, unlike other data, computer software is also an end item in itself. Thus, the contracting officer shall use Alternate III if delivery of restricted computer software is required to meet agency needs.

(3) Unless otherwise agreed (see paragraph (d)(4) of this subsection), the restricted rights obtained by the Government are set forth in the Restricted Rights Notice contained in paragraph (g)(4) (Alternate III). Such restricted computer software will not be used or reproduced by the Government, or disclosed outside the Government, except that the computer software may be—

(i) Used or copied for use with the computers for which it was acquired, including use at any Government installation to which the computers may be transferred;

(ii) Used or copied for use with a backup computer if any computer for which it was acquired is inoperative;

(iii) Reproduced for safekeeping (archives) or backup purposes;

(iv) Modified, adapted, or combined with other computer software, *provided* that the modified, adapted, or combined portions of the derivative software incorporating any of the delivered, restricted computer software shall be subject to the same restricted rights;

(v) Disclosed to and reproduced for use by support service contractors or their subcontractors, in accordance with paragraphs (3)(i) through (iv) of this section; and

(vi) Used or copied for use with a replacement computer.

(4) The restricted rights set forth in paragraph (d)(3) of this subsection are the minimum rights the Government normally obtains with restricted computer software and will automatically apply when such software is acquired under the Restricted Rights Notice of paragraph (g)(4) of Alternate III of the clause at 52.227–14. However, the contracting officer may specify different rights in the contract, consistent with the purposes and needs for which the software is to be acquired. For example, the contracting officer should consider any networking needs or any requirements for use of the computer software from remote terminals. Also, in addressing such needs, the scope of the restricted rights may be different for the documentation accompanying the computer software than for the programs and databases. Any additions to, or limitations on, the restricted rights set forth in the Restricted Rights Notice of paragraph (g)(4) of Alternate III of the clause at 52.227–14 shall be expressly stated in the contract or in a collateral agreement incorporated in and made part of the contract, and the notice modified accordingly.

(5) The provision at 52.227–15, Representation of Limited Rights Data and Restricted Computer Software, helps the contracting officer determine whether to use the clause at 52.227–14 with its Alternate III. This provision requests that an offeror state whether restricted computer software is likely to be delivered under the contract. In addition, the need for Alternate III should be addressed during negotiations or discussions with an offeror, particularly where negotiations are based on an unsolicited proposal. However, if Alternate III is not used initially, it may be added by modification, if needed, during contract performance.

27.404–3 Copyrighted works.

(a) *Data first produced in the performance of a contract.* (1) Generally, the contractor must obtain permission of the contracting officer prior to asserting rights in any copyrighted work containing data first produced in the

performance of a contract. However, contractors are normally authorized, without prior approval of the contracting officer, to assert copyright in technical or scientific articles based on or containing such data that is published in academic, technical or professional journals, symposia proceedings and similar works.

(2) The contractor must make a written request for permission to assert its copyright in works containing data first produced under the contract. In its request, the contractor should identify the data involved or furnish copies of the data for which permission is requested, as well as a statement as to the intended publication or dissemination media or other purpose for which the permission is requested. Generally, a contracting officer should grant the contractor's request when copyright protection will enhance the appropriate dissemination or use of the data unless the—

(i) Data consist of a report that represents the official views of the agency or that the agency is required by statute to prepare;

(ii) Data are intended primarily for internal use by the Government;

(iii) Data are of the type that the agency itself distributes to the public under an agency program;

(iv) Government determines that limitation on distribution of the data is in the national interest; or

(v) Government determines that the data should be disseminated without restriction.

(3) Alternate IV of the clause at 52.227–14 provides a substitute paragraph (c)(1) granting permission for contractors to assert copyright in any data first produced in the performance of the contract without the need for any further requests. Except for contracts for management or operation of Government facilities and contracts and subcontracts in support of programs being conducted at those facilities or where international agreements require otherwise, Alternate IV shall be used in all contracts for basic or applied research to be performed solely by colleges and universities. Alternate IV shall not be used in contracts with colleges and universities if a purpose of the contract is for development of computer software for distribution to the public (including use in solicitations) by or on behalf of the Government. In addition, Alternate IV may be used in other contracts if an agency determines that it is not necessary for a contractor to request further permission to assert copyright in data first produced in performance of the contract. The contracting officer may exclude any data, or items or categories of data, from the provisions of Alternate IV by expressly so providing in the contract or by adding a paragraph (d)(4) to the clause, consistent with 27.404–4(b).

(4) Pursuant to paragraph (c)(1) of the clause at 52.227–14, the contractor grants the Government a paid-up nonexclusive, irrevocable, worldwide license to reproduce, prepare derivative works, distribute to the public, perform publicly and display publicly by or on behalf of the Government, for all data (other than computer software) first produced in the performance of a contract. For computer software, the scope of the Government's license includes all of the above rights except the right to distribute to the public. Agencies may also obtain a license of different scope if the contracting officer determines, after consulting with legal counsel, such a license will substantially enhance the dissemination of any data first produced under the contract or if such a license is required to comply with international agreements. If an agency obtains a different license, the contractor shall clearly state the scope of that license in a conspicuous place on the medium on which the data is recorded. For example, if the data is delivered as a report, the terms of the license shall be stated on the cover, or first page, of the report.

(5) The clause requires the contractor to affix the applicable copyright notices of 17 U.S.C. 401 or 402, and acknowledgment of Government sponsorship, (including the contract number) to data when it asserts copyright in data. Failure to do so could result in such data being treated as unlimited rights data (see 27.404–5(b)).

(b) *Data not first produced in the performance of a contract.* (1) Contractors shall not deliver any data that is not

first produced under the contract without either—

(i) Acquiring for or granting to the Government a copyright license for the data; or

(ii) Obtaining permission from the contracting officer to do otherwise.

(2) The copyright license the Government acquires for such data will normally be of the same scope as discussed in paragraph (a)(4) of this subsection, and is set forth in paragraph (c)(2) of the clause at 52.227–14. However, agencies may obtain a license of different scope if the agency determines, after consultation with its legal counsel, that such different license will not be inconsistent with the purpose of acquiring the data. If a license of a different scope is acquired, it must be so stated in the contract and clearly set forth in a conspicuous place on the data when delivered to the Government. If the contractor delivers computer software not first produced under the contract, the contractor shall grant the Government the license set forth in paragraph (g)(4) of Alternate III if included in the clause at 52.227–14, or a license agreed to in a collateral agreement made part of the contract.

27.404–4 Contractor's release, publication, and use of data.

(a) In contracts for basic or applied research with universities or colleges, agencies shall not place any restrictions on the conduct of or reporting on the results of unclassified basic or applied research, except as provided in applicable U.S. statutes. However, agencies may restrict the release or disclosure of computer software that is or is intended to be developed to the point of practical application (including for agency distribution under established programs). This is not considered a restriction on the reporting of the results of basic or applied research. Agencies may also preclude a contractor from asserting copyright in any computer software for purposes of established agency distribution programs, or where required to accomplish the purpose for which the software is acquired.

(b) Except for the results of basic or applied research under contracts with universities or colleges, agencies may, to the extent provided in their FAR supplements, place limitations or restrictions on the contractor's exercise of its rights in data first produced in the performance of the contract, including a requirement to assign copyright to the Government or another party. Any of these restrictions shall be expressly included in the contract.

27.404–5 Unauthorized, omitted, or incorrect markings.

(a) *Unauthorized marking of data.* (1) The Government has, in accordance with paragraph (e) of the clause at 52.227–14, the right to either return data containing unauthorized markings or to cancel or ignore the markings.

(2) Agencies shall not cancel or ignore markings without making written inquiry of the contractor and affording the contractor at least 60 days to provide a written justification substantiating the propriety of the markings.

(i) If the contractor fails to respond or fails to provide a written justification substantiating the propriety of the markings within the time afforded, the Government may cancel or ignore the markings.

(ii) If the contractor provides a written justification substantiating the propriety of the markings, the contracting officer shall consider the justification.

(A) If the contracting officer determines that the markings are authorized, the contractor will be so notified in writing.

(B) If the contracting officer determines, with concurrence of the head of the contracting activity, that the markings are not authorized, the contractor will be furnished a written determination which becomes the final agency decision regarding the appropriateness of the markings and the markings will be cancelled or ignored and the data will no longer be made subject to disclosure prohibitions, unless the contractor files suit within 90 days in a court of competent jurisdiction. The markings will not be cancelled or ignored until final resolution of the matter, either by the contracting officer's determination becoming the final agency decision or by

final disposition of the matter by court decision if suit is filed.

(3) The foregoing procedures may be modified in accordance with agency regulations implementing the Freedom of Information Act (5 U.S.C. 552) if necessary to respond to a request. In addition, the contractor may bring a claim, in accordance with the Disputes clause of the contract, that may arise as the result of the Government's action to remove or ignore any markings on data, unless the action occurs as the result of a final disposition of the matter by a court of competent jurisdiction.

(b) *Omitted or incorrect notices.* (1) Data delivered under a contract containing the clause without a limited rights notice or restricted rights notice, and without a copyright notice, will be presumed to have been delivered with unlimited rights, and the Government assumes no liability for the disclosure, use, or reproduction of the data. However, to the extent the data has not been disclosed without restriction outside the Government, the contractor may, within 6 months (or a longer period approved by the contracting officer for good cause shown), request permission of the contracting officer to have the omitted limited rights or restricted rights notices, as applicable, placed on qualifying data at the contractor's expense. The contracting officer may permit adding appropriate notices if the contractor—

(i) Identifies the data for which a notice is to be added;

(ii) Demonstrates that the omission of the proposed notice was inadvertent;

(iii) Establishes that use of the proposed notice is authorized; and

(iv) Acknowledges that the Government has no liability with respect to any disclosure or use of any such data made prior to the addition of the notice or resulting from the omission of the notice.

(2) The contracting officer may also—

(i) Permit correction, at the contractor's expense, of incorrect notices if the contractor identifies the data on which correction of the notice is to be made, and demonstrates that the correct notice is authorized; or

(ii) Correct any incorrect notices.

27.404–6 Inspection of data at the contractor's facility.

Contracting officers may obtain the right to inspect data at the contractor's facility by use of the clause at 52.227–14 with its Alternate V, which adds paragraph (j) to provide that right. Agencies may also adopt Alternate V for general use. The data subject to inspection may be data withheld or withholdable under paragraph (g)(1) of the clause. Inspection may be made by the contracting officer or designee (including nongovernmental personnel under the same conditions as the contracting officer) for the purpose of verifying a contractor's assertion regarding the limited rights or restricted rights status of the data, or for evaluating work performance under the contract. This right may be exercised up to 3 years after acceptance of all items to be delivered under the contract. The contract may specify data items that are not subject to inspection under paragraph (j) of the Alternate. If the contractor demonstrates to the contracting officer that there would be a possible conflict of interest if inspection were made by a particular representative, the contracting officer shall designate an alternate representative.

27.405 Other data rights provisions.

27.405–1 Special works.

(a) The clause at 52.227–17, Rights in Data—Special Works, is for use in contracts (or may be made applicable to portions thereof) that are primarily for the production or compilation of data (other than limited rights data or restricted computer software) for the Government's own use, or when there is a specific need to limit distribution and use of the data or to obtain indemnity for liabilities that may arise out of the content, performance, or disclosure of the data. Examples are contracts for—

(1) The production of audiovisual works, including motion pictures or television recordings with or without accompanying sound, or for the preparation of motion picture scripts, musical compositions, sound tracks, translation, adaptation, and the like;

(2) Histories of the respective agencies, departments, services, or units thereof;

(3) Surveys of Government establishments;

(4) Works pertaining to the instruction or guidance of Government officers and employees in the discharge of their official duties;

(5) The compilation of reports, books, studies, surveys, or similar documents that do not involve research, development, or experimental work;

(6) The collection of data containing personally identifiable information such that the disclosure thereof would violate the right of privacy or publicity of the individual to whom the information relates;

(7) Investigatory reports;

(8) The development, accumulation, or compilation of data (other than that resulting from research, development, or experimental work performed by the contractor), the early release of which could prejudice follow-on acquisition activities or agency regulatory or enforcement activities; or

(9) The development of computer software programs, where the program—

(i) May give a commercial advantage; or

(ii) Is agency mission sensitive, and release could prejudice agency mission, programs, or follow-on acquisitions.

(b) The contract may specify the purposes and conditions (including time limitations) under which the data may be used, released, or reproduced other than for contract performance. Contracts for the production of audiovisual works, sound recordings, etc., may include limitations in connection with talent releases, music licenses, and the like that are consistent with the purposes for which the works are acquired.

(c) Paragraph (c)(1)(ii) of the clause, which enables the Government to obtain assignment of copyright in any data first produced in the performance of the contract, may be deleted if the contracting officer determines that such assignment is not needed to further the objectives of the contract.

(d) Paragraph (e) of the clause, which requires the contractor to indemnify the Government against any liability incurred as the result of any violation of trade secrets, copyrights, right of privacy or publicity, or any libelous or other unlawful matter arising out of or contained in any production or compilation of data that are subject to the clause, may be deleted or limited in scope where the contracting officer determines that, because of the nature of the particular data involved, such liability will not arise.

(e) When the audiovisual or other special works are produced to accomplish a public purpose other than acquisition for the Government's own use (such as for production and distribution to the public of the works by other than a Federal agency) agencies are authorized to modify the clause for use in contracts, with rights in data provisions that meet agency mission needs yet protect free speech and freedom of expression, as well as the artistic license of the creator of the work.

27.405–2 Existing works.

The clause at 52.227–18, Rights in Data—Existing Works, is for use in contracts exclusively for the acquisition (without modification) of existing works such as, motion pictures, television recordings, and other audiovisual works; sound recordings; musical, dramatic, and literary works; pantomimes and choreographic works; pictorial, graphic, and sculptural works; and works of a similar nature. The contract may set forth limitations consistent with the purposes for which the works covered by the contract are being acquired. Examples of these limitations are means of exhibition or transmission, time, type of audience, and geographical location. However, if the contract requires that works of the type indicated in this paragraph are to be modified through editing, translation, or addition of subject matter, etc. (rather than purchased in existing form), then see 27.405–1.

27.405–3 Commercial computer software.

(a) When contracting other than from GSA's Multiple Award Schedule contracts for the acquisition of commercial computer software, no specific contract clause prescribed in this subpart need be used, but the contract

shall specifically address the Government's rights to use, disclose, modify, distribute, and reproduce the software. Section 12.212 sets forth the guidance for the acquisition of commercial computer software and states that commercial computer software or commercial computer software documentation shall be acquired under licenses customarily provided to the public to the extent the license is consistent with Federal law and otherwise satisfies the Government's needs. The clause at 52.227–19, Commercial Computer Software License, may be used when there is any confusion as to whether the Government's needs are satisfied or whether a customary commercial license is consistent with Federal law. Additional or lesser rights may be negotiated using the guidance concerning restricted rights as set forth in 27.404–2(d), or the clause at 52.227–19. If greater rights than the minimum rights identified in the clause at 52.227–19 are needed, or lesser rights are to be acquired, they shall be negotiated and set forth in the contract. This includes any additions to, or limitations on, the rights set forth in paragraph (b) of the clause at 52.227–19 when used. Examples of greater rights may be those necessary for networking purposes or use of the software from remote terminals communicating with a host computer where the software is located. If the computer software is to be acquired with unlimited rights, the contract shall also so state. In addition, the contract shall adequately describe the computer programs and/or databases, the media on which it is recorded, and all the necessary documentation.

(b) If the contract incorporates, makes reference to, or uses a vendor's standard commercial lease, license, or purchase agreement, the contracting officer shall ensure that the agreement is consistent with paragraph (a)(1) of this subsection. The contracting officer should exercise caution in accepting a vendor's terms and conditions, since they may be directed to commercial sales and may not be appropriate for Government contracts. Any inconsistencies in a vendor's standard commercial agreement shall be addressed in the contract and the contract terms shall take precedence over the vendor's standard commercial agreement. If the clause at 52.227–19 is used, inconsistencies in the vendor's standard commercial agreement regarding the Government's right to use, reproduce or disclose the computer software are reconciled by that clause.

(c) If a prime contractor under a contract containing the clause at 52.227–14, Rights in Data—General, with paragraph (g)(4) (Alternate III) in the clause, acquires restricted computer software from a subcontractor (at any tier) as a separate acquisition for delivery to or for use on behalf of the Government, the contracting officer may approve any additions to, or limitations on the restricted rights in the Restricted Rights Notice of paragraph (g)(4) in a collateral agreement incorporated in and made part of the contract.

27.405–4 Other existing data.

(a) Except for existing works pursuant to 27.405–2 or commercial computer software pursuant to 27.405–3, no clause contained in this subpart is required to be included in—

(1) Contracts solely for the acquisition of books, periodicals, and other printed items in the exact form in which these items are to be obtained unless reproduction rights are to be acquired; or

(2) Other contracts that require only existing data (other than limited rights data) to be delivered and the data are available without disclosure prohibitions, unless reproduction rights to the data are to be obtained.

(b) If the reproduction rights to the data are to be obtained in any contract of the type described in paragraph (b)(1) (i) or (ii) of this section, the rights shall be specifically set forth in the contract. No clause contained in this subpart is required to be included in contracts substantially for on-line data base services in the same form as they are normally available to the general public.

27.406 Acquisition of data.

27.406–1 General.

(a) It is the Government's practice to determine, to the extent feasible, its data requirements in time for inclusion

in solicitations. The data requirements may be subject to revision during contract negotiations. Since the preparation, reformatting, maintenance and updating, cataloging, and storage of data represents an expense to both the Government and the contractor, efforts should be made to keep the contract data requirements to a minimum, consistent with the purposes of the contract.

(b) The contracting officer shall specify in the contract all known data requirements, including the time and place for delivery and any limitations and restrictions to be imposed on the contractor in the handling of the data. Further, and to the extent feasible, in major system acquisitions, the contracting officer shall set out data requirements as separate line items. In establishing the contract data requirements and in specifying data items to be delivered by a contractor, agencies may, consistent with paragraph (a) of this subsection, develop their own contract schedule provisions. Agency procedures may, among other things, provide for listing, specifying, identifying source, assuring delivery, and handling any data required to be delivered, first produced, or specifically used in the performance of the contract.

(c) Data delivery requirements should normally not require that a contractor provide the Government, as a condition of the procurement, unlimited rights in data that qualify as limited rights data or restricted computer software. Rather, form, fit, and function data may be furnished with unlimited rights instead of the qualifying data, or the qualifying data may be furnished with limited rights or restricted rights if needed (see 27.404–2(c) and (d)). If greater rights are needed, they should be clearly set forth in the solicitation and the contractor fairly compensated for the greater rights.

[72 FR 63049, Nov. 7, 2007, as amended at 82 FR 4714, Jan. 13, 2017]

27.406–2 Additional data requirements.

(a) In some contracting situations, such as experimental, developmental, research, or demonstration contracts, it may not be feasible to ascertain all the data requirements at contract award. The clause at 52.227–16, Additional Data Requirements, may be used to enable the subsequent ordering by the contracting officer of additional data first produced or specifically used in the performance of these contracts as the actual requirements become known. The clause shall normally be used in solicitations and contracts involving experimental, developmental, research or demonstration work (other than basic or applied research to be performed under a contract solely by a university or college when the contract amount will be $500,000 or less) unless all the requirements for data are believed to be known at the time of contracting and specified in the contract. If the contract is for basic or applied research to be performed by a university or college, and the contracting officer believes the contract effort will in the future exceed $500,000, even though the initial award does not, the contracting officer may include the clause in the initial award.

(b) Data may be ordered under the clause at 52.227–16 at any time during contract performance or within a period of 3 years after acceptance of all items to be delivered under the contract. The contractor is to be compensated for converting the data into the prescribed form, for reproduction, and for delivery. In order to minimize storage costs for the retention of data, the contracting officer may relieve the contractor of the retention requirements for specified data items at any time during the retention period required by the clause. The contracting officer may permit the contractor to identify and specify in the contract data not to be ordered for delivery under the clause if the data is not necessary to meet the Government's requirements for data. Also, the contracting officer may alter the clause by deleting the term ''or specifically used'' in paragraph (a) of the clause if delivery of the data is not necessary to meet the Government's requirements for data. Any data ordered under this clause will be subject to the clause at 52.227–14, Rights in Data—General, (or other equivalent clause setting forth the respective rights of the Government and the contractor) in the contract. Data authorized to be withheld

under such clause will not be required to be delivered under the clause at 52.227–16, except as provided in Alternate II or Alternate III, if included (see 27.404–2(c) and (d)).

(c) Absent an established program for dissemination of computer software, agencies should not order additional computer software under the clause at 52.227–16, for the sole purpose of disseminating or marketing the software to the public. In ordering software for internal purposes, the contracting officer shall consider, consistent with the Government's needs, not ordering particular source codes, algorithms, processes, formulas, or flow charts of the software if the contractor shows that this aids its efforts to disseminate or market the software.

27.406–3 Major system acquisition.

(a) The clause at 52.227–21, Technical Data Declaration, Revision, and Withholding of Payment—Major Systems, implements 41 U.S.C. 2302(e). When using the clause at 52.227–21, the section of the contract specifying data delivery requirements (see 27.406–1(b)) shall expressly identify those line items of technical data to which the clause applies. Upon delivery of the technical data, the contracting officer shall review the technical data and the contractor's declaration relating to it to assure that the data are complete, accurate, and comply with contract requirements. If the data are not complete, accurate, or compliant, the contracting officer should request the contractor to correct the deficiencies, and may withhold payment. Final payment shall not be made under the contract until it has been determined that the delivery requirements of those line items of data to which the clause applies have been satisfactorily met.

(b) In a contract for, or in support of, a major system awarded by a civilian agency other than NASA or the U.S. Coast Guard, the following applies:

(1) The contracting officer shall require the delivery of any technical data relating to the major system or supplies for the major system, that are to be developed exclusively with Federal funds if the delivery of the technical data is needed to ensure the competitive acquisition of supplies or services that will be required in substantial quantities in the future. The clause at 52.227–22, Major System—Minimum Rights, is used in addition to the clause at 52.227–14, Rights in Data—General, and other required clauses, to ensure that the Government acquires at least those rights required by Pub. L. 98–577 in technical data developed exclusively with Federal funds.

(2) Technical data, relating to a major system or supplies for a major system, procured or to be procured by the Government and also relating to the design, development, or manufacture of products or processes offered or to be offered for sale to the public (except for such data as may be necessary for the Government to operate or maintain the product, or use the process if obtained by the Government as an element of performance under the contract), shall not be required to be provided to the Government from persons who have developed such products or processes as a condition for the procurement of such products or processes by the Government.

[72 FR 63049, Nov. 7, 2007, as amended at 79 FR 24210, Apr. 29, 2014]

27.407 Rights to technical data in successful proposals.

The clause at 52.227–23, Rights to Proposal Data (Technical), allows the Government to acquire unlimited rights to technical data in successful proposals. Pursuant to the clause, the prospective contractor is afforded the opportunity to specifically identify pages containing technical data to be excluded from the grant of unlimited rights. This exclusion is not dispositive of the protective status of the data, but any excluded technical data, as well as any commercial and financial information contained in the proposal, will remain subject to the policies in Subpart 15.2 or 15.6 (or agency supplements) relating to proposal information (*e.g.*, will be used for evaluation purposes only). If there is a need to have access to any of the excluded technical data during contract performance, consideration should be given to acquiring the data with limited rights, if they so qualify, in accordance with 27.404–2(c).

27.408 Cosponsored research and development activities.

(a) In contracts involving cosponsored research and development that require the contractor to make substantial contributions of funds or resources (*e.g.*, by cost-sharing or by repayment of nonrecurring costs), and the contractor's and the Government's respective contributions to any item, component, process, or computer software, developed or produced under the contract are not readily segregable, the contracting officer may limit the acquisition of, or acquire less than unlimited rights to, any data developed and delivered under the contract. Agencies may regulate the use of this authority in their supplements. Lesser rights shall, at a minimum, assure use of the data for agreed-to Governmental purposes (including reprocurement rights as appropriate), and address any disclosure limitations or restrictions to be imposed on the data. Also, consideration may be given to requiring the contractor to directly license others if needed to carry out the objectives of the contract. Since the purpose of the cosponsored research and development, the legitimate proprietary interests of the contractor, the needs of the Government, and the respective contributions of both parties may vary, no specific clauses are prescribed, but a clause providing less than unlimited rights in the Government for data developed and delivered under the contract (such as license rights) may be tailored to the circumstances consistent with the foregoing and the policy set forth in 27.402. As a guide, a clause may be appropriate when the contractor contributes money or resources, or agrees to make repayment of nonrecurring costs, of a value of approximately 50 percent of the total cost of the contract (*i.e.*, Government, contractor, and/or third party paid costs), and the respective contributions are not readily segregable for any work element to be performed under the contract. A clause may be used for all or for only specifically identified tasks or work elements under the contract. In the latter instance, its use will be in addition to whatever other data rights clause is prescribed under this subpart, with the contract specifically identifying which clause is to apply to which tasks or work elements. Further, this type of clause may not be appropriate where the purpose of the contract is to produce data for dissemination to the public, or to develop or demonstrate technologies that will be available, in any event, to the public for its direct use.

(b) Where the contractor's contributions are readily segregable (by performance requirements and the funding for the contract) and so identified in the contract, any resulting data may be treated under this clause as limited rights data or restricted computer software in accordance with 27.404–2(c) or (d), as applicable; or if this treatment is inconsistent with the purpose of the contract, rights to the data may, if so negotiated and stated in the contract, be treated in a manner consistent with paragraph (a) of this section.

27.409 Solicitation provisions and contract clauses

(a) Generally, a contract should contain only one data rights clause. However, where more than one is needed, the contract should distinguish the portion of contract performance to which each pertains.

(b)(1) Insert the clause at 52.227–14, Rights in Data—General, in solicitations and contracts if it is contemplated that data will be produced, furnished, or acquired under the contract, unless the contract is—

(i) For the production of special works of the type set forth in 27.405–1, although in these cases insert the clause at 52.227–14, Rights in Data—General, and make it applicable to data other than special works, as appropriate (see paragraph (e) of this section);

(ii) For the acquisition of existing data, commercial computer software, or other existing data, as described in 27.405–2 through 27.405–4 (see paragraphs (f) and (g) of this section);

(iii) A small business innovation research contract (see paragraph (h) of this section);

(iv) To be performed outside the United States (see paragraph (i)(1) of this section);

(v) For architect-engineer services or construction work (see paragraph (i)(2) of this section);

(vi) For the management, operation, design, or construction of a Government-owned facility to perform research, development, or production work (see paragraph (i)(3) of this section); or

(vii) A contract involving cosponsored research and development in which a clause providing for less than unlimited right has been authorized (see 27.408).

(2) If an agency determines, in accordance with 27.404–2(b), to adopt the alternate definition of ''Limited Rights Data'' in paragraph (a) of the clause, use the clause with its Alternate I.

(3) If a contracting officer determines, in accordance with 27.404–2(c) that it is necessary to obtain limited rights data, use the clause with its Alternate II. The contracting officer shall complete paragraph (g)(3) to include the purposes, if any, for which limited rights data are to be disclosed outside the Government.

(4) In accordance with 27.404–2(d), if a contracting officer determines it is necessary to obtain restricted computer software, use the clause with its Alternate III. Any greater or lesser rights regarding the use, reproduction, or disclosure of restricted computer software than those set forth in the Restricted Rights Notice of paragraph (g)(4) of the clause shall be specified in the contract and the notice modified accordingly.

(5) Use the clause with its Alternate IV in contracts for basic or applied research (other than those for the management or operation of Government facilities, and contracts and subcontracts in support of programs being conducted at those facilities or where international agreements require otherwise) to be performed solely by universities and colleges. The clause may be used with its Alternate IV in other contracts if in accordance with 27.404–3(a), an agency determines to grant permission for the contractor to assert claim to copyright subsisting in all data first produced without further request being made by the contractor. When Alternate IV is used, the contract may exclude items or categories of data from the permission granted, either by express provisions in the contract or by the addition of a paragraph (d)(4) to the clause (see 27.404–4).

(6) In accordance with 27.404–6, if the Government needs the right to inspect certain data at a contractor's facility, use the clause with its Alternate V.

(c) In accordance with 27.404–2(c)(2) and 27.404–2(d)(5), if the contracting officer desires to have an offeror state in response to a solicitation whether limited rights data or restricted computer software are likely to be used in meeting the data delivery requirements set forth in the solicitation, insert the provision at 52.227–15, Representation of Limited Rights Data and Restricted Computer Software, in any solicitation containing the clause at 52.227–14, Rights in Data—General. The contractor's response may provide an aid in determining whether the clause should be used with Alternate II and/or Alternate III.

(d) Insert the clause at 52.227–16, Additional Data Requirements, in solicitations and contracts involving experimental, developmental, research, or demonstration work (other than basic or applied research to be performed solely by a university or college where the contract amount will be $500,000 or less) unless all the requirements for data are believed to be known at the time of contracting and specified in the contract (see 27.406–2). This clause may also be used in other contracts when considered appropriate. For example, if the contract is for basic or applied research to be performed by a university or college, and the contracting officer believes the contract effort will in the future exceed $500,000, even though the initial award does not, the contracting officer may include the clause in the initial award.

(e) In accordance with 27.405–1, insert the clause at 52.227–17, Rights in Data—Special Works, in solicitations and contracts primarily for the production or compilation of data (other than limited rights data or restricted computer software) for the Government's internal use, or when there is a specific need to limit distribution and use of the data or to obtain indemnity for liabilities that may arise out of the content, performance, or disclosure of the data.

Examples of such contracts are set forth in 27.405–1.

(1) Insert the clause if existing works are to be modified, as by editing, translation, addition of subject matter, etc.

(2) The contract may specify the purposes and conditions (including time limitations) under which the data may be used, released, or reproduced by the contractor for other than contract performance.

(3) Contracts for the production of audiovisual works, sound recordings, etc. may include limitations in connection with talent releases, music licenses, and the like that are consistent with the purposes for which the data is acquired.

(4) The clause may be modified in accordance with paragraphs (c) through (e) of 27.405–1.

(f) Insert the clause at 52.227–18, Rights in Data—Existing Works, in solicitations and contracts exclusively for the acquisition, without modification, of existing audiovisual and similar works of the type set forth in 27.405–2. The contract may set forth limitations consistent with the purposes for which the work is being acquired. While no specific clause of this subpart is required to be included in contracts solely for the acquisition, without disclosure prohibitions, of books, publications, and similar items in the exact form in which the items exist prior to the request for purchase (*i.e.*, the off-the-shelf purchase of such items), or in other contracts where only existing data available without disclosure prohibitions is to be furnished, if reproduction rights are to be acquired, the contract shall include terms addressing such rights. (See 27.405–4.)

(g) In accordance with 27.405–3, when contracting (other than from GSA's Multiple Award Schedule contracts) for the acquisition of commercial computer software, the contracting officer may insert the clause at 52.227–19, Commercial Computer Software License, in the solicitation and contract. In any event, the contracting officer shall assure that the contract contains terms to obtain sufficient rights for the Government to fulfill the need for which the software is being acquired and is otherwise consistent with 27.405–3).

(h) If the contract is a Small Business Innovation Research (SBIR) contract, insert the clause at 52.227–20, Rights in Data—SBIR Program in all Phase I, Phase II, and Phase III contracts awarded under the Small Business Innovation Research Program established pursuant to 15 U.S.C. 638. The SBIR protection period may be extended in accordance with the Small Business Administration's ''Small Business Innovation Research Program Policy Directive'' (September 24, 2002).

(i) Agencies may prescribe in their procedures, as appropriate, a clause consistent with the policy of 27.402 in contracts—

(1) To be performed outside the United States;

(2) For architect-engineer services and construction work, *e.g.*, the clause at 52.227–17, Rights in Data—Special Works); or

(3) For management, operation, design, or construction of Government-owned research, development, or production facilities, and in contracts and subcontracts in support of programs being conducted at such facilities.

(j) In accordance with 27.406–3(a), insert the clause at 52.227–21, Technical Data Declaration, Revision, and Withholding of Payment—Major Systems, in contracts for major systems acquisitions or for support of major systems acquisitions. This requirement includes contracts for detailed design, development, or production of a major system and contracts for any individual part, component, subassembly, assembly, or subsystem integral to the major system, and other property that may be replaced during the service life of the system, including spare parts. When used, this clause requires that the technical data to which it applies be specified in the contract (see 27.406–3(a)).

(k) In accordance with 27.406–3(b), in the case of civilian agencies other than NASA and the U.S. Coast Guard, insert the clause at 52.227–22, Major System—Minimum Rights, in contracts for major systems or contracts in support of major systems.

(l) In accordance with 27.407, if a contracting officer desires to acquire unlimited rights in technical data contained in a successful proposal upon

which a contract award is based, insert the clause at 52.227–23, Rights to Proposal Data (Technical). Rights to technical data in a proposal are not acquired by mere incorporation by reference of the proposal in the contract, and if a proposal is incorporated by reference, the contracting officer shall follow 27.404 to assure that the rights are appropriately addressed.

Subpart 27.5—Foreign License and Technical Assistance Agreements

27.501 General.

Agencies shall provide necessary policy and procedures regarding foreign technical assistance agreements and license agreements involving intellectual property, including avoiding unnecessary royalty charges.

PART 28—BONDS AND INSURANCE

Sec.

Subpart 28.1—Bonds and Other Financial Protections

Subpart 28.2—Sureties and Other Security for Bonds

Subpart 28.3—Insurance

AUTHORITY: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

SOURCE: 48 FR 42286, Sept. 19, 1983, unless otherwise noted.

28.000 Scope of part.

This part prescribes requirements for obtaining financial protection against

losses under contracts that result from the use of the sealed bid or negotiated methods. It covers bid guarantees, bonds, alternative payment protections, security for bonds, and insurance.

[67 FR 13056, Mar. 20, 2002]

28.001 Definitions.

As used in this part—

Attorney-in-fact means an agent, independent agent, underwriter, or any other company or individual holding a power of attorney granted by a surety (see also *power of attorney* at 2.101).

Bid means any response to a solicitation, including a proposal under a negotiated acquisition. See the definition of ''offer'' at 2.101.

Bidder means any entity that is responding or has responded to a solicitation, including an offeror under a negotiated acquisition.

Bid guarantee means a form of security assuring that the bidder (1) will not withdraw a bid within the period specified for acceptance and (2) will execute a written contract and furnish required bonds, including any necessary coinsurance or reinsurance agreements, within the time specified in the bid, unless a longer time is allowed, after receipt of the specified forms.

Bond means a written instrument executed by a bidder or contractor (the ''principal''), and a second party (''the surety'' or ''sureties'') (except as provided in 28.204), to assure fulfillment of the principal's obligations to a third party (the ''obligee'' or ''Government''), identified in the bond. If the principal's obligations are not met, the bond assures payment, to the extent stipulated, of any loss sustained by the obligee. The types of bonds and related documents are as follows:

(1) An advance payment bond secures fulfillment of the contractor's obligations under an advance payment provision.

(2) An annual bid bond is a single bond furnished by a bidder, in lieu of separate bid bonds, which secures all bids (on other than construction contracts) requiring bonds submitted during a specific Government fiscal year.

(3) An annual performance bond is a single bond furnished by a contractor, in lieu of separate performance bonds, to secure fulfillment of the contractor's obligations under contracts (other than construction contracts) requiring bonds entered into during a specific Government fiscal year.

(4) A patent infringement bond secures fulfillment of the contractor's obligations under a patent provision.

(5) A payment bond assures payments as required by law to all persons supplying labor or material in the prosecution of the work provided for in the contract.

(6) A performance bond secures performance and fulfillment of the contractor's obligations under the contract.

Consent of surety means an acknowledgment by a surety that its bond given in connection with a contract continues to apply to the contract as modified.

Penal sum or *penal amount* means the amount of money specified in a bond (or a percentage of the bid price in a bid bond) as the maximum payment for which the surety is obligated or the amount of security required to be pledged to the Government in lieu of a corporate or individual surety for the bond.

Reinsurance means a transaction which provides that a surety, for a consideration, agrees to indemnify another surety against loss which the latter may sustain under a bond which it has issued.

[48 FR 42286, Sept. 19, 1983, as amended at 61 FR 31652, June 20, 1996; 62 FR 44806, Aug. 22, 1997; 66 FR 2130, Jan. 10, 2001; 67 FR 13056, Mar. 20, 2002]

Subpart 28.1—Bonds and Other Financial Protections

28.100 Scope of subpart.

This subpart prescribes requirements and procedures for the use of bonds, alternative payment protections, and all types of bid guarantees.

[62 FR 44806, Aug. 22, 1997]

28.101 Bid guarantees.

28.101–1 Policy on use.

(a) A contracting officer shall not require a bid guarantee unless a performance bond or a performance and payment bond is also required (see 28.102 and 28.103). Except as provided in paragraph (c) of this subsection, bid guarantees shall be required whenever a performance bond or a performance and payment bond is required.

(b) All types of bid guarantees are acceptable for supply or service contracts (see annual bid bonds and annual performance bonds coverage in 28.001). Only separate bid guarantees are acceptable in connection with construction contracts. Agencies may specify that only separate bid bonds are acceptable in connection with construction contracts.

(c) The chief of the contracting office may waive the requirement to obtain a bid guarantee when a performance bond or a performance and payment bond is required if it is determined that a bid guarantee is not in the best interest of the Government for a specific acquisition (e.g., overseas construction, emergency acquisitions, sole-source contracts). Class waivers may be authorized by the agency head or designee.

[48 FR 42286, Sept. 19, 1983, as amended at 51 FR 2665, Jan. 17, 1986; 52 FR 19803, May 27, 1987; 52 FR 30076, Aug. 12, 1987; 54 FR 34755, Aug. 21, 1989; 61 FR 39213, July 26, 1996]

28.101–2 Solicitation provision or contract clause.

(a) The contracting officer shall insert a provision or clause substantially the same as the provision at 52.228–1, Bid Guarantee, in solicitations or contracts that require a bid guarantee or similar guarantee. For example, the contracting officer may modify this provision—

(1) To set a period of time that is other than 10 days for the return of executed bonds;

(2) For use in connection with construction solicitations when the agency has specified that only separate bid bonds are acceptable in accordance with 28.101–1(b);

(3) For use in solicitations for negotiated contracts; or

(4) For use in service contracts containing options for extended performance.

(b) The contracting officer shall determine the amount of the bid guarantee for insertion in the provision at 52.228–1 (see 28.102–2(a)). The amount shall be adequate to protect the Government from loss should the successful bidder fail to execute further contractual documents and bonds as required. The bid guarantee amount shall be at least 20 percent of the bid price but shall not exceed $3 million. When the penal sum is expressed as a percentage, a maximum dollar limitation may be stated.

[61 FR 39213, July 26, 1996, as amended at 65 FR 46070, July 26, 2000]

28.101–3 Authority of an attorney-in-fact for a bid bond.

(a) Any person signing a bid bond as an attorney-in-fact shall include with the bid bond evidence of authority to bind the surety.

(b) An original, or a photocopy or facsimile of an original, power of attorney is sufficient evidence of such authority.

(c) For purposes of this section, electronic, mechanically-applied and printed signatures, seals and dates on the power of attorney shall be considered original signatures, seals and dates, without regard to the order in which they were affixed.

(d) The contracting officer shall—

(1) Treat the failure to provide a signed and dated power of attorney at the time of bid opening as a matter of responsiveness; and

(2) Treat questions regarding the authenticity and enforceability of the power of attorney at the time of bid opening as a matter of responsibility. These questions are handled after bid opening.

(e)(1) If the contracting officer contacts the surety to validate the power of attorney, the contracting officer shall document the file providing, at a minimum, the following information:

(i) Name of person contacted.

(ii) Date and time of contact.

(iii) Response of the surety.

(2) If, upon investigation, the surety declares the power of attorney to have been valid at the time of bid opening,

the contracting officer may require correction of any technical error.

(3) If the surety declares the power of attorney to have been invalid, the contracting officer shall not allow the bidder to substitute a replacement power of attorney or a replacement surety.

(f) Determinations of non-responsibility based on the unacceptability of a power of attorney are not subject to the Certificate of Competency process of subpart 19.6 if the surety has disavowed the validity of the power of attorney.

[70 FR 57461, Sept. 30, 2005]

28.101–4 Noncompliance with bid guarantee requirements.

(a) In sealed bidding, noncompliance with a solicitation requirement for a bid guarantee requires rejection of the bid, except in the situations described in paragraph (c) of this subsection when the noncompliance shall be waived.

(b) In negotiation, noncompliance with a solicitation requirement for a bid guarantee requires rejection of an initial proposal as unacceptable, if a determination is made to award the contract based on initial proposals without discussion, except in the situations described in paragraph (c) of this subsection when noncompliance shall be waived. (See 15.306(a)(2) for conditions regarding making awards based on initial proposals.) If the conditions for awarding based on initial proposals are not met, deficiencies in bid guarantees submitted by offerors determined to be in the competitive range shall be addressed during discussions and the offeror shall be given an opportunity to correct the deficiency.

(c) Noncompliance with a solicitation requirement for a bid guarantee shall be waived in the following circumstances unless the contracting officer determines in writing that acceptance of the bid would be detrimental to the Government's interest when—

(1) Only one offer is received. In this case, the contracting officer may require the furnishing of the bid guarantee before award;

(2) The amount of the bid guarantee submitted is less than required, but is equal to or greater than the difference between the offer price and the next higher acceptable offer;

(3) The amount of the bid guarantee submitted, although less than that required by the solicitation for the maximum quantity offered, is sufficient for a quantity for which the offeror is otherwise eligible for award. Any award to the offeror shall not exceed the quantity covered by the bid guarantee;

(4) The bid guarantee is received late, and late receipt is waived under 14.304;

(5) A bid guarantee becomes inadequate as a result of the correction of a mistake under 14.407 (but only if the bidder will increase the bid guarantee to the level required for the corrected bid);

(6) An otherwise acceptable bid bond was submitted with a signed offer, but the bid bond was not signed by the offeror;

(7) An otherwise acceptable bid bond is erroneously dated or bears no date at all; or

(8) A bid bond does not list the United States as obligee, but correctly identifies the offeror, the solicitation number, and the name and location of the project involved, so long as it is acceptable in all other respects.

[54 FR 48985, Nov. 28, 1989, as amended at 60 FR 34739, July 3, 1995; 62 FR 51271, Sept. 30, 1997; 81 FR 83099, Nov. 18, 2016]

28.102 Performance and payment bonds and alternative payment protections for construction contracts.

28.102–1 General.

(a) 40 U.S.C. chapter 31, subchapter III, Bonds (formerly known as the Miller Act), requires performance and payment bonds for any construction contract exceeding $150,000, except that this requirement may be waived— (1) by the contracting officer for as much of the work as is to be performed in a foreign country upon finding that it is impracticable for the contractor to furnish such bond, or

(2) As otherwise authorized by the Bonds statute or other law.

(b)(1) Pursuant to 40 U.S.C. 3132, for construction contracts greater than $35,000, but not greater than $150,000, the contracting officer shall select two

or more of the following payment protections, giving particular consideration to inclusion of an irrevocable letter of credit as one of the selected alternatives:

(i) A payment bond.

(ii) An irrevocable letter of credit (ILC).

(iii) *A tripartite escrow agreement*. The prime contractor establishes an escrow account in a federally insured financial institution and enters into a tripartite escrow agreement with the financial institution, as escrow agent, and all of the suppliers of labor and material. The escrow agreement shall establish the terms of payment under the contract and of resolution of disputes among the parties. The Government makes payments to the contractor's escrow account, and the escrow agent distributes the payments in accordance with the agreement, or triggers the disputes resolution procedures if required.

(iv) *Certificates of deposit*. The contractor deposits certificates of deposit from a federally insured financial institution with the contracting officer, in an acceptable form, executable by the contracting officer.

(v) A deposit of the types of security listed in 28.204–1 and 28.204–2.

(2) The contractor shall submit to the Government one of the payment protections selected by the contracting officer.

(c) The contractor shall furnish all bonds or alternative payment protection, including any necessary reinsurance agreements, before receiving a notice to proceed with the work or being allowed to start work.

[48 FR 42286, Sept. 19, 1983, as amended at 61 FR 31652, June 20, 1996; 70 FR 57454, Sept. 30, 2005; 71 FR 57368, Sept. 28, 2006; 75 FR 53134, Aug. 30, 2010; 79 FR 24210, Apr. 29, 2014; 80 FR 38298, July 2, 2015]

28.102–2 Amount required.

(a) *Definition*. As used in this subsection—

Original contract price means the award price of the contract; or, for requirements contracts, the price payable for the estimated total quantity; or, for indefinite-quantity contracts, the price payable for the specified minimum quantity. Original contract price does not include the price of any options, except those options exercised at the time of contract award.

(b) *Contracts exceeding $150,000*—(1) *Performance bonds*. Unless the contracting officer determines that a lesser amount is adequate for the protection of the Government, the penal amount of performance bonds must equal—

(i) 100 percent of the original contract price; and

(ii) If the contract price increases, an additional amount equal to 100 percent of the increase.

(2) *Payment bonds*. (i) Unless the contracting officer makes a written determination supported by specific findings that a payment bond in this amount is impractical, the amount of the payment bond must equal—

(A) 100 percent of the original contract price; and

(B) If the contract price increases, an additional amount equal to 100 percent of the increase.

(ii) The amount of the payment bond must be no less than the amount of the performance bond.

(c) *Contracts exceeding $35,000 but not exceeding $150,000*. Unless the contracting officer determines that a lesser amount is adequate for the protection of the Government, the penal amount of the payment bond or the amount of alternative payment protection must equal—

(1) 100 percent of the original contract price; and

(2) If the contract price increases, an additional amount equal to 100 percent of the increase.

(d) *Securing additional payment protection*. If the contract price increases, the Government must secure any needed additional protection by directing the contractor to—

(1) Increase the penal sum of the existing bond;

(2) Obtain an additional bond; or

(3) Furnish additional alternative payment protection.

(e) *Reducing amounts*. The contracting officer may reduce the amount of security to support a bond, subject

to the conditions of 28.203–5(c) or 28.204(b).

[65 FR 46070, July 26, 2000, as amended at 71 FR 57368, Sept. 28, 2006; 75 FR 53134, Aug. 30, 2010; 79 FR 24210, Apr. 29, 2014; 80 FR 38298, July 2, 2015]

28.102–3 Contract clauses.

(a) Insert a clause substantially the same as the clause at 52.228–15, Performance and Payment Bonds—Construction, in solicitations and contracts for construction that contain a requirement for performance and payment bonds if the resultant contract is expected to exceed $150,000. The contracting officer may revise paragraphs (b)(1) and/or (b)(2) of the clause to establish a lower percentage in accordance with 28.102–2(b). If the provision at 52.228–1 is not included in the solicitation, the contracting officer must set a period of time for return of executed bonds.

(b) Insert the clause at 52.228–13, Alternative Payment Protections, in solicitations and contracts for construction, when the estimated or actual value exceeds $35,000 but does not exceed $150,000. Complete the clause by specifying the payment protections selected (see 28.102–1(b)(1)) and the deadline for submission. The contracting officer may revise paragraph (b) of the clause to establish a lower percentage in accordance with 28.102–2(c).

[48 FR 42286, Sept. 19, 1983, as amended at 61 FR 31652, June 20, 1996; 61 FR 39213, July 26, 1996; 62 FR 44806, Aug. 22, 1997; 65 FR 46070, July 26, 2000; 71 FR 57368, Sept. 28, 2006; 75 FR 53134, Aug. 30, 2010; 80 FR 38298, July 2, 2015]

28.103 Performance and payment bonds for other than construction contracts.

28.103–1 General.

(a) Generally, agencies shall not require performance and payment bonds for other than construction contracts. However, performance and payment bonds may be used as permitted in 28.103–2 and 28.103–3.

(b) The contractor shall furnish all bonds before receiving a notice to proceed with the work.

(c) No bond shall be required after the contract has been awarded if it was not specifically required in the contract, except as may be determined necessary for a contract modification.

28.103–2 Performance bonds.

(a) Performance bonds may be required for contracts exceeding the simplified acquisition threshold when necessary to protect the Government's interest. The following situations may warrant a performance bond:

(1) Government property or funds are to be provided to the contractor for use in performing the contract or as partial compensation (as in retention of salvaged material).

(2) A contractor sells assets to or merges with another concern, and the Government, after recognizing the latter concern as the successor in interest, desires assurance that it is financially capable.

(3) Substantial progress payments are made before delivery of end items starts.

(4) Contracts are for dismantling, demolition, or removal of improvements.

(b) The Government may require additional performance bond protection when a contract price is increased.

(c) The contracting officer must determine the contractor's responsibility (see subpart 9.1) even though a bond has been or can be obtained.

[48 FR 42286, Sept. 19, 1983, as amended at 60 FR 34759, July 3, 1995; 61 FR 39213, July 26, 1996]

28.103–3 Payment bonds.

(a) A payment bond is required only when a performance bond is required, and if the use of payment bond is in the Government's interest.

(b) When a contract price is increased, the Government may require additional bond protection in an amount adequate to protect suppliers of labor and material.

[48 FR 42286, Sept. 19, 1983, as amended at 61 FR 39213, July 26, 1996]

28.103–4 Contract clause.

The contracting officer shall insert a clause substantially the same as the clause at 52.228–16, Performance and Payment Bonds—Other than Construction, in solicitations and contracts that contain a requirement for both

payment and performance bonds. The contracting officer shall determine the amount of each bond for insertion in the clause. The amount shall be adequate to protect the interest of the Government. The contracting officer shall also set a period of time (normally 10 days) for return of executed bonds. *Alternate I* shall be used when only performance bonds are required.

[61 FR 39213, July 26, 1996]

28.104 Annual performance bonds.

(a) Annual performance bonds only apply to non-construction contracts. They shall provide a gross penal sum applicable to the total amount of all covered contracts.

(b) When the penal sums obligated by contracts are approximately equal to or exceed the penal sum of the annual performance bond, an additional bond will be required to cover additional contracts.

28.105 Other types of bonds.

The head of the contracting activity may approve using other types of bonds in connection with acquiring particular supplies or services. These types include advance payment bonds and patent infringement bonds.

28.105–1 Advance payment bonds.

Advance payment bonds may be required only when the contract contains an advance payment provision and a performance bond is not furnished. The contracting officer shall determine the amount of the advance payment bond necessary to protect the Government.

28.105–2 Patent infringement bonds.

(a) Contracts providing for patent indemnity may require these bonds only if—

(1) A performance bond is not furnished; and

(2) The financial responsibility of the contractor is unknown or doubtful.

(b) The contracting officer shall determine the penal sum.

28.106 Administration.

28.106–1 Bonds and bond related forms.

The following Standard Forms (SF's) and Optional Forms (OF's) shall be used, except in foreign countries, when a bid bond, performance or payment bond, or an individual surety is required. The bond forms shall be used as indicated in the instruction portion of each form.

(a) SF 24, Bid Bond (see 28.101).

(b) SF 25, Performance Bond (see 28.102–1 and 28.106–3(b)).

(c) SF 25–A, Payment Bond (see 28.102–1 and 28.106–3(b)).

(d) SF 25–B, Continuation Sheet (for SF's 24, 25, and 25–A).

(e) SF 28, Affidavit of Individual Surety (see 28.203).

(f) SF 34, Annual Bid Bond (see 28.001).

(g) SF 35, Annual Performance Bond (see 28.104).

(h) SF 273, Reinsurance Agreement for a Bonds Statute Performance Bond (see 28.202(a)(4)).

(i) SF 274, Reinsurance Agreement for a Bonds Statute Payment Bond (see 28.202(a)(4)).

(j) SF 275, Reinsurance Agreement in Favor of the United States (see 28.202(a)(4)).

(k) SF 1414, Consent of Surety (see 28.106–5).

(l) SF 1415, Consent of Surety and Increase of Penalty (see 28.106–3).

(m) SF 1416, Payment Bond for Other Than Construction Contracts (see 28.103–3 and 28.106–3(b)).

(n) SF 1418, Performance Bond for Other Than Construction Contracts (see 28.103–2 and 28.106–3(b)).

(o) OF 90, Release of Lien on Real Property (see 28.203–5).

(p) OF 91, Release of Personal Property from Escrow (see 28.203–5).

[48 FR 42286, Sept. 19, 1983, as amended at 54 FR 48986, Nov. 28, 1989; 61 FR 39213, July 26, 1996; 79 FR 24210, Apr. 29, 2014; 83 FR 42573, Aug. 22, 2018]

28.106–2 Substitution of surety bonds.

(a) A new surety bond covering all or part of the obligations on a bond previously approved may be substituted for the original bond if approved by the head of the contracting activity, or as otherwise specified in agency regulation.

(b) When a new surety bond is approved, the contracting officer shall notify the principal and surety of the

original bond of the effective date of the new bond.

[48 FR 42286, Sept. 19, 1983, as amended at 61 FR 39213, July 26, 1996]

28.106–3 Additional bond and security.

(a) When additional bond coverage is required and is secured in whole or in part by the original surety or sureties, agencies shall use Standard Form 1415, Consent of Surety and Increase of Penalty. Standard Form 1415 is authorized for local reproduction.

(b) When additional bond coverage is required and is secured in whole or in part by a new surety or by one of the alternatives described in 28.204 in lieu of corporate or individual surety, agencies shall use Standard Form 25, Performance Bond; Standard Form 1418, Performance Bond for Other Than Construction Contracts; Standard Form 25–A, Payment Bond; or Standard Form 1416, Payment Bond for Other Than Construction Contracts.

[63 FR 44806, Aug. 22, 1997, as amended at 83 FR 42573, Aug. 22, 2018]

28.106–4 Contract clause.

(a) The contracting officer shall insert the clause at 52.228–2, Additional Bond Security, in solicitations and contracts when bonds are required.

(b) In accordance with Section 806(a)(3) of Pub. L. 102–190, as amended by Sections 2091 and 8105 of Pub. L. 103–355 (10 U.S.C. 2302 note), the contracting officer shall insert the clause at 52.228–12, Prospective Subcontractor Requests for Bonds, in solicitations and contracts with respect to which a payment bond will be furnished pursuant to 40 U.S.C. chapter 31, subchapter III, Bonds (see 28.102–1), except for contracts for the acquisition of commercial items as defined in Subpart 2.1.

[48 FR 42286, Sept. 19, 1983, as amended at 60 FR 48273, Sept. 18, 1995; 79 FR 24210, Apr. 29, 2014]

28.106–5 Consent of surety.

(a) When any contract is modified, the contracting officer shall obtain the consent of surety if—

(1) An additional bond is obtained from other than the original surety;

(2) No additional bond is required and—

(i) The modification is for new work beyond the scope of the original contract; or

(ii) The modification does not change the contract scope but changes the contract price (upward or downward) by more than 25 percent or $50,000; or

(3) Consent of surety is required for a novation agreement (See subpart 42.12).

(b) When a contract for which performance or payment is secured by any of the types of security listed in 28.204 is modified as described in paragraph (a) of this subsection, no consent of surety is required.

(c) Agencies shall use Standard Form 1414, Consent of Surety, for all types of contracts.

[48 FR 42286, Sept. 19, 1983, as amended at 61 FR 31652, June 20, 1996]

28.106–6 Furnishing information.

(a) The surety on the bond, upon its written request, may be furnished information on the progress of the work, payments, and the estimated percentage of completion, concerning the contract for which the bond was furnished.

(b) When a payment bond has been provided, the contracting officer shall, upon request, furnish the name and address of the surety or sureties to any subcontractor or supplier who has furnished or been requested to furnish labor or material for the contract. In addition, general information concerning the work progress, payments, and the estimated percentage of completion may be furnished to persons who have provided labor or materials and have not been paid.

(c) When a payment bond has been provided for a contract, the head of the agency or designee shall furnish a certified copy of the bond and the contract for which it was given to any person who makes a request therefor and who furnishes an affidavit that the requestor has supplied labor or materials for such work and payment therefor has not been made or that the requestor is being sued on such bond. The person who makes the request shall be required to pay such costs of preparation as determined by the head of the agency or designee to be reasonable and appropriate (see 40 U.S.C. 3133).

(d) Section 806(a)(2) of Pub. L. 102–190, as amended by Sections 2091 and 8105 of

Pub. L. 103–355 (10 U.S.C. 2302 note), requires that the Federal Government provide information to subcontractors on payment bonds under contracts for other than commercial items as defined in Subpart 2.1. Upon the written or oral request of a subcontractor/supplier, or prospective subcontractor/supplier, under a contract with respect to which a payment bond has been furnished pursuant to the Bonds statute, the contracting officer shall promptly provide to the requester, either orally or in writing, as appropriate, any of the following:

(1) Name and address of the surety or sureties on the payment bond.

(2) Penal amount of the payment bond.

(3) Copy of the payment bond. The contracting officer may impose reasonable fees to cover the cost of copying and providing a copy of the payment bond.

[48 FR 42286, Sept. 19, 1983, as amended at 50 FR 26903, June 28, 1985; 60 FR 48273, Sept. 18, 1995; 70 FR 57454, Sept. 30, 2005; 79 FR 24210, Apr. 29, 2014]

28.106–7 Withholding contract payments.

(a) During contract performance, agencies shall not withhold payments due contractors or assignees because subcontractors or suppliers have not been paid.

(b) If, after completion of the contract work, the Government receives written notice from the surety regarding the contractor's failure to meet its obligation to its subcontractors or suppliers, the contracting officer shall withhold final payment. However, the surety must agree to hold the Government harmless from any liability resulting from withholding the final payment. The contracting officer will authorize final payment upon agreement between the contractor and surety or upon a judicial determination of the rights of the parties.

(c) For any withholding incident to the labor standards provisions of the contract, see part 22.

28.106–8 Payment to subcontractors or suppliers.

The contracting officer will only authorize payment to subcontractors or suppliers from an ILC (or any other cash equivalent security) upon a judicial determination of the rights of the parties, a signed notarized statement by the contractor that the payment is due and owed, or a signed agreement between the parties as to amount due and owed.

[62 FR 44807, Aug. 22, 1997]

Subpart 28.2—Sureties and Other Security for Bonds

28.200 Scope of subpart.

This subpart prescribes procedures for the use of sureties and other security to protect the Government from financial losses.

[62 FR 44807, Aug. 22, 1997]

28.201 Requirements for security.

(a) Agencies shall obtain adequate security for bonds (including coinsurance and reinsurance agreements) required or used with a contract for supplies or services (including construction). Acceptable forms of security include (1) corporate or individual sureties or (2) any of the types of security authorized in lieu of sureties by 28.204.

(b) Solicitations shall not preclude offerors from using the types of surety or other security permitted by this subpart, unless prohibited by law or regulation.

[48 FR 42286, Sept. 19, 1983, as amended at 55 FR 25530, June 21, 1990; 62 FR 44807, Aug. 22, 1997]

28.202 Acceptability of corporate sureties.

(a)(1) Corporate sureties offered for bonds furnished with contracts performed in the United States or its outlying areas must appear on the list contained in the Department of the Treasury Circular 570, ''Companies Holding Certificates of Authority as Acceptable Sureties on Federal Bonds and Acceptable Reinsuring Companies.''

(2) The penal amount of the bond should not exceed the surety's underwriting limit stated in the Department of the Treasury circular. If the penal amount exceeds the underwriting limit, the bond will be acceptable only if (i) the amount which exceeds the

specified limit is coinsured or reinsured and (ii) the amount of coinsurance or reinsurance does not exceed the underwriting limit of each coinsurer or reinsurer.

(3) Coinsurance or reinsurance agreements shall conform to the Department of the Treasury regulations in 31 CFR 223.10 and 223.11. When reinsurance is contemplated, the contracting office generally shall require reinsurance agreements to be executed and submitted with the bonds before making a final determination on the bonds.

(4) When specified in the solicitation, the contracting officer may accept a bond from the direct writing company in satisfaction of the total bond requirement of the contract. This is permissible until necessary reinsurance agreements are executed, even though the total bond requirement may exceed the insurer's underwriting limitation. The contractor shall execute and submit necessary reinsurance agreements to the contracting officer within the time specified on the bid form, which may not exceed 45 calendar days after the execution of the bond. The contractor shall use Standard Form 273, Reinsurance Agreement for a Bonds Statute Performance Bond, and Standard Form 274, Reinsurance Agreement for a Bonds Statute Payment Bond, when reinsurance is furnished with the required performance or payment bonds. Standard Form 275, Reinsurance Agreement in Favor of the United States, is used when reinsurance is furnished with bonds for other purposes.

(b) For contracts performed in a foreign country, sureties not appearing on Treasury Department Circular 570 are acceptable if the contracting officer determines that it is impracticable for the contractor to use Treasury listed sureties.

(c) The Department of the Treasury issues supplements to Circular 570, notifying all Federal agencies of (1) new approved corporate surety companies and (2) the termination of the authority of any specific corporate surety to qualify as a surety on Federal bonds. Upon receipt of notification of termination of a company's authority to qualify as a surety on Federal bonds, the contracting officer shall review the outstanding contracts and take action necessary to protect the Government, including, where appropriate, securing new bonds with acceptable sureties in lieu of outstanding bonds with the named company.

(d) The Department of the Treasury Circular 570 may be obtained from the U.S. Department of the Treasury, Financial Management Service, Surety Bond Branch, 3700 East West Highway, Room 6F01, Hyattsville, MD 20782. Or via the internet at *http://www.fms.treas.gov/c570/*.

[48 FR 42286, Sept. 19, 1983, as amended at 54 FR 48986, Nov. 28, 1989; 68 FR 28083, May 22, 2003; 71 FR 67779, Nov. 22, 2006; 79 FR 24210, Apr. 29, 2014]

28.203 Acceptability of individual sureties.

(a) An individual surety is acceptable for all types of bonds except position schedule bonds. The contracting officer shall determine the acceptability of individuals proposed as sureties, and shall ensure that the surety's pledged assets are sufficient to cover the bond obligation. (See 28.203–7 for information on excluded individual sureties.)

(b) An individual surety must execute the bond, and the unencumbered value of the assets (exclusive of all outstanding pledges for other bond obligations) pledged by the individual surety, must equal or exceed the penal amount of each bond. The individual surety shall execute the Standard Form 28 and provide a security interest in accordance with 28.203–1. One individual surety is adequate support for a bond, provided the unencumbered value of the assets pledged by that individual surety equal or exceed the amount of the bond. An offeror may submit up to three individual sureties for each bond, in which case the pledged assets, when combined, must equal or exceed the penal amount of the bond. Each individual surety must accept both joint and several liability to the extent of the penal amount of the bond.

(c) If the contracting officer determines that no individual surety in support of a bid guarantee is acceptable, the offeror utilizing the individual surety shall be rejected as nonresponsible, except as provided in 28.101–4. A finding of nonresponsibility based on

unacceptability of an individual surety, need not be referred to the Small Business Administration for a competency review. (See 19.602–1(a)(2)(i) and 61 Comp. Gen. 456 (1982).)

(d) A contractor submitting an unacceptable individual surety in satisfaction of a performance or payment bond requirement may be permitted a reasonable time, as determined by the contracting officer, to substitute an acceptable surety for a surety previously determined to be unacceptable.

(e) When evaluating individual sureties, contracting officers may obtain assistance from the office identified in 28.202(d).

(f) Contracting officers shall obtain the opinion of legal counsel as to the adequacy of the documents pledging the assets prior to accepting the bid guarantee and payment and performance bonds.

(g) Evidence of possible criminal or fraudulent activities by an individual surety shall be referred to the appropriate agency official in accordance with agency procedures.

[54 FR 48986, Nov. 28, 1989]

28.203–1 Security interests by an individual surety.

(a) An individual surety may be accepted only if a security interest in assets acceptable under 28.203–2 is provided to the Government by the individual surety. The security interest shall be furnished with the bond.

(b) The value at which the contracting officer accepts the assets pledged must be equal to or greater than the aggregate penal amounts of the bonds required by the solicitation and may be provided by one or a combination of the following methods:

(1) An escrow account with a federally insured financial institution in the name of the contracting agency. (See 28.203–2(b)(2) with respect to Government securities in book entry form.) Acceptable securities for deposit in escrow are discussed in 28.203–2. While the offeror is responsible for establishing the escrow account, the terms and conditions must be acceptable to the contracting officer. At a minimum, the escrow account shall provide for the following:

(i) The account must provide the contracting officer the sole and unrestricted right to draw upon all or any part of the funds deposited in the account. A written demand for withdrawal shall be sent to the financial institution by the contracting officer, after obtaining the concurrence of legal counsel, with a copy to the offeror/contractor and to the surety. Within the time period specified in the demand, the financial institution would pay the Government the amount demanded up to the amount on deposit. If any dispute should arise between the Government and the offeror/contractor, the surety, or the subcontractors or suppliers with respect to the offer or contract, the financial institution would be required, unless precluded by order of a court of competent jurisdiction, to disburse monies to the Government as directed by the contracting officer.

(ii) The financial institution would be authorized to release to the individual surety all or part of the balance of the escrow account, including any accrued interest, upon receipt of written authorization from the contracting officer.

(iii) The Government would not be responsible for any costs attributable to the establishment, maintenance, administration, or any other aspect of the account.

(iv) The financial institution would not be liable or responsible for the interpretation of any provisions or terms and conditions of the solicitation or contract.

(v) The financial institution would provide periodic account statements to the contracting officer.

(vi) The terms of the escrow account could not be amended without the consent of the contracting officer.

(2) A lien on real property, subject to the restrictions in 28.203–2 and 28.203–3.

[54 FR 48986, Nov. 28, 1989]

28.203–2 Acceptability of assets.

(a) The Government will accept only cash, readily marketable assets, or irrevocable letters of credit from a federally insured financial institution from individual sureties to satisfy the underlying bond obligations.

(b) Acceptable assets include—

(1) Cash, or certificates of deposit, or other cash equivalents with a federally insured financial institution;

(2) United States Government securities at market value. (An escrow account is not required if an individual surety offers Government securities held in book entry form at a depository institution. In lieu thereof, the individual shall provide evidence that the depository institution has (i) placed a notation against the individual's book entry account indicating that the security has been pledged in favor of the respective agency; (ii) agreed to notify the agency prior to maturity of the security; and (iii) agreed to hold the proceeds of the security subject to the pledge in favor of the agency until a substitution of securities is made or the security interest is formally released by the agency);

(3) Stocks and bonds actively traded on a national U.S. security exchange with certificates issued in the name of the individual surety. National security exchanges are—(i) the New York Stock Exchange; (ii) the American Stock Exchange; (iii) the Boston Stock Exchange; (iv) the Cincinnati Stock Exchange; (v) the Midwest Stock Exchange; (vi) the Philadelphia Stock Exchange; (vii) the Pacific Stock Exchange; and (viii) the Spokane Stock Exchange. These assets will be accepted at 90 percent of their 52-week low, as reflected at the time of submission of the bond. Stock options and stocks on the over-the-counter (OTC) market or NASDQ Exchanges will not be accepted. Assistance in evaluating the acceptability of securities may be obtained from the Securities and Exchange Commission, Division of Enforcement, 450 Fifth Street NW., Washington, DC 20549.

(4) Real property owned in fee simple by the surety without any form of concurrent ownership, except as provided in paragraph (c)(3)(iii) of this subsection, and located in the United States or its outlying areas. These assets will be accepted at 100 percent of the most current tax assessment value (exclusive of encumbrances) or 75 percent of the properties' unencumbered market value provided a current appraisal is furnished (see 28.203–3).

(5) Irrevocable letters of credit (ILC) issued by a federally insured financial institution in the name of the contracting agency and which identify the agency and solicitation or contract number for which the ILC is provided.

(c) Unacceptable assets include but are not limited to—

(1) Notes or accounts receivable;

(2) Foreign securities;

(3) Real property as follows:

(i) Real property located outside the United States and its outlying areas.

(ii) Real property which is a principal residence of the surety.

(iii) Real property owned concurrently regardless of the form of co-tenancy (including joint tenancy, tenancy by the entirety, and tenancy in common) except where all co-tenants agree to act jointly.

(iv) Life estates, leasehold estates, or future interests in real property.

(4) Personal property other than that listed in paragraph (b) of this subsection (e.g., jewelry, furs, antiques);

(5) Stocks and bonds of the individual surety in a controlled, affiliated, or closely held concern of the offeror/contractor;

(6) Corporate assets (e.g., plant and equipment);

(7) Speculative assets (e.g., mineral rights);

(8) Letters of credit, except as provided in 28.203–2(b)(5).

[54 FR 48987, Nov. 28, 1989, as amended at 68 FR 28083, May 22, 2003]

28.203–3 Acceptance of real property.

(a) Whenever a bond with a security interest in real property is submitted, the individual surety shall provide—

(1) A mortgagee title insurance policy, in an insurance amount equal to the amount of the lien, or other evidence of title that is consistent with the requirements of Section 2 of the United States Department of Justice Title Standards at *https://www.justice.gov/enrd/page/file/922431/download*. This title evidence must show fee simple title vested in the surety along with any concurrent owners; whether any real estate taxes are due and payable; and any recorded encumbrances against the property, including

the lien filed in favor of the Government under paragraph (d) of this subsection. Agency contracting officers should request the assistance of their designated agency legal counsel in determining if the title evidence is consistent with the Department of Justice standards;

(2) Evidence of the amount due under any encumbrance shown in the evidence of title;

(3) A copy of the current real estate tax assessment of the property or a current appraisal dated no earlier than 6 months prior to the date of the bond, prepared by a professional appraiser who certifies that the appraisal has been conducted in accordance with the generally accepted appraisal standards as reflected in the Uniform Standards of Professional Appraisal Practice as promulgated by the Appraisal Foundation, 1029 Vermont Avenue NW., Washington, DC 20005.

(b) Failure to provide evidence that the lien has been properly recorded will render the offeror nonresponsible.

(c) The individual surety is liable for the payment of all administrative costs of the Government, including legal fees, associated with the liquidation of pledged real estate.

(d) The following format, or any document substantially the same, shall be signed by all owners of the property and used by the surety and recorded in the local recorder's office when a surety pledges real estate on Standard Form 28, Affidavit of Individual Surety.

LIEN ON REAL ESTATE

I/we agree that this instrument constitutes a lien in the amount of $_____ on the property described in this lien. The rights of the United States Government shall take precedence over any subsequent lien or encumbrance until the lien is formally released by a duly authorized representative of the United States. I/we hereby grant the United States the power of sale of subject property, including the right to satisfy its reasonable administrative costs, including legal fees associated with any sale of subject property, in the event of contractor default if I/we otherwise fail to satisfy the underlying ( ) bid guarantee, ( ) performance bond, ( ) or payment bond obligations as an individual surety on solicitation/contract number _____. The lien is upon the real estate now owned by me/us described as follows: (legal description, street address and other identifying description)

IN WITNESS HEREOF, I/we have hereunto affixed my/our hand(s) and seal(s) this ____ DAY OF _____ 20____.

WITNESS:

(SEAL)

I, _____, a Notary Public in and for the (CITY) _____, (STATE) _____, do hereby certify that _____, a party or parties to a certain Agreement bearing the date _____ day of _____ 20__, and hereunto annexed, personally appeared before me, the said _____ being personally well known to me as the person(s) who executed said lien, and acknowledged the same to be his/her/their act and deed. GIVEN under my hand and seal this _____ day of _____ 20____.

NOTARY PUBLIC, STATE

My Commission expires:

[54 FR 48987, Nov. 28, 1989, as amended at 70 FR 11763, Mar. 9, 2005; 74 FR 40467, Aug. 11, 2009; 77 FR 204, Jan. 3, 2012; 83 FR 42573, Aug. 22, 2018]

28.203–4 Substitution of assets.

An individual surety may request the Government to accept a substitute asset for that currently pledged by submitting a written request to the responsible contracting officer. The contracting officer may agree to the substitution of assets upon determining, after consultation with legal counsel, that the substitute assets to be pledged are adequate to protect the outstanding bond or guarantee obiligations. If acceptable, the substitute assets shall be pledged as provided for in subpart 28.2.

[54 FR 48988, Nov. 28, 1989]

28.203–5 Release of lien.

(a) After consultation with legal counsel, the contracting officer shall release the security interest on the individual surety's assets using the Optional Form 90, Release of Lien on Real Property, or Optional Form 91, Release of Personal Property from Escrow, or a similar release as soon as possible consistent with the conditions in subparagraphs (a) (1) and (2) of this subsection. A surety's assets pledged in support of a payment bond may be released to a

subcontractor or supplier upon Government receipt of a Federal district court judgment, or a sworn statement by the subcontractor or supplier that the claim is correct along with a notarized authorization of the release by the surety stating that it approves of such release.

(1) *Contracts subject to the Bonds statute.* The security interest shall be maintained for the later of (i) 1 year following final payment, (ii) until completion of any warranty period (applicable only to performance bonds), or (iii) pending resolution of all claims filed against the payment bond during the 1-year period following final payment.

(2) *Contracts subject to alternative payment protection (28.102–1(b)(1)).* The security interest shall be maintained for the full contract performance period plus one year.

(3) *Other contracts not subject to the Bonds statute.* The security interest shall be maintained for 90 days following final payment or until completion of any warranty period (applicable only to performance bonds), whichever is later.

(b) Upon written request, the contracting officer may release the security interest on the individual surety's assets in support of a bid guarantee based upon evidence that the offer supported by the individual surety will not result in contract award.

(c) Upon written request by the individual surety, the contracting officer may release a portion of the security interest on the individual surety's assets based upon substantial performance of the contractor's obligations under its performance bond. Release of the security interest in support of a payment bond must comply with the subparagraphs (a) (1) through (3) of this subsection. In making this determination, the contracting officer will give consideration as to whether the unreleased portion of the lien is sufficient to cover the remaining contract obligations, including payments to subcontractors and other potential liabilities. The individual surety shall, as a condition of the partial release, furnish an affidavit agreeing that the release of such assets does not relieve the individual surety of its obligations under the bond(s).

[54 FR 48988, Nov. 28, 1989, as amended at 61 FR 31652, June 20, 1996; 79 FR 24210, Apr. 29, 2014]

28.203–6 Contract clause.

Insert the clause at 52.228–11 in solicitations and contracts which require the submission of bid guarantees, performance, or payment bonds.

[54 FR 48988, Nov. 28, 1989]

28.203–7 Exclusion of individual sureties.

(a) An individual may be excluded from acting as a surety on bonds submitted by offerors on procurement by the executive branch of the Federal Government, by the acquiring agency's head or designee utilizing the procedures in subpart 9.4. The exclusion shall be for the purpose of protecting the Government.

(b) An individual may be excluded for any of the following causes:

(1) Failure to fulfill the obligations under any bond.

(2) Failure to disclose all bond obligations.

(3) Misrepresentation of the value of available assets or outstanding liabilities.

(4) Any false or misleading statement, signature or representation on a bond or affidavit of individual suretyship.

(5) Any other cause affecting responsibility as a surety of such serious and compelling nature as may be determined to warrant exclusion.

(c) An individual surety excluded pursuant to this subsection shall be entered as an exclusion in the System for Award Management (see 9.404).

(d) Contracting officers shall not accept the bonds of individual sureties whose names appear in an active exclusion record in the System for Award Management (see 9.404), unless the acquiring agency's head or a designee states in writing the compelling reasons justifying acceptance.

(e) An exclusion of an individual surety under this subsection will also preclude such party from acting as a contractor in accordance with subpart 9.4.

[54 FR 48988, Nov. 28, 1989, as amended at 60 FR 33066, June 26, 1995; 69 FR 76349, Dec. 20, 2004; 78 FR 37678, June 21, 2013; 83 FR 48697, Sept. 26, 2018]

28.204 Alternatives in lieu of corporate or individual sureties.

(a) Any person required to furnish a bond to the Government may furnish any of the types of security listed in 28.204–1 through 28.204–3 instead of a corporate or individual surety for the bond. When any of those types of security are deposited, a statement shall be incorporated in the bond form pledging the security in lieu of execution of the bond form by corporate or individual sureties. The contractor shall execute the bond forms as the principal. Agencies shall establish safeguards to protect against loss of the security and shall return the security or its equivalent to the contractor when the bond obligation has ceased.

(b) Upon written request by any contractor securing a performance or payment bond by any of the types of security listed in 28.204–1 through 28.204–3, the contracting officer may release a portion of the security only when the conditions allowing the partial release of lien in 28.203–5(c) are met. The contractor shall, as a condition of the partial release, furnish an affidavit agreeing that the release of such security does not relieve the contractor of its obligations under the bond(s).

(c) The contractor may satisfy a requirement for bond security by furnishing a combination of the types of security listed in 28.204–1 through 28.204–3 or a combination of bonds supported by these types of security and additional surety bonds under 28.202 or 28.203. During the period for which a bond supported by security is required, the contractor may substitute one type of security listed in 28.204–1 through 28.204–3 for another, or may substitute, in whole or combination, additional surety bonds under 28.202 or 28.203.

[61 FR 31653, June 20, 1996, as amended at 62 FR 44807, Aug. 22, 1997]

28.204–1 United States bonds or notes.

Any person required to furnish a bond to the Government has the option, instead of furnishing a surety or sureties on the bond, of depositing certain United States bonds or notes in an amount equal at their par value to the penal sum of the bond (the Act of February 24, 1919 (31 U.S.C. 9303) and Treasury Department Circular No. 154 dated July 1, 1978 (31 CFR part 225)). In addition, a duly executed power of attorney and agreement authorizing the collection or sale of such United States bonds or notes in the event of default of the principal on the bond shall accompany the deposited bonds or notes. The contracting officer may (a) turn securities over to the finance or other authorized agency official, or (b) deposit them with the Treasurer of the United States, a Federal Reserve Bank (or branch with requisite facilities), or other depository designated for that purpose by the Secretary of the Treasury, under procedures prescribed by the agency concerned and Treasury Department Circular No. 154 (exception: The contracting officer shall deposit all bonds and notes received in the District of Columbia with the Treasurer of the United States).

[48 FR 42286, Sept. 19, 1983. Redesignated and amended at 54 FR 48986, 48989, Nov. 28, 1989]

28.204–2 Certified or cashiers checks, bank drafts, money orders, or currency.

Any person required to furnish a bond has an option to furnish a certified or cashier's check, bank draft, Post Office money order, or currency, in an amount equal to the penal sum of the bond, instead of furnishing surety or sureties on the bonds. Those furnishing checks, drafts, or money orders shall draw them to the order of the appropriate Federal agency.

[48 FR 42286, Sept. 19, 1983. Redesignated at 54 FR 48986, Nov. 28, 1989]

28.204–3 Irrevocable letter of credit.

(a) Any person required to furnish a bond has the option to furnish a bond secured by an irrevocable letter of credit (ILC) in an amount equal to the penal sum required to be secured (see

28.204). A separate ILC is required for each bond.

(b) The ILC shall be irrevocable, require presentation of no document other than a written demand and the ILC (and letter of confirmation, if any), expire only as provided in paragraph (f) of this subsection, and be issued/confirmed by an acceptable federally insured financial institution as provided in paragraph (g) of this subsection.

(c) To draw on the ILC, the contracting officer shall use the sight draft set forth in the clause at 52.228–14, and present it with the ILC (including letter of confirmation, if any) to the issuing financial institution or the confirming financial institution (if any).

(d) If the contractor does not furnish an acceptable replacement ILC, or other acceptable substitute, at least 30 days before an ILC's scheduled expiration, the contracting officer shall immediately draw on the ILC.

(e) If, after the period of performance of a contract where ILCs are used to support payment bonds, there are outstanding claims against the payment bond, the contracting officer shall draw on the ILC prior to the expiration date of the ILC to cover these claims.

(f) The period for which financial security is required shall be as follows:

(1) If used as a bid guarantee, the ILC should expire no earlier than 60 days after the close of the bid acceptance period.

(2) If used as an alternative to corporate or individual sureties as security for a performance or payment bond, the offeror/contractor may submit an ILC with an initial expiration date estimated to cover the entire period for which financial security is required or an ILC with an initial expiration date that is a minimum period of one year from the date of issuance. The ILC shall provide that, unless the issuer provides the beneficiary written notice of non-renewal at least 60 days in advance of the current expiration date, the ILC is automatically extended without amendment for one year from the expiration date, or any future expiration date, until the period of required coverage is completed and the contracting officer provides the financial institution with a written statement waiving the right to payment. The period of required coverage shall be:

(i) For contracts subject to the Bonds statute, the later of—

(A) One year following the expected date of final payment;

(B) For performance bonds only, until completion of any warranty period; or

(C) For payment bonds only, until resolution of all claims filed against the payment bond during the one-year period following final payment.

(ii) For contracts not subject to the Bonds statute, the later of—

(A) 90 days following final payment; or

(B) For performance bonds only, until completion of any warranty period.

(g) Only federally insured financial institutions rated investment grade shall issue or confirm the ILC. Unless the financial institution issuing the ILC had letter of credit business of at least $25 million in the past year, ILCs over $5 million must be confirmed by another acceptable financial institution that had letter of credit business of at least $25 million in the past year.

(1) The offeror/contractor is required by paragraph (d) of the clause at 52.228–14, Irrevocable Letter of Credit, to provide the contracting officer a credit rating from a recognized commercial rating service that indicates the financial institution has the required rating(s) as of the date of issuance of the ILC.

(2) To support the credit rating of the financial institution(s) issuing or confirming the ILC, the contracting officer shall verify the following information:

(i) *Federal insurance:* Each financial institution is federally insured. Verification of federal insurance is available through the Federal Deposit Insurance Corporation (FDIC) institution directory at the Web site *http://www2.fdic.gov/idasp/index.asp.*

(ii) *Current credit rating.* The current credit rating for each financial institution is investment grade and that the credit rating is from a Nationally Recognized Statistical Rating Organization (NRSRO). NRSROs can be located

at the Web site *http://www.sec.gov/answers/nrsro.htm* maintained by the SEC.

(3) The rating services listed in the Web site *http://www.sec.gov/answers/nrsro.htm* use different rating scales (*e.g.*, AAA, AA, A, BBB, BB, B, CCC, CC, C, and D; or Aaa, Aa, A, Baa, Ba, B, Caa, Ca, and C) to provide evaluations of institutional credit risk; however, all such systems specify the range of investment grade ratings (*e.g.*, BBB–AAA or Baa–Aaa in the examples in this section) and permit evaluation of the relative risk associated with a specific institution. If the contracting officer learns that a financial institution's rating has dropped below investment grade level, the contracting officer shall give the contractor 30 days to substitute an acceptable ILC or shall draw on the ILC using the sight draft in paragraph (g) of the clause at 52.228–14.

(h) A copy of the Uniform Customs and Practice (UCP) for Documentary Credits, 2007 Edition, International Chamber of Commerce Publication No. 600, is available from: ICC Books USA, 1212 Avenue of the Americas, 21st Floor, New York, NY 10036; Phone: 212–703–5078; Fax: 212–391–6568; Email: *iccbooks@uscib.org;* Via the internet at: *http://www.uscib.org/ucp-600-ud-4465/*.

[61 FR 31653, June 20, 1996, as amended at 62 FR 44807, Aug. 22, 1997; 79 FR 24210, Apr. 29, 2014; 79 FR 61745, Oct. 14, 2014; 83 FR 42573, Aug. 22, 2018]

28.204–4 Contract clause.

Insert the clause at 52.228–14, Irrevocable Letter of Credit, in solicitations and contracts for services, supplies, or construction, when a bid guarantee, or performance bonds, or performance and payment bonds are required.

[61 FR 31653, June 20, 1996]

Subpart 28.3—Insurance

28.301 Policy.

Contractors shall carry insurance under the following circumstances:

(a)(1) The Government requires any contractor subject to Cost Accounting Standard (CAS) 416 (48 CFR 9004.416 (appendix B, FAR loose-leaf edition)) to obtain insurance, by purchase or self-coverage, for the perils to which the contractor is exposed, except when (i) the Government, by providing in the contract in accordance with law, agrees to indemnify the contractor under specified circumstances or (ii) the contract specifically relieves the contractor of liability for loss of or damage to Government property.

(2) The Government reserves the right to disapprove the purchase of any insurance coverage not in the Government's interest.

(3) Allowability of the insurance program's cost shall be determined in accordance with the criteria in 31.205–19.

(b) Contractors, whether or not their contracts are subject to CAS 416, are required by law and this regulation to provide insurance for certain types of perils (e.g., workers' compensation). Insurance is mandatory also when commingling of property, type of operation, circumstances of ownership, or condition of the contract make it necessary for the protection of the Government. The minimum amounts of insurance required by this regulation (see 28.307–2) may be reduced when a contract is to be performed outside the United states and its outlying areas. When more than one agency is involved, the agency responsible for review and approval of a contractor's insurance program shall coordinate with other interested agencies before acting on significant insurance matters.

(c) Contractors awarded nonpersonal services contracts for health care services are required to maintain medical liability insurance and indemnify the Government for liability producing acts or omissions by the contractor, its employees and agents (see 37.400).

[48 FR 42286, Sept. 19, 1983, as amended at 54 FR 5056, Jan. 31, 1989; 59 FR 67043, Dec. 28, 1994; 68 FR 28083, May 22, 2003]

28.302 Notice of cancellation or change.

When the Government requires the contractor to provide insurance coverage, the policies shall contain an endorsement that any cancellation or material change in the coverage adversely affecting the Government's interest shall not be effective unless the insurer or the contractor gives written notice of cancellation or change as required by the contracting officer. When

the coverage is provided by self-insurance, the contractor shall not change or decrease the coverage without the administrative contracting officer's prior approval (see 28.308(c)).

28.303 Insurance against loss of or damage to Government property.

When the Government requires or approves insurance to cover loss of or damage to Government property (see 45.104, Responsibility and liability for Government property), it may be provided by specific insurance policies or by inclusion of the risks in the contractor's existing policies. The policies shall disclose the Government's interest in the property.

[48 FR 42286, Sept. 19, 1983, as amended at 72 FR 27384, May 15, 2007]

28.304 Risk-pooling arrangements.

Agencies may establish risk-pooling arrangements. These arrangements are designed to use the services of the insurance industry for safety engineering and the handling of claims at minimum cost to the Government. The agency responsible shall appoint a single manager or point of contact for each arrangement.

28.305 Overseas workers' compensation and war-hazard insurance.

(a) *Public-work contract*, as used in this subpart, means any contract for a fixed improvement or for any other project, fixed or not, for the public use of the United States or its allies, involving construction, alteration, removal, or repair, including projects or operations under service contracts and projects in connection with the national defense or with war activities, dredging, harbor improvements, dams, roadways, and housing, as well as preparatory and ancillary work in connection therewith at the site or on the project.

(b) The Defense Base Act (42 U.S.C. 1651 *et seq.*) extends the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 901) to various classes of employees working outside the United States, including those engaged in performing—

(1) Public-work contracts; or

(2) Contracts approved or financed under the Foreign Assistance Act of 1961 (Pub. L. 87–195) other than (i) contracts approved or financed by the Development Loan Fund (unless the Secretary of Labor, acting upon the recommendation of a department or agency, determines that such contracts should be covered) or (ii) contracts exclusively for materials or supplies.

(c) When the Defense Base Act applies (see 42 U.S.C. 1651 *et seq.*) to these employees, the benefits of the Longshoremen's and Harbor Workers' Compensation Act are extended through operation of the War Hazards Compensation Act (42 U.S.C. 1701 *et seq.*) to protect the employees against the risk of war hazards (injury, death, capture, or detention). When, by means of an insurance policy or a self-insurance program, the contractor provides the workers' compensation coverage required by the Defense Base Act, the contractor's employees automatically receive war-hazard risk protection.

(d) When the agency head recommends a waiver to the Secretary of Labor, the Secretary may waive the applicability of the Defense Base Act to any contract, subcontract, work location, or classification of employees.

(e) If the Defense Base Act is waived for some or all of the contractor's employees, the benefits of the War Hazards Compensation Act are automatically waived with respect to those employees for whom the Defense Base Act is waived. For those employees, the contractor shall provide workers' compensation coverage against the risk of work injury or death and assume liability toward the employees and their beneficiaries for war-hazard injury, death, capture, or detention. The contract shall provide either that the costs of this liability or the reasonable costs of insurance against this liability shall be allowed as a cost under the contract.

28.306 Insurance under fixed-price contracts.

(a) *General.* Although the Government is not ordinarily concerned with the contractor's insurance coverage if the contract is a fixed-price contract, in special circumstances agencies may specify insurance requirements under fixed-price contracts. Examples of such circumstances include the following:

(1) The contractor is—or has a separate operation—engaged principally in Government work.

(2) Government property is involved.

(3) The work is to be performed on a Government installation.

(4) The Government elects to assume risks for which the contractor ordinarily obtains commercial insurance.

(b) *Work on a Government installation.* (1) When the clause at 52.228–5, Insurance—Work on a Government Installation, is required to be included in a fixed-price contract by 28.310, the coverage specified in 28.307 is the minimum insurance required and shall be included in the contract Schedule or elsewhere in the contract. The contracting officer may require additional coverage and higher limits.

(2) When the clause at 52.228–5, Insurance—Work on a Government Installation, is not required by 28.310 but is included because the contracting officer considers it to be in the Government's interest to do so, any of the types of insurance specified in 28.307 may be omitted or the limits may be lowered, if appropriate.

28.307 Insurance under cost-reimbursement contracts.

Cost-reimbursement contracts (and subcontracts, if the terms of the prime contract are extended to the subcontract) ordinarily require the types of insurance listed in 28.307–2, with the minimum amounts of liability indicated. (See 28.308 for self-insurance.)

28.307–1 Group insurance plans.

(a) *Prior approval requirement.* Under cost-reimbursement contracts, before buying insurance under a group insurance plan, the contractor must submit the plan for approval, in accordance with agency regulations. Any change in benefits provided under an approved plan that can reasonably be expected to increase significantly the cost to the Government requires similar approval.

(b) *Premium refunds or credits.* The plan shall provide for the Government to share in any premium refunds or credits paid or otherwise allowed to the contractor. In determining the extent of the Government's share in any premium refunds or credits, any special reserves and other refunds to which the contractor may be entitled in the future shall be taken into account.

28.307–2 Liability.

(a) *Workers' compensation and employer's liability.* Contractors are required to comply with applicable Federal and State workers' compensation and occupational disease statutes. If occupational diseases are not compensable under those statutes, they shall be covered under the employer's liability section of the insurance policy, except when contract operations are so commingled with a contractor's commercial operations that it would not be practical to require this coverage. Employer's liability coverage of at least $100,000 shall be required, except in States with exclusive or monopolistic funds that do not permit workers' compensation to be written by private carriers. (See 28.305(c) for treatment of contracts subject to the Defense Base Act.)

(b) *General liability.* (1) The contracting officer shall require bodily injury liability insurance coverage written on the comprehensive form of policy of at least $500,000 per occurrence.

(2) Property damage liability insurance shall be required only in special circumstances as determined by the agency.

(c) *Automobile liability.* The contracting officer shall require automobile liability insurance written on the comprehensive form of policy. The policy shall provide for bodily injury and property damage liability covering the operation of all automobiles used in connection with performing the contract. Policies covering automobiles operated in the United States shall provide coverage of at least $200,000 per person and $500,000 per occurrence for bodily injury and $20,000 per occurrence for property damage. The amount of liability coverage on other policies shall be commensurate with any legal requirements of the locality and sufficient to meet normal and customary claims.

(d) *Aircraft public and passenger liability.* When aircraft are used in connection with performing the contract, the contracting officer shall require aircraft public and passenger liability insurance. Coverage shall be at least

$200,000 per person and $500,000 per occurrence for bodily injury, other than passenger liability, and $200,000 per occurrence for property damage. Coverage for passenger liability bodily injury shall be at least $200,000 multiplied by the number of seats or passengers, whichever is greater.

(e) *Vessel liability*. When contract performance involves use of vessels, the contracting officer shall require, as determined by the agency, vessel collision liability and protection and indemnity liability insurance.

28.308 Self-insurance.

(a) When it is anticipated that 50 percent or more of the self-insurance costs to be incurred at a segment of a contractor's business will be allocable to negotiated Government contracts, and the self-insurance costs at the segment for the contractor's fiscal year are expected to be $200,000 or more, the contractor shall submit, in writing, information on its proposed self-insurance program to the administrative contracting officer and obtain that official's approval of the program. The submission shall be by segment or segments of the contractor's business to which the program applies and shall include—

(1) A complete description of the program, including any resolution of the board of directors authorizing and adopting coverage, including types of risks, limits of coverage, assignments of safety and loss control, and legal service responsibilities;

(2) If available, the corporate insurance manual and organization chart detailing fiscal responsibilities for insurance;

(3) The terms regarding insurance coverage for any Government property;

(4) The contractor's latest financial statements;

(5) Any self-insurance feasibility studies or insurance market surveys reporting comparative alternatives;

(6) Loss history, premiums history, and industry ratios;

(7) A formula for establishing reserves, including percentage variations between losses paid and losses reserved;

(8) Claims administration policy, practices, and procedures;

(9) The method of calculating the projected average loss; and

(10) A disclosure of all captive insurance company and re-insurance agreements, including methods of computing cost.

(b) Programs of self-insurance covering a contractor's insurable risks, including the deductible portion of purchased insurance, may be approved when examination of a program indicates that its application is in the Government's interest. Agencies shall not approve a program of self-insurance for workers' compensation in a jurisdiction where workers' compensation does not completely cover the employer's liability to employees, unless the contractor—

(1) Maintains an approved program of self-insurance for any employer's liability not so covered; or

(2) Shows that the combined cost to the Government of self-insurance for workers' compensation and commercial insurance for employer's liability will not exceed the cost of covering both kinds of risk by commercial insurance.

(c) Once the administrative contracting officer has approved a program, the contractor must submit to that official for approval any major proposed changes to the program. Any program approval may be withdrawn if a contracting officer finds that either (1) any part of a program does not comply with the requirements of this subpart and/or the criteria at 31.205–19 or (2) conditions or situations existing at the time of approval that were a basis for original approval of the program have changed to the extent that a program change is necessary.

(d) To qualify for a self-insurance program, a contractor must demonstrate ability to sustain the potential losses involved. In making the determination, the contracting officer shall consider the following factors:

(1) The soundness of the contractor's financial condition, including available lines of credit.

(2) The geographic dispersion of assets, so that the potential of a single loss depleting all the assets is unlikely.

(3) The history of previous losses, including frequency of occurrence and the financial impact of each loss.

(4) The type and magnitude of risk, such as minor coverage for the deductible portion of purchased insurance or major coverage for hazardous risks.

(5) The contractor's compliance with Federal and State laws and regulations.

(e) Agencies shall not approve a program of self-insurance for catastrophic risks (e.g., see 50.104–3, Special procedures for unusually hazardous or nuclear risks). Should performance of Government contracts create the risk of catastrophic losses, the Government may, to the extent authorized by law, agree to indemnify the contractor or recognize an appropriate share of premiums for purchased insurance, or both.

(f) Self-insurance programs to protect a contractor against the costs of correcting its own defects in materials or workmanship shall not be approved. For these purposes, normal rework estimates and warranty costs will not be considered self-insurance.

[48 FR 42286, Sept. 19, 1983, as amended at 55 FR 3883, Feb. 5, 1990; 66 FR 2131, Jan. 10, 2001; 72 FR 63030, Nov. 7, 2007]

28.309 Contract clauses for workers' compensation insurance.

(a) The contracting officer shall insert the clause at 52.228–3, Workers' Compensation Insurance (Defense Base Act), in solicitations and contracts when the Defense Base Act applies (see 28.305) and—

(1) The contract will be a public-work contract performed outside the United States; or

(2) The contract will be approved or financed under the Foreign Assistance Act of 1961 (Pub. L. 87–195) and is not excluded by 28.305(b)(2).

(b) The contracting officer shall insert the clause at 52.228–4, Workers' Compensation and War-Hazard Insurance Overseas, in solicitations and contracts when the contract will be a public-work contract performed outside the United States and the Secretary of Labor waives the applicability of the Defense Base Act (see 28.305(d)).

28.310 Contract clause for work on a Government installation.

(a) Insert the clause at 52.228–5, Insurance—Work on a Government Installation, in solicitations and contracts if a fixed-price contract is contemplated, the contract amount is expected to exceed the simplified acquisition threshold, and the contract will require work on a Government installation, unless—

(1) Only a small amount of work is required on the Government installation (e.g., a few brief visits per month); or

(2) All work on the Government installation will be performed outside the United States and its outlying areas.

(b) The contracting officer may insert the clause at 52.228–5 in solicitations and contracts described in (a)(1) and (2) above if it is in the Government's interest to do so.

[48 FR 42286, Sept. 19, 1983, as amended at 60 FR 34759, July 3, 1995; 61 FR 39190, July 26, 1996; 68 FR 28083, May 22, 2003]

28.311 Solicitation provision and contract clause on liability insurance under cost-reimbursement contracts.

28.311–1 Contract clause.

In accordance with agency acquisition regulations, the contracting officer shall insert the clause at 52.228–7, Insurance—Liability to Third Persons, in solicitations and contracts, other than those for construction contracts and those for architect-engineer services, when a cost-reimbursement contract is contemplated.

[55 FR 52793, Dec. 21, 1990. Redesignated and amended at 61 FR 2639, Jan. 26, 1996]

28.311–2 Agency solicitation provisions and contract clauses.

Agencies may prescribe their own solicitation provisions and contract clauses to implement the basic policies contained in this subpart 28.3.

[55 FR 52793, Dec. 21, 1990. Redesignated at 61 FR 2639, Jan. 26, 1996]

28.312 Contract clause for insurance of leased motor vehicles.

The contracting officer shall insert the clause at 52.228–8, Liability and Insurance—Leased Motor Vehicles, in solicitations and contracts for the leasing of motor vehicles (see subpart 8.11).

28.313 Contract clauses for insurance of transportation or transportation-related services.

(a) The contracting officer shall insert the clause at 52.228–9, Cargo Insurance, in solicitations and contracts for transportation or for transportation-related services, except when freight is shipped under rates subject to released or declared value.

(b) The contracting officer shall insert a clause substantially the same as that at 52.228–10, Vehicular and General Public Liability Insurance, in solicitations and contracts for transportation or for transportation-related services when the contracting officer determines that vehicular liability or general public liability insurance required by law is not sufficient.

PART 29—TAXES

Sec.

AUTHORITY: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

SOURCE: 48 FR 42293, Sept. 19, 1983, unless otherwise noted.

29.000 Scope of part.

This part prescribes policies and procedures for (a) using tax clauses in contracts (including foreign contracts), (b) asserting immunity or exemption from taxes, and (c) obtaining tax refunds. It explains Federal, State, and local taxes on certain supplies and services acquired by executive agencies and the applicability of such taxes to the Federal Government. It is for the general information of Government personnel and does not present the full scope of the tax laws and regulations.

Subpart 29.1—General

29.101 Resolving tax problems.

(a) Contract tax problems are essentially legal in nature and vary widely. Specific tax questions must be resolved by reference to the applicable contract terms and to the pertinent tax laws and regulations. Therefore, when tax questions arise, contracting officers should request assistance from the agency-designated legal counsel.

(b) To keep treatment within an agency consistent, contracting officers or other authorized personnel shall consult the agency-designated counsel before negotiating with any taxing authority for the purpose of (1) determining whether or not a tax is valid or applicable or (2) obtaining exemption from, or refund of, a tax.

(c) When the constitutional immunity of the Government from State or local taxation may reasonably be at issue, contractors should be discouraged from negotiating independently with taxing authorities if the contract involved is either (1) a cost-reimbursement contract or (2) a fixed-price contract containing a tax escalation clause.

(d) Before purchasing goods or services from a foreign source, the contracting officer should consult the agency-designated counsel (1) for information on foreign tax treaties and agreements in force and on the implementation of any foreign-tax-relief programs and (2) to resolve any other

tax questions affecting the prospective contract.

Subpart 29.2—Federal Excise Taxes

29.201 General.

(a) Federal excise taxes are levied on the sale or use of particular supplies or services. Subtitle D of the Internal Revenue Code of 1954, Miscellaneous Excise Taxes, 26 U.S.C. 4041 *et seq.*, and its implementing regulations, 26 CFR parts 40 through 299, cover miscellaneous federal excise tax requirements. Questions arising in this area should be directed to the agency-designated counsel. The most common excise taxes are—

(1) Manufacturers' excise taxes imposed on certain motor-vehicle articles, tires and inner tubes, gasoline, lubricating oils, coal, fishing equipment, firearms, shells, and cartridges sold by manufacturers, producers, or importers; and

(2) Special-fuels excise taxes imposed at the retail level on diesel fuel and special motor fuels.

(b) Sometimes the law exempts the Federal Government from these taxes. Contracting officers should solicit prices on a tax-exclusive basis when it is known that the Government is exempt from these taxes, and on a tax-inclusive basis when no exemption exists.

(c) Executive agencies shall take maximum advantage of available Federal excise tax exemptions.

[48 FR 42293, Sept. 19, 1983, as amended at 55 FR 52793, Dec. 21, 1990]

29.202 General exemptions.

No Federal manufacturers' or special-fuels excise taxes are imposed in many contracting situations as, for example, when the supplies are for any of the following:

(a) The exclusive use of any State or political subdivision, including the District of Columbia (26 U.S.C. 4041 and 4221).

(b) Shipment for export to a foreign country or an outlying area of the United States. Shipment must occur within 6 months of the time title passes to the Government. When the exemption is claimed, the words ''for export'' must appear on the contract or purchase document, and the contracting officer must furnish the seller proof of export (*see* 26 CFR 48.4221–3).

(c) Further manufacture, or resale for further manufacture (this exemption does not include tires and inner tubes) (26 CFR 48.4221–2).

(d) Use as fuel supplies, ships or sea stores, or legitimate equipment on vessels of war, including (1) aircraft owned by the United States and constituting a part of the armed forces and (2) guided missiles and pilotless aircraft owned or chartered by the United States. When this exemption is to be claimed, the purchase should be made on a tax-exclusive basis. The contracting officer shall furnish the seller an exemption certificate for Supplies for Vessels of War (an example is given in 26 CFR 48.4221–4(d)(2); the IRS will accept one certificate covering all orders under a single contract for a specified period of up to 12 calendar quarters) (26 U.S.C. 4041 and 4221).

(e) A nonprofit educational organization (26 U.S.C. 4041 and 4221).

(f) Emergency vehicles (26 U.S.C. 4053 and 4064(b)(1)(c)).

[48 FR 42293, Sept. 19, 1983, as amended at 53 FR 662, Jan. 11, 1988; 68 FR 28083, May 22, 2003]

29.203 Other Federal tax exemptions.

(a) Pursuant to 26 U.S.C. 4293, the Secretary of the Treasury has exempted the United States from the communications excise tax imposed in 26 U.S.C. 4251, when the supplies and services are for the exclusive use of the United States. (Secretarial Authorization, June 20, 1947, Internal Revenue Cumulative Bulletin, 1947–1, 205.)

(b) Pursuant to 26 U.S.C. 4483(b), the Secretary of the Treasury has exempted the United States from the federal highway vehicle users tax imposed in 26 U.S.C. 4481. The exemption applies whether the vehicle is owned or leased by the United States. (Secretarial Authorization, Internal Revenue Cumulative Bulletin, 1956–2, 1369.)

[53 FR 662, Jan. 11, 1988]

Subpart 29.3—State and Local Taxes

29.300 Scope of subpart.

This subpart prescribes the policies and procedures regarding the exemption or immunity of Federal Government purchases and property from State and local taxation.

29.301 [Reserved]

29.302 Application of State and local taxes to the Government.

(a) Generally, purchases and leases made by the Federal Government are immune from State and local taxation. Whether any specific purchase or lease is immune, however, is a legal question requiring advice and assistance of the agency-designated counsel.

(b) When it is economically feasible to do so, executive agencies shall take maximum advantage of all exemptions from State and local taxation that may be available. If appropriate, the contracting officer shall provide a Standard Form 1094, U.S. Tax Exemption Form (see part 53), or other evidence listed in 29.305(a) to establish that the purchase is being made by the Government.

[48 FR 42293, Sept. 19, 1983, as amended at 62 FR 237, Jan. 2, 1997]

29.303 Application of State and local taxes to Government contractors and subcontractors.

(a) Prime contractors and subcontractors shall not normally be designated as agents of the Government for the purpose of claiming immunity from State or local sales or use taxes. Before any activity contends that a contractor is an agent of the Government, the matter shall be referred to the agency head for review. The referral shall include all pertinent data on which the contention is based, together with a thorough analysis of all relevant legal precedents.

(b) When purchases are not made by the Government itself, but by a prime contractor or by a subcontractor under a prime contract, the right to an exemption of the transaction from a sales or use tax may not rest on the Government's immunity from direct taxation by States and localities. It may rest instead on provisions of the particular State or local law involved, or, in some cases, the transaction may not in fact be expressly exempt from the tax. The Government's interest shall be protected by using the procedures in 29.101.

(c) Frequently, property (including property acquired under the progress payments clause of fixed-price contracts or the Government property clause of cost-reimbursement contracts) owned by the Government is in the possession of a contractor or subcontractor. Situations may arise in which States or localities assert the right to tax Government property directly or to tax the contractor's or subcontractor's possession of, interest in, or use of that property. In such cases, the contracting officer shall seek review and advice from the agency-designated counsel on the appropriate course of action.

29.304 Matters requiring special consideration.

The imposition of State and local taxes may result in special contract considerations including the following:

(a) With coordination of the agency-designated counsel, a contract may (1) state that the contract price includes or excludes a specified tax or (2) require that the contractor take certain actions with regard to payment, nonpayment, refund, protest, or other treatment of a specified tax. Such special treatment may be appropriate when there is doubt as to the applicability or allocability of the tax, or when the applicability of the tax is being litigated.

(b) The applicability of State and local taxes to purchases by the Federal Government may depend on the place and terms of delivery. When the contract price will be substantial, alternative places and terms of delivery should be considered in light of possible tax consequences.

(c) Indefinite-delivery contracts for equipment rental may require the contractor to furnish equipment in any of the States. Since leased equipment remains the contractor's property, States and local governments impose a wide variety of property, use, or other

taxes on equipment leased to the Government. The amount of these taxes can vary considerably from jurisdiction to jurisdiction. See 29.401–1 for the prescription of the contract clause to be included in contracts when delivery points are not known at time of contracting.

(d) The North Carolina State and local sales and use tax.

(1) The North Carolina Sales and Use Tax Act authorizes counties and incorporated cities and towns to obtain each year from the Commissioner of Revenue of the State of North Carolina a refund of sales and use taxes indirectly paid on building materials, supplies, fixtures, and equipment that become a part of or are annexed to any building or structure erected, altered, or repaired for such counties and incorporated cities and towns in North Carolina. In United States v. Clayton, 250 F. Supp. 827 (1965), it was held that the United States is entitled to the benefit of the refund, but must follow the refund procedure of the Act and the regulations to recover what it is due.

(2) The Act provides that, to receive the refund, claimants must file, within 6 months after the claimant's fiscal year closes, a written request substantiated by such records, receipts, and information as the Commissioner of Revenue may require. No refund will be made on an application not filed within the time allowed and in such manner as the Commissioner may require. The requirements of the Commissioner are set forth in regulations that provide that, to substantiate a refund claim for sales or use taxes paid on purchases of building materials, supplies, fixtures, or equipment by a contractor, the Government must secure from the contractor certified statements setting forth the cost of the property purchased from each vendor and the amount of sales or use taxes paid. In the event the contractor makes several purchases from the same vendor, the certified statement must indicate the invoice numbers, the inclusive dates of the invoices, the total amount of the invoices, and the sales and use taxes paid. The statement must also include the cost of any tangible personal property withdrawn from the contractor's warehouse stock and the amount of sales or use tax paid by the contractor. Similar certified statements by subcontractors must be obtained by the general contractor and furnished to the claimant. Any local sales or use taxes included in the contractor's statement must be shown separately from the State sales or use taxes.

(3) The clause prescribed at 29.401–2 requires contractors to submit to contracting officers by November 30 of each year a certified statement disclosing North Carolina State and local sales and use taxes paid during the 12-month period that ended the preceding September 30. The contracting officer shall ensure that contractors comply with this requirement and shall obtain the annual refund to which the Government may be entitled. The application for refund must be filed each year before March 31 and in the manner and form required by the Commissioner of Revenue. Copies of the form may be obtained from the State of North Carolina, Department of Revenue, P.O. Box 25000, Raleigh, NC 27640.

[48 FR 42293, Sept. 19, 1983, as amended at 62 FR 40237, July 25, 1997]

29.305 State and local tax exemptions.

(a) *Evidence of exemption.* Evidence needed to establish exemption from State or local taxes depends on the grounds for the exemption claimed, the parties to the transaction, and the requirements of the taxing jurisdiction. Such evidence may include the following:

(1) A copy of the contract or relevant portion.

(2) Copies of purchase orders, shipping documents, credit-card-imprinted sales slips, paid or acknowledged invoices, or similar documents that identify an agency or instrumentality of the United States as the buyer.

(3) A U.S. Tax Exemption Form (SF 1094).

(4) A State or local form indicating that the supplies or services are for the exclusive use of the United States.

(5) Any other State or locally required document for establishing general or specific exemption.

(6) Shipping documents indicating that shipments are in interstate or foreign commerce.

(b) *Furnishing proof of exemption.* If a reasonable basis to sustain a claimed exemption exists, the seller will be furnished evidence of exemption, as follows:

(1) Under a contract containing the clause at 52.229–3, Federal, State, and Local Taxes, or at 52.229–4, Federal, State, and Local Taxes (State and Local Adjustments), in accordance with the terms of those clauses.

(2) Under a cost-reimbursement contract, if requested by the contractor and approved by the contracting officer or at the discretion of the contracting officer.

(3) Under a contract or purchase order that contains no tax provision, if—

(i) Requested by the contractor and approved by the contracting officer or at the discretion of the contracting officer; and

(ii) Either the contract price does not include the tax or, if the transaction or property is tax exempt, the contractor consents to a reduction in the contract price.

[48 FR 42293, Sept. 19, 1983, as amended at 62 FR 237, Jan. 2, 1997; 68 FR 13205, Mar. 18, 2003]

Subpart 29.4—Contract Clauses

29.401 Domestic contracts.

29.401–1 Indefinite-delivery contracts for leased equipment.

Insert the clause at 52.229–1, State and Local Taxes, in solicitations and contracts for leased equipment when—

(a) A fixed-price indefinite-delivery contract is contemplated;

(b) The contract will be performed wholly or partly in the United States or its outlying areas; and

(c) The place or places of delivery are not known at the time of contracting.

[68 FR 28083, May 22, 2003]

29.401–2 Construction contracts performed in North Carolina.

The contracting officer shall insert the clause at 52.229–2, North Carolina State and Local Sales and Use Tax, in solicitations and contracts for construction to be performed in North Carolina. If the requirement is for vessel repair to be performed in North Carolina, the clause shall be used with its *Alternate I.*

29.401–3 Federal, State, and local taxes.

(a) Except as provided in paragraph (b) of this section, insert the clause at 52.229–3, Federal, State, and Local Taxes, in solicitations and contracts if—

(1) The contract is to be performed wholly or partly in the United States or its outlying areas;

(2) A fixed-price contract is contemplated; and

(3) The contract is expected to exceed the simplified acquisition threshold.

(b) In a noncompetitive contract that meets all the conditions in paragraph (a) of this section, the contracting officer may insert the clause at 52.229–4, Federal, State, and Local Taxes (State and Local Adjustments), instead of the clause at 52.229–3, if the price would otherwise include an inappropriate contingency for potential postaward change(s) in State or local taxes.

[68 FR 13205, Mar. 18, 2003, as amended at 68 FR 28083, May 22, 2003]

29.401–4 New Mexico gross receipts and compensating tax.

(a) *Definition. Services,* as used in this subsection, is as defined in the Gross Receipts and Compensating Tax Act of the State of New Mexico, Sec. 7–9–3(k) NM SA 1978, and means all activities engaged in for other persons for a consideration, which activities involve predominately the performance of a service as distinguished from selling or leasing property. *Services* includes activities performed by a person for its members of shareholders. In determining what is a service, the intended use, principal objective or ultimate objective of the contracting parties shall not be controlling. *Services* also includes construction activities and all tangible personal property that will become an ingredient or component part of a construction project. Such tangible personal property retains its character as tangible personal property until it is installed as an ingredient or component part of a construction project in New Mexico. However, sales of tangible personal property that will become an ingredient or component

part of a construction project to persons engaged in the construction business are sales of tangible personal property.

(b) *Contract clause.* The contracting officer shall insert the clause at 52.229–10, State of New Mexico Gross Receipts and Compensating Tax, in solicitations and contracts issued by the agencies identified in paragraph (c) of this subsection when all three of the following conditions exist:

(1) The contractor will be performing a cost-reimbursement contract.

(2) The contract directs or authorizes the contractor to acquire tangible personal property as a direct cost under a contract and title to such property passes directly to and vests in the United States upon delivery of the property by the vendor.

(3) The contract will be for services to be performed in whole or in part within the State of New Mexico.

(c) *Participating agencies.* (1) The agencies listed below have entered into an agreement with the State of New Mexico to eliminate the double taxation of Government cost-reimbursement contracts when contractors and their subcontractors purchase tangible personal property to be used in performing services in whole or in part in the State of New Mexico and for which title to such property will pass to the United States upon delivery of the property to the contractor and its subcontractors by the vendor. Therefore, the clause applies only to solicitations and contracts issued by the—

United States Defense Advanced Research Projects Agency;
United States Defense Threat Reduction Agency;
United States Department of Agriculture;
United States Department of the Air Force;
United States Department of the Army;
United States Department of Energy;
United States Department of Health and Human Services;
United States Department of Interior;
United States Department of Labor;
United States Department of the Navy;
United States Department of Transportation;
United States General Services Administration;
United States Missile Defense Agency; and
United States National Aeronautics and Space Administration.

(2) Any other Federal agency which expects to award cost-reimbursement contracts to be performed in New Mexico should contact the New Mexico Taxation and Revenue Department to execute a similar agreement.

[53 FR 34228, Sept. 2, 1988, as amended at 55 FR 3883, Feb. 5, 1990; 55 FR 38517, Sept. 18, 1990; 62 FR 64930, Dec. 9, 1997. Redesignated at 68 FR 13205, Mar. 18, 2003; 69 FR 17770, Apr. 5, 2004; 77 FR 44064, July 26, 2012]

29.402 Foreign contracts.

29.402–1 Foreign fixed-price contracts.

(a) The contracting officer shall insert the clause at 52.229–6, Taxes—Foreign Fixed-Price Contracts, in solicitations and contracts expected to exceed the simplified acquisition threshold when a fixed-price contract is contemplated and the contract is to be performed wholly or partly in a foreign country, unless it is contemplated that the contract will be with a foreign government.

(b) The contracting officer shall insert the clause at 52.229–7, Taxes—Fixed-Price Contracts With Foreign Governments, in solicitations and contracts that exceed the simplified acquisition threshold when a fixed-price contract with a foreign government is contemplated.

[48 FR 42293, Sept. 19, 1983, as amended at 55 FR 52793, Dec. 21, 1990; 61 FR 39198, July 26, 1996]

29.402–2 Foreign cost-reimbursement contracts.

(a) The contracting officer shall insert the clause at 52.229–8, Taxes—Foreign Cost-Reimbursement Contracts, in solicitations and contracts when a cost-reimbursement contract is contemplated and the contract is to be performed wholly or partly in a foreign country, unless it is contemplated that the contract will be with a foreign government.

(b) The contracting officer shall insert the clause at 52.229–9, Taxes—Cost-Reimbursement Contracts with Foreign Governments, in solicitations and contracts when a cost-reimbursement contract with a foreign government is contemplated.

PART 30—COST ACCOUNTING STANDARDS ADMINISTRATION

AUTHORITY: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

SOURCE: 57 FR 39587, Aug. 31, 1992, unless otherwise noted.

30.000 Scope of part.

This part describes policies and procedures for applying the Cost Accounting Standards Board (CASB) rules and regulations (48 CFR chapter 99 (FAR appendix)) to negotiated contracts and subcontracts. This part does not apply to sealed bid contracts or to any contract with a small business concern (see 48 CFR 9903.201–1(b) (FAR appendix) for these and other exemptions).

[57 FR 39587, Aug. 31, 1992, as amended at 61 FR 18916, Apr. 29, 1996; 62 FR 40237, July 25, 1997]

30.001 Definitions.

As used in this part—

Affected CAS-covered contract or subcontract means a contract or subcontract subject to Cost Accounting Standards (CAS) rules and regulations for which a contractor or subcontractor—

(1) Used one cost accounting practice to estimate costs and a changed cost accounting practice to accumulate and report costs under the contract or subcontract; or

(2) Used a noncompliant practice for purposes of estimating or accumulating and reporting costs under the contract or subcontract.

Cognizant Federal agency official (CFAO) means the contracting officer assigned by the cognizant Federal agency to administer the CAS.

Desirable change means a compliant change to a contractor's established or disclosed cost accounting practices that the CFAO finds is desirable and not detrimental to the Government and is, therefore, not subject to the no increased cost prohibition provisions of CAS-covered contracts and subcontracts affected by the change.

Fixed-price contracts and subcontracts means—

(1) Fixed-price contracts and subcontracts described at 16.202, 16.203 (except when price adjustments are based on actual costs of labor or material, described at 16.203–1(a)(2)), and 16.207;

(2) Fixed-price incentive contracts and subcontracts where the price is not adjusted based on actual costs incurred (Subpart 16.4);

(3) Orders issued under indefinite-delivery contracts and subcontracts

where final payment is not based on actual costs incurred (Subpart 16.5); and

(4) The fixed-hourly rate portion of time-and-materials and labor-hours contracts and subcontracts (Subpart 16.6).

Flexibly-priced contracts and subcontracts means—

(1) Fixed-price contracts and subcontracts described at 16.203–1(a)(2), 16.204, 16.205, and 16.206;

(2) Cost-reimbursement contracts and subcontracts (Subpart 16.3);

(3) Incentive contracts and subcontracts where the price may be adjusted based on actual costs incurred (Subpart 16.4);

(4) Orders issued under indefinite-delivery contracts and subcontracts where final payment is based on actual costs incurred (Subpart 16.5); and

(5) The materials portion of time-and-materials contracts and subcontracts (Subpart 16.6).

Noncompliance means a failure in estimating, accumulating, or reporting costs to—

(1) Comply with applicable CAS; or

(2) Consistently follow disclosed or established cost accounting practices.

Required change means—

(1) A change in cost accounting practice that a contractor is required to make in order to comply with applicable Standards, modifications or interpretations thereto, that subsequently becomes applicable to an existing CAS-covered contract or subcontract due to the receipt of another CAS-covered contract or subcontract; or

(2) A prospective change to a disclosed or established cost accounting practice when the CFAO determines that the former practice was in compliance with applicable CAS and the change is necessary for the contractor to remain in compliance.

Unilateral change means a change in cost accounting practice from one compliant practice to another compliant practice that a contractor with a CAS-covered contract(s) or subcontract(s) elects to make that has not been deemed a desirable change by the CFAO and for which the Government will pay no aggregate increased costs.

[70 FR 11752, Mar. 9, 2005, as amended at 73 FR 10966, Feb. 28, 2008]

Subpart 30.1—General

30.101 Cost Accounting Standards.

(a) 41 U.S.C. chapter 15, Cost Accounting Standards, requires certain contractors and subcontractors to comply with Cost Accounting Standards (CAS) and to disclose in writing and follow consistently their cost accounting practices.

(b) Contracts that refer to this part 30 for the purpose of applying the policies, procedures, standards and regulations promulgated by the CASB pursuant to 41 U.S.C. chapter 15, shall be deemed to refer to the CAS, and any other regulations promulgated by the CASB (see 48 CFR chapter 99), all of which are hereby incorporated in this part 30.

(c) The appendix to the FAR loose-leaf edition contains—

(1) Cost Accounting Standards and Cost Accounting Standards Board Rules and Regulations Recodified by the Cost Accounting Standards Board at 48 CFR Chapter 99; and

(2) The following preambles:

(i) Part I—Preambles to the Cost Accounting Standards Published by the Cost Accounting Standards Board.

(ii) Part II—Preambles to the Related Rules and Regulations Published by the Cost Accounting Standards Board.

(iii) Part III—Preambles Published under the FAR System.

(d) The preambles are not regulatory but are intended to explain why the Standards and related Rules and Regulations were written, and to provide rationale for positions taken relative to issues raised in the public comments. The preambles are printed in chronological order to provide an administrative history.

[57 FR 39587, Aug. 31, 1992, as amended at 62 FR 40237, July 25, 1997; 63 FR 9060, Feb. 23, 1998; 79 FR 24210, Apr. 29, 2014]

30.102 Cost Accounting Standards Board publication.

Copies of the CASB Standards and Regulations are printed in title 48 of the Code of Federal Regulations, chapter 99, and may be obtained by writing the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402, or by calling the

Washington, DC, ordering desk at area code (202) 512–1800.

[57 FR 39587, Aug. 31, 1992, as amended at 62 FR 40237, July 25, 1997; 84 FR 19847, May 6, 2019]

Subpart 30.2—CAS Program Requirements

30.201 Contract requirements.

Title 48 CFR 9903.201–1 (FAR appendix) describes the rules for determining whether a proposed contract or subcontract is exempt from CAS. Negotiated contracts not exempt in accordance with 48 CFR 9903.201–1(b) shall be subject to CAS. A CAS-covered contract may be subject to either full or modified coverage. The rules for determining whether full or modified coverage applies are in 48 CFR 9903.201–2 (FAR appendix).

[57 FR 39587, Aug. 31, 1992, as amended at 61 FR 18916, Apr. 29, 1996; 62 FR 40237, July 25, 1997]

30.201–1 CAS applicability.

See 48 CFR 9903.201–1 (FAR appendix).

[61 FR 18916, Apr. 29, 1996, as amended at 62 FR 40237, July 25, 1997]

30.201–2 Types of CAS coverage.

See 48 CFR 9903.201–2 (FAR appendix).

[61 FR 18916, Apr. 29, 1996, as amended at 62 FR 40237, July 25, 1997]

30.201–3 Solicitation provisions.

(a) The contracting officer shall insert the provision at 52.230–1, Cost Accounting Standards Notices and Certification, in solicitations for proposed contracts subject to CAS as specified in 48 CFR 9903.201 (FAR appendix).

(b) If an award to an educational institution is contemplated prior to July 1, 1997, the contracting officer shall insert the basic provision set forth at 52.230–1 with its *Alternate I*, unless the contract is to be performed by a Federally Funded Research and Development Center (FFRDC) (see 48 CFR 9903.201–2(c)(5) (FAR appendix)), or the provision at 48 CFR 9903.201–2(c)(6) (FAR appendix) applies.

(c) Insert the provision at FAR 52.230–7, Proposal Disclosure—Cost Accounting Practice Changes, in solicitations for contracts subject to CAS as specified in 48 CFR 9903.201 (FAR Appendix).

[61 FR 18917, Apr. 29, 1996, as amended at 62 FR 40237, July 25, 1997; 70 FR 11753, Mar. 9, 2005]

30.201–4 Contract clauses.

(a) *Cost Accounting Standards.* (1) The contracting officer shall insert the clause at FAR 52.230–2, Cost Accounting Standards, in negotiated contracts, unless the contract is exempted (see 48 CFR 9903.201–1 (FAR appendix)), the contract is subject to modified coverage (see 48 CFR 9903.201–2 (FAR appendix)), or the clause prescribed in paragraph (c) of this subsection is used.

(2) The clause at FAR 52.230–2 requires the contractor to comply with all CAS specified in 48 CFR part 9904 (FAR appendix), to disclose actual cost accounting practices (applicable to CAS-covered contracts only), and to follow disclosed and established cost accounting practices consistently.

(b) *Disclosure and consistency of cost accounting practices.* (1) Insert the clause at FAR 52.230–3, Disclosure and Consistency of Cost Accounting Practices, in negotiated contracts when the contract amount is over $750,000 but less than $50 million, and the offeror certifies it is eligible for and elects to use modified CAS coverage (see 48 CFR 9903.201–2 (FAR Appendix)), unless the clause prescribed in paragraph (c) of this subsection is used.

(2) The clause at FAR 52.230–3 requires the contractor to comply with 48 CFR 9904.401, 9904.402, 9904.405, and 9904.406 (FAR appendix) to disclose (if it meets certain requirements) actual cost accounting practices, and to follow consistently its established cost accounting practices.

(c) *Disclosure and Consistency of Cost Accounting Practices—Foreign Concerns.* (1) The contracting officer shall insert the clause at 52.230–4, Disclosure and Consistency of Cost Accounting Practices—Foreign Concerns, in negotiated contracts with foreign concerns, unless the contract is otherwise exempt from CAS (see 48 CFR 9903.201–1). Foreign concerns do not include foreign governments or their agents or instrumentalities.

(2) The clause at 52.230–4 requires the contractor to comply with 48 CFR 9904.401 and 48 CFR 9904.402 to disclose (if it meets certain requirements) actual cost accounting practices, and to follow consistently its disclosed and established cost accounting practices.

(d) *Administration of Cost Accounting Standards.* (1) The contracting officer shall insert the clause at FAR 52.230–6, Administration of Cost Accounting Standards, in contracts containing any of the clauses prescribed in paragraphs (a), (b), (c), or (e) of this subsection.

(2) The clause at FAR 52.230–6 specifies rules for administering CAS requirements and procedures to be followed in cases of failure to comply.

(e) *Cost Accounting Standards—Educational Institutions.* (1) The contracting officer shall insert the clause at FAR 52.230–5, Cost Accounting Standards—Educational Institution, in negotiated contracts awarded to educational institutions, unless the contract is exempted (see 48 CFR 9903.201–1 (FAR appendix)), the contract is to be performed by an FFRDC (see 48 CFR 9903.201–2(c)(5) (FAR appendix)), or the provision at 48 CFR 9903.201–2(c)(6) (FAR appendix) applies.

(2) The clause at FAR 52.230–5 requires the educational institution to comply with all CAS specified in 48 CFR part 9905 (FAR appendix), to disclose actual cost accounting practices as required by 48 CFR 9903.202–1(f) (FAR appendix), and to follow disclosed and established cost accounting practices consistently.

[61 FR 18917, Apr. 29, 1996, as amended at 62 FR 40237, July 25, 1997; 65 FR 36029, June 6, 2000; 73 FR 54012, 54013, Sept. 17, 2008; 75 FR 34284, June 16, 2010; 77 FR 27551, May 10, 2012; 80 FR 38298, July 2, 2015]

30.201–5 Waiver.

(a) The head of the agency—

(1) May waive the applicability of CAS for a particular contract or subcontract under the conditions listed in paragraph (b) of this subsection; and

(2) Must not delegate this waiver authority to any official in the agency below the senior contract policy-making level.

(b) The head of the agency may grant a waiver when one of the following conditions exists:

(1) The contract or subcontract value is less than $15,000,000, and the head of the agency determines, in writing, that the segment of the contractor or subcontractor that will perform the contract or subcontract—

(i) Is primarily engaged in the sale of commercial items; and

(ii) Has no contracts or subcontracts that are subject to CAS.

(2) The head of the agency determines that exceptional circumstances exist whereby a waiver of CAS is necessary to meet the needs of the agency. Exceptional circumstances exist only when the benefits to be derived from waiving the CAS outweigh the risk associated with the waiver. The determination that exceptional circumstances exist must—

(i) Be set forth in writing; and

(ii) Include a statement of the specific circumstances that justify granting the waiver.

(c) When one of the conditions in paragraph (b) of this subsection exists, the request for waiver should include the following:

(1) The amount of the proposed award.

(2) A description of the contract or subcontract type (*e.g.*, firm-fixed-price, cost-reimbursement).

(3) Whether the segment(s) that will perform the contract or subcontract has CAS-covered contracts or subcontracts.

(4) A description of the item(s) being procured.

(5) When the contractor or subcontractor will not accept the contract or subcontract if CAS applies, a statement to that effect.

(6) Whether certified cost or pricing data will be obtained, and if so, a discussion of how the data will be used in negotiating the contract or subcontract price.

(7) The benefits to the Government of waiving CAS.

(8) The potential risk to the Government of waiving CAS.

(9) The date by which the waiver is needed.

(10) Any other information that may be useful in evaluating the request.

(d) When neither of the conditions in paragraph (b) of this subsection exists, the waiver request must be prepared in

accordance with 48 CFR 9903.201–5(e) (FAR Appendix) and submitted to the CAS Board.

(e) Each agency must report any waivers granted under paragraph (a) of this subsection to the CAS Board, on a fiscal year basis, not later than 90 days after the close of the Government's fiscal year.

[65 FR 36030, June 6, 2000, as amended at 75 FR 53149, Aug. 30, 2010]

30.201–6 Findings.

See 48 CFR 9903.201–6 (FAR appendix).

[61 FR 18917, Apr. 29, 1996, as amended at 62 FR 40237, July 25, 1997]

30.201–7 Cognizant Federal agency responsibilities.

See 48 CFR 9903.201–7 (FAR appendix).

[61 FR 18917, Apr. 29, 1996, as amended at 62 FR 40237, July 25, 1997]

30.202 Disclosure requirements.

30.202–1 General requirements.

See 48 CFR 9903.202–1 (FAR appendix).

[61 FR 18917, Apr. 29, 1996, as amended at 62 FR 40237, July 25, 1997]

30.202–2 Impracticality of submission.

See 48 CFR 9903.202–2 (FAR appendix).

[61 FR 18917, Apr. 29, 1996, as amended at 62 FR 40237, July 25, 1997]

30.202–3 Amendments and revisions.

See 48 CFR 9903.202–3 (FAR appendix).

[61 FR 18917, Apr. 29, 1996, as amended at 62 FR 40237, July 25, 1997]

30.202–4 Privileged and confidential information.

See 48 CFR 9903.202–4 (FAR appendix).

[61 FR 18917, Apr. 29, 1996, as amended at 62 FR 40237, July 25, 1997]

30.202–5 Filing disclosure statements.

See 48 CFR 9903.202–5 (FAR appendix).

[61 FR 18917, Apr. 29, 1996, as amended at 62 FR 40237, July 25, 1997]

30.202–6 Responsibilities.

(a) The contracting officer is responsible for determining when a proposed contract may require CAS coverage and for including the appropriate notice in the solicitation. The contracting officer must then ensure that the offeror has made the required solicitation certifications and that required Disclosure Statements are submitted. (Also see 48 CFR 9903.201–3 and 9903.202 (FAR appendix).)

(b) The contracting officer shall not award a CAS-covered contract until the cognizant Federal agency official (CFAO) has made a written determination that a required Disclosure Statement is adequate unless, in order to protect the Government's interest, the agency head, on a nondelegable basis, authorizes award without obtaining submission of the required Disclosure Statement (see 48 CFR 9903.202–2). In this event, the contractor shall submit the required Disclosure Statement and the CFAO shall make a determination of adequacy as soon as possible after the award.

(c) The cognizant auditor is responsible for conducting reviews of Disclosure Statements for adequacy and compliance.

(d) The CFAO is responsible for issuing determinations of adequacy and compliance of the Disclosure Statement.

[57 FR 39587, Aug. 31, 1992, as amended at 61 FR 18917, Apr. 29, 1996; 62 FR 40237, July 25, 1997; 70 FR 11753, Mar. 9, 2005]

30.202–7 Determinations.

(a) *Adequacy determination.* (1) As prescribed by 48 CFR 9903.202–6 (FAR Appendix), the auditor shall—

(i) Conduct a review of the Disclosure Statement to ascertain whether it is current, accurate, and complete; and

(ii) Report the results to the CFAO.

(2) The CFAO shall determine if the Disclosure Statement adequately describes the contractor's cost accounting practices. Also, the CFAO shall—

(i) If the Disclosure Statement is adequate, notify the contractor in writing, and provide a copy to the auditor with a copy to the contracting officer if the proposal triggers submission of a Disclosure Statement. The notice of adequacy shall state that—

(A) The disclosed practices are adequately described and the CFAO currently is not aware of any additional practices that should be disclosed;

(B) The notice is not a determination that all cost accounting practices were disclosed; and

(C) The contractor shall not consider a disclosed practice, by virtue of such disclosure, an approved practice for estimating proposals or accumulating and reporting contract and subcontract cost data; or

(ii) If the Disclosure Statement is inadequate, notify the contractor of the inadequacies and request a revised Disclosure Statement.

(3) Generally, the CFAO should furnish the contractor notification of adequacy or inadequacy within 30 days after the CFAO receives the Disclosure Statement.

(b) *Compliance determination.* (1) After the notification of adequacy, the auditor shall—

(i) Conduct a detailed compliance review to ascertain whether or not the disclosed practices comply with CAS and Part 31, as applicable; and

(ii) Advise the CFAO of the results.

(2) The CFAO shall make a determination of compliance or take action regarding a report of alleged noncompliance in accordance with 30.605(b). Such action should include requesting a revised Disclosure Statement that corrects the CAS noncompliance. Noncompliances with Part 31 shall be processed separately.

[70 FR 11753, Mar. 9, 2005]

30.202–8 Subcontractor disclosure statements.

(a) When the Government requires determinations of adequacy of subcontractor disclosure statements, the CFAO for the subcontractor shall provide this determination to the CFAO for the contractor or next higher-tier subcontractor. The higher-tier CFAO shall not change the determination of the lower-tier CFAO.

(b) Any determination that it is impractical to secure a subcontractor's Disclosure Statement must be made in accordance with 48 CFR 9903.202–2 (FAR appendix).

[57 FR 39587, Aug. 31, 1992, as amended at 61 FR 18918, Apr. 29, 1996; 62 FR 40237, July 25, 1997; 70 FR 11753, Mar. 9, 2005]

Subpart 30.3—CAS Rules and Regulations [Reserved]

NOTE: See 48 CFR 9903.3 (FAR appendix).

Subpart 30.4—Cost Accounting Standards [Reserved]

NOTE: See 48 CFR part 9904 (FAR appendix).

Subpart 30.5—Cost Accounting Standards for Educational Institutions [Reserved]

NOTE: See 48 CFR part 9905 (FAR appendix).

Subpart 30.6—CAS Administration

SOURCE: 70 FR 11753, Mar. 9, 2005, unless otherwise noted.

30.601 Responsibility.

(a) The CFAO shall perform CAS administration for all contracts and subcontracts in a business unit, even when the contracting officer retains other administration functions. The CFAO shall make all CAS-related required determinations and findings (*see* Subpart 1.7) for all CAS-covered contracts and subcontracts, including—

(1) Whether a change in cost accounting practice or noncompliance has occurred; and

(2) If a change in cost accounting practice or noncompliance has occurred, how any resulting cost impacts are resolved.

(b) Within 30 days after the award of any new contract subject to CAS, the contracting officer making the award shall request the CFAO to perform administration for CAS matters (see Subpart 42.2). For subcontract awards, the contractor awarding the subcontract must follow the procedures at 52.230–6(l), (m), and (n).

(c) In performing CAS administration, the CFAO shall request and consider the advice of the auditor as appropriate (see 1.602–2).

[70 FR 11753, Mar. 9, 2005, as amended at 73 FR 10967, Feb. 28, 2008]

30.602 Materiality.

(a) In determining materiality, the CFAO shall use the criteria in 48 CFR 9903.305 (FAR Appendix).

(b) A CFAO determination of materiality—

(1) May be made before or after a general dollar magnitude proposal has been submitted, depending on the particular facts and circumstances; and

(2) Shall be based on adequate documentation.

(c) When the CFAO determines the cost impact is immaterial, the CFAO shall—

(1) Make no contract adjustments and conclude the cost impact process;

(2) Document the rationale for the determination; and

(3) In the case of noncompliance issues, inform the contractor that—

(i) The noncompliance should be corrected; and

(ii) If the noncompliance is not corrected, the Government reserves the right to make appropriate contract adjustments should the cost impact become material in the future.

(d) For required, unilateral, and desirable changes, and CAS noncompliances, when the amount involved is material, the CFAO shall follow the applicable provisions in 30.603, 30.604, 30.605, and 30.606.

[70 FR 11753, Mar. 9, 2005, as amended at 73 FR 10967, Feb. 28, 2008]

30.603 Changes to disclosed or established cost accounting practices.

30.603–1 Required changes.

(a) *General.* Offerors shall state whether or not the award of a contract would require a change to an established cost accounting practice affecting existing contracts and subcontracts (*see* 52.230–1). The contracting officer shall notify the CFAO if the offeror states that a change in cost accounting practice would be required.

(b) *CFAO responsibilities.* Prior to making an equitable adjustment under the applicable paragraph(s) that address a required change at 52.230–2, Cost Accounting Standards; 52.230–3, Disclosure and Consistency of Cost Accounting Practices; or 52.230–5, Cost Accounting Standards—yEducational Institution, the CFAO shall determine that—

(1) The cost accounting practice change is required to comply with a CAS, or a modification or interpretation thereof, that subsequently became applicable to one or more contracts or subcontracts; or

(2) The former cost accounting practice was in compliance with applicable CAS and the change is necessary to remain in compliance.

(c) *Notice and proposal preparation.* (1) When the award of a contract would require a change to an established cost accounting practice, the provision at 52.230–7, Proposal Disclosure—Cost Accounting Practice Changes, requires the offeror to—

(i) Prepare the contract pricing proposal in response to the solicitation using the changed cost accounting practice for the period of performance for which the practice will be used; and

(ii) Submit a description of the changed cost accounting practice to the contracting officer and the CFAO as pricing support for the proposal.

(2) When a change is required to remain in compliance (for reasons other than a contract award) or to comply with a new or modified standard, the clause at 52.230–6, Administration of Cost Accounting Standards, requires the contractor to—

(i) Submit a description of the change to the CFAO not less than 60 days (or other mutually agreeable date) before implementation of the change; and

(ii) Submit rationale to support any contractor written statement that the cost impact of the change is immaterial.

(d) *Equitable adjustments for new or modified standards.* (1) Required changes made to comply with new or modified standards may require equitable adjustments, but only to those contracts awarded before the effective date of the new or modified standard (*see* 52.230–2, 52.230–3, or 52.230–5).

(2) When a contractor elects to implement a required change to comply with a new or modified standard prior to the applicability date of the standard, the CFAO shall administer the change as a unilateral change (*see* 30.603–2). Contractors shall not receive

an equitable adjustment that will result in increased costs in the aggregate to the Government prior to the applicability date unless the CFAO determines that the unilateral change is a desirable change.

30.603–2 Unilateral and desirable changes.

(a) *Unilateral changes.* (1) The contractor may unilaterally change its disclosed or established cost accounting practices, but the Government shall not pay any increased cost, in the aggregate, as a result of the unilateral change.

(2) Prior to making any contract price or cost adjustments under the applicable paragraph(s) addressing a unilateral change at 52.230–2, 52.230–3, or 52.230–5, the CFAO shall determine that—

(i) The contemplated contract price or cost adjustments will protect the Government from the payment of the estimated increased costs, in the aggregate; and

(ii) The net effect of the contemplated adjustments will not result in the recovery of more than the increased costs to the Government, in the aggregate.

(b) *Desirable changes.* (1) Prior to taking action under the applicable paragraph(s) addressing a desirable change at 52.230–2, 52.230–3, or 52.230–5, the CFAO shall determine the change is a desirable change and not detrimental to the interests of the Government.

(2) Until the CFAO has determined a change to a cost accounting practice is a desirable change, the change is a unilateral change.

(3) Some factors to consider in determining if a change is desirable include, but are not limited to, whether—

(i) The contractor must change the cost accounting practices it uses for Government contract and subcontract costing purposes to remain in compliance with the provisions of Part 31;

(ii) The contractor is initiating management actions directly associated with the change that will result in cost savings for segments with CAS-covered contracts and subcontracts over a period for which forward pricing rates are developed or 5 years, whichever is shorter, and the cost savings are reflected in the forward pricing rates; and

(iii) Funds are available if the determination would necessitate an upward adjustment of contract cost or price.

(c) *Notice and proposal preparation.* (1) When a contractor makes a unilateral change, the clause at 52.230–6, Administration of Cost Accounting Standards, requires the contractor to—

(i) Submit a description of the change to the CFAO not less than 60 days (or other mutually agreeable date) before implementation of the change; and

(ii) Submit rationale to support any contractor written statement that the cost impact of the change is immaterial.

(2) If a contractor implements the change in cost accounting practice without submitting the notice as required in paragraph (c)(1) of this subsection, the CFAO may determine the change a failure to follow a cost accounting practice consistently and process it as a noncompliance in accordance with 30.605.

(d) *Retroactive changes.* (1) If a contractor requests that a unilateral change be retroactive, the contractor shall submit supporting rationale.

(2) The CFAO shall promptly evaluate the contractor's request and shall, as soon as practical, notify the contractor in writing whether the request is or is not approved.

(3) The CFAO shall not approve a date for the retroactive change that is before the beginning of the contractor's fiscal year in which the request is made.

(e) *Contractor accounting changes due to external restructuring activities.* The requirements for contract price and cost adjustments do not apply to compliant cost accounting practice changes that are directly associated with external restructuring activities that are subject to and meet the requirements of 10 U.S.C. 2325. However, the disclosure requirements in 52.230–6(b) shall be followed.

30.604 Processing changes to disclosed or established cost accounting practices.

(a) *Scope.* This section applies to required, unilateral, and desirable changes in cost accounting practices.

(b) *Procedures.* Upon receipt of the contractor's notification and description of the change in cost accounting practice, the CFAO should review the proposed change concurrently for adequacy and compliance. The CFAO shall—

(1) If the description of the change is both adequate and compliant, notify the contractor in writing and—

(i) For required or unilateral changes (except those requested to be determined desirable changes), request the contractor submit a general dollar magnitude (GDM) proposal by a specified date, unless the CFAO determines the cost impact is immaterial; or

(ii) For unilateral changes that the contractor requests to be determined desirable changes, inform the contractor that the request shall include supporting rationale and—

(A) For any request based on the criteria in 30.603–2(b)(3)(ii), the data necessary to demonstrate the required cost savings; or

(B) For any request other than those based on the criteria in 30.603–2(b)(3)(ii), a GDM proposal and any other data necessary for the CFAO to determine if the change is a desirable change;

(2) If the description of the change is inadequate, request a revised description of the new cost accounting practice; and

(3) If the disclosed practice is noncompliant, notify the contractor in writing that, if implemented, the CFAO will determine the cost accounting practice to be noncompliant and process it accordingly.

(c) *Evaluating requests for desirable changes.* (1) When a contractor requests a unilateral change be determined a desirable change, the CFAO shall promptly evaluate the contractor's request and, as soon as practical, notify the contractor in writing whether the change is a desirable change or the request is denied.

(2) If the CFAO determines the change is a desirable change, the CFAO shall negotiate any cost or price adjustments that may be needed to resolve the cost impact (see 30.606).

(3) If the request is denied, the change is a unilateral change and shall be processed accordingly.

(d) *General dollar magnitude proposal.* The GDM proposal—

(1) Provides information to the CFAO on the estimated overall impact of a change in cost accounting practice on affected CAS-covered contracts and subcontracts that were awarded based on the previous cost accounting practice;

(2) Assists the CFAO in determining whether individual contract price or cost adjustments are required; and

(3) The contractor may submit a detailed cost-impact (DCI) proposal in lieu of a GDM proposal provided the DCI proposal is in accordance with paragraph (g) of this section.

(e) *General dollar magnitude proposal content.* The GDM proposal—

(1) Shall calculate the cost impact in accordance with paragraph (h) of this section;

(2) May use one or more of the following methods to determine the increase or decrease in cost accumulations:

(i) A representative sample of affected CAS-covered contracts and subcontracts.

(ii) The change in indirect rates multiplied by the total estimated base computed for each of the following groups:

(A) Fixed-price contracts and subcontracts.

(B) Flexibly-priced contracts and subcontracts.

(iii) Any other method that provides a reasonable approximation of the total increase or decrease in cost accumulations for all affected fixed-price and flexibly-priced contracts and subcontracts.

(3) May be in any format acceptable to the CFAO but, as a minimum, shall include the following data:

(i) A general dollar magnitude estimate of the total increase or decrease in cost accumulations by Executive agency, including any impact the change may have on contract and subcontract incentives, fees, and profits, for each of the following groups:

(A) Fixed-price contracts and subcontracts.

(B) Flexibly-priced contracts and subcontracts.

(ii) For unilateral changes, the increased or decreased costs to the Government for each of the following groups:

(A) Fixed-price contracts and subcontracts.

(B) Flexibly-priced contracts and subcontracts; and

(4) When requested by the CFAO, shall identify all affected CAS-covered contracts and subcontracts.

(f) *General dollar magnitude proposal evaluation.* The CFAO shall promptly evaluate the GDM proposal. If the cost impact is immaterial, the CFAO shall notify the contractor in writing and conclude the cost-impact process with no contract adjustments. Otherwise, the CFAO shall—

(1) Negotiate and resolve the cost impact (see 30.606). If necessary, the CFAO may request that the contractor submit a revised GDM proposal by a specified date with specific additional data needed to resolve the cost impact (*e.g.*, an expanded sample of affected CAS-covered contracts and subcontracts or a revised method of computing the increase or decrease in cost accumulations); or

(2) Request that the contractor submit a DCI proposal by a specified date if the CFAO determines that the GDM proposal is not sufficient to resolve the cost impact.

(g) *Detailed cost-impact proposal.* If the contractor is required to submit a DCI proposal, the CFAO shall promptly evaluate the DCI proposal and follow the procedures at 30.606 to negotiate and resolve the cost impact. The DCI proposal—

(1) Shall calculate the cost impact in accordance with paragraph (h) of this section;

(2) Shall show the estimated increase or decrease in cost accumulations for each affected CAS-covered contract and subcontract unless the CFAO and contractor agree to—

(i) Include only those affected CAS-covered contracts and subcontracts exceeding a specified amount; and

(ii) Estimate the total increase or decrease in cost accumulations for all affected CAS-covered contracts and subcontracts, using the results in paragraph (g)(2)(i) of this section;

(3) May be in any format acceptable to the CFAO but, as a minimum, shall include the requirements at paragraphs (e)(3)(i) and (ii) of this section; and

(4) When requested by the CFAO, shall identify all affected contracts and subcontracts.

(h) *Calculating cost impacts.* The cost impact calculation shall—

(1) Include all affected CAS-covered contracts and subcontracts regardless of their status (*i.e.*, open or closed) or the fiscal year(s) in which the costs are incurred (*i.e.*, whether or not the final indirect rates have been established);

(2) Combine the cost impact for all affected CAS-covered contracts and subcontracts for all segments if the effect of a change results in costs flowing between those segments;

(3) For unilateral changes—

(i) Determine the increased or decreased cost to the Government for flexibly-priced contracts and subcontracts as follows:

(A) When the estimated cost to complete using the changed practice exceeds the estimated cost to complete using the current practice, the difference is increased cost to the Government.

(B) When the estimated costs to complete using the changed practice is less than the estimated cost to complete using the current practice, the difference is decreased cost to the Government.

(ii) Determine the increased or decreased cost to the Government for fixed-price contracts and subcontracts as follows:

(A) When the estimated cost to complete using the changed practice is less than the estimated cost to complete using the current practice, the difference is increased cost to the Government.

(B) When the estimated cost to complete using the changed practice exceeds the estimated cost to complete using the current practice, the difference is decreased cost to the Government.

(iii) Calculate the total increase or decrease in contract and subcontract incentives, fees, and profits associated

with the increased or decreased cost to the Government in accordance with 48 CFR 9903.306(c). The associated increase or decrease is based on the difference between the negotiated incentives, fees and profits and the amounts that would have been negotiated had the cost impact been known at the time the contracts and subcontracts were negotiated.

(iv) Calculate the increased cost to the Government in the aggregate.

(4) For required or desirable changes, negotiate an equitable adjustment as provided in the Changes clause of the contract.

(i) *Remedies.* If the contractor does not submit the accounting change description or the proposals required in paragraph (d) or (g) of this section within the specified time, or any extension granted by the CFAO, the CFAO shall—

(1) Estimate the general dollar magnitude of the cost impact on affected CAS-covered contracts and subcontracts; and

(2) Take one or both of the following actions:

(i) Withhold an amount not to exceed 10 percent of each subsequent payment related to the contractor's CAS-covered contracts (up to the estimated general dollar magnitude of the cost impact), until the contractor furnishes the required information.

(ii) Issue a final decision in accordance with 33.211 and unilaterally adjust the contract(s) by the estimated amount of the cost impact.

[70 FR 11753, Mar. 9, 2005, as amended at 73 FR 10967, Feb. 28, 2008]

30.605 Processing noncompliances.

(a) *General.* Prior to making any contract price or cost adjustments under the applicable paragraph(s) addressing noncompliance at 52.230–2, 52.230–3, or 52.230–5, the CFAO shall determine that—

(1) The contemplated contract price or cost adjustments will protect the Government from the payment of increased costs, in the aggregate;

(2) The net effect of the contemplated contract price or cost adjustments will not result in the recovery of more than the increased costs to the Government, in the aggregate;

(3) The net effect of any invoice adjustments made to correct an estimating noncompliance will not result in the recovery of more than the increased costs paid by the Government, in the aggregate; and

(4) The net effect of any interim and final voucher billing adjustments made to correct a cost accumulation noncompliance will not result in the recovery of more than the increased cost paid by the Government, in the aggregate.

(b) *Notice and determination.* (1) Within 15 days of receiving a report of alleged noncompliance from the auditor, the CFAO shall—

(i) Notify the auditor that the CFAO disagrees with the alleged noncompliance; or

(ii) Issue a notice of potential noncompliance to the contractor and provide a copy to the auditor.

(2) The notice of potential noncompliance shall—

(i) Notify the contractor in writing of the exact nature of the noncompliance; and

(ii) Allow the contractor 60 days or other mutually agreeable date to—

(A) Agree or submit reasons why the contractor considers the existing practices to be in compliance; and

(B) Submit rationale to support any written statement that the cost impact of the noncompliance is immaterial.

(3) The CFAO shall—

(i) If applicable, review the reasons why the contractor considers the existing practices to be compliant or the cost impact to be immaterial;

(ii) Make a determination of compliance or noncompliance consistent with 1.704; and

(iii) Notify the contractor and the auditor in writing of the determination of compliance or noncompliance and the basis for the determination.

(4) If the CFAO makes a determination of noncompliance, the CFAO shall follow the procedures in paragraphs (c) through (h) of this section, as appropriate, unless the CFAO also determines the cost impact is immaterial. If immaterial, the CFAO shall—

(i) Inform the contractor in writing that—

(A) The noncompliance should be corrected; and

(B) If the noncompliance is not corrected, the Government reserves the right to make appropriate contract adjustments should the noncompliance become material in the future; and

(ii) Conclude the cost-impact process with no contract adjustments.

(c) *Correcting noncompliances.* (1) The clause at 52.230–6 requires the contractor to submit a description of any cost accounting practice change needed to correct a noncompliance within 60 days after the earlier of—

(i) Agreement with the CFAO that there is a noncompliance; or

(ii) Notification by the CFAO of a determination of noncompliance.

(2) The CFAO should review the proposed change to correct the noncompliance concurrently for adequacy and compliance (see 30.202–7). The CFAO shall—

(i) When the description of the change is both adequate and compliant—

(A) Notify the contractor in writing;

(B) Request that the contractor submit by a specified date a general dollar magnitude (GDM) proposal, unless the CFAO determines the cost impact is immaterial; and

(C) Follow the procedures at paragraph (b)(4) of this section if the CFAO determines the cost impact is immaterial.

(ii) If the description of the change is inadequate, request a revised description of the new cost accounting practice; or

(iii) If the disclosed practice is noncompliant, notify the contractor in writing that, if implemented, the CFAO will determine the cost accounting practice to be noncompliant and process it accordingly.

(d) *General dollar magnitude proposal content.* The GDM proposal—

(1) Shall calculate the cost impact in accordance with paragraph (h) of this section;

(2) May use one or more of the following methods to determine the increase or decrease in contract and subcontract price or cost accumulations, as applicable:

(i) A representative sample of affected CAS-covered contracts and subcontracts affected by the noncompliance.

(ii) When the noncompliance involves cost accumulation, the change in indirect rates multiplied by the applicable base for flexibly-priced contracts and subcontracts.

(iii) Any other method that provides a reasonable approximation of the total increase or decrease in contract and subcontract prices and cost accumulations;

(3) The contractor may submit a DCI proposal in lieu of a GDM proposal provided the DCI proposal is in accordance with paragraph (f) of this section.

(4) May be in any format acceptable to the CFAO but, as a minimum, shall include the following data:

(i) The total increase or decrease in contract and subcontract prices and cost accumulations, as applicable, by Executive agency, including any impact the noncompliance may have on contract and subcontract incentives, fees, and profits, for each of the following groups:

(A) Fixed-price contracts and subcontracts.

(B) Flexibly-priced contracts and subcontracts.

(ii) The increased or decreased costs to the Government for each of the following groups:

(A) Fixed-price contracts and subcontracts.

(B) Flexibly-priced contracts and subcontracts.

(iii) The total overpayments and underpayments for fixed-price and flexibly-priced contracts made by the Government during the period of noncompliance; and

(5) When requested by the CFAO, shall identify all affected CAS-covered contracts and subcontracts.

(e) *General dollar magnitude proposal evaluation.* The CFAO shall promptly evaluate the GDM proposal. If the cost impact is immaterial, the CFAO shall follow the requirements in paragraph (b)(4) of this section. Otherwise, the CFAO shall—

(1) Negotiate and resolve the cost impact (see 30.606). If necessary, the CFAO may request the contractor submit a revised GDM proposal by a specified date, with specific additional data needed to resolve the cost impact (*e.g.*, an expanded sample of affected CAS-covered contracts and subcontracts or

a revised method of computing the increase or decrease in contract and subcontract price and cost accumulations); or

(2) Request that the contractor submit a DCI proposal by a specified date if the CFAO determines that the GDM proposal is not sufficient to resolve the cost impact.

(f) *Detailed cost-impact proposal.* If the contractor is required to submit a DCI proposal, the CFAO shall promptly evaluate the DCI proposal and follow the procedures at 30.606 to negotiate and resolve the cost impact. The DCI proposal—

(1) Shall calculate the cost impact in accordance with paragraph (h) of this section.

(2) Shall show the increase or decrease in price and cost accumulations, as applicable for each affected CAS-covered contract and subcontract unless the CFAO and contractor agree to—

(i) Include only those affected CAS-covered contracts and subcontracts having—

(A) Contract and subcontract values exceeding a specified amount when the noncompliance involves estimating costs; and

(B) Incurred costs exceeding a specified amount when the noncompliance involves accumulating costs; and

(ii) Estimate the total increase or decrease in price and cost accumulations for all affected CAS-covered contracts and subcontracts using the results in paragraph (f)(2)(i) of this section;

(3) May be in any format acceptable to the CFAO but, as a minimum, shall include the information in paragraph (d)(4) of this section; and

(4) When requested by the CFAO, shall identify all affected CAS-covered contracts and subcontracts.

(g) *Interest.* The CFAO shall—

(1) Separately identify interest on any increased cost paid, in the aggregate, as a result of the noncompliance;

(2) Compute interest from the date of overpayment to the date of repayment using the rate specified in 26 U.S.C. 6621(a)(2).

(h) *Calculating cost impacts.* The cost impact calculation shall—

(1) Include all affected CAS-covered contracts and subcontracts regardless of their status (*i.e.*, open or closed) or the fiscal year in which the costs are incurred (*i.e.*, whether or not the final indirect cost rates have been established);

(2) Combine the cost impact for all affected CAS-covered contracts and subcontracts for all segments if the effect of a change results in costs flowing between those segments;

(3) For noncompliances that involve estimating costs, determine the increased or decreased cost to the Government for fixed-price contracts and subcontracts as follows:

(i) When the negotiated contract or subcontract price exceeds what the negotiated price would have been had the contractor used a compliant practice, the difference is increased cost to the Government.

(ii) When the negotiated contract or subcontract price is less than what the negotiated price would have been had the contractor used a compliant practice, the difference is decreased cost to the Government;

(4) For noncompliances that involve accumulating costs, determine the increased or decreased cost to the Government for flexibly-priced contracts and subcontracts as follows:

(i) When the costs that were accumulated under the noncompliant practice exceed the costs that would have been accumulated using a compliant practice (from the time the noncompliant practice was first implemented until the date the noncompliant practice was replaced with a compliant practice), the difference is increased cost to the Government.

(ii) When the costs that were accumulated under the noncompliant practice are less than the costs that would have been accumulated using a compliant practice (from the time the noncompliant practice was first implemented until the date the noncompliant practice was replaced with a compliant practice) the difference is decreased cost to the Government;

(5) Calculate the total increase or decrease in contract and subcontract incentives, fees, and profits associated with the increased or decreased costs to the Government in accordance with

48 CFR 9903.306(c). The associated increase or decrease is based on the difference between the negotiated incentives, fees, and profits and the amounts that would have been negotiated had the contractor used a compliant practice;

(6) Determine the cost impact of each noncompliance that affects both cost estimating and cost accumulation by combining the cost impacts in paragraphs (h)(3), (h)(4), and (h)(5) of this section; and

(7) Calculate the increased cost to the Government in the aggregate.

(i) *Remedies.* If the contractor does not correct the noncompliance or submit the proposal required in paragraph (d) or (f) of this section within the specified time, or any extension granted by the CFAO, the CFAO shall follow the procedures at 30.604(i).

[70 FR 11753, Mar. 9, 2005, as amended at 73 FR 10967, Feb. 28, 2008]

30.606 Resolving cost impacts.

(a) *General.* (1) The CFAO shall coordinate with the affected contracting officers before negotiating and resolving the cost impact when the estimated cost impact on any of their contracts is at least $100,000. However, the CFAO has the sole authority for negotiating and resolving the cost impact.

(2) The CFAO may resolve a cost impact attributed to a change in cost accounting practice or a noncompliance by adjusting a single contract, several but not all contracts, all contracts, or any other suitable method.

(3) In resolving the cost impact, the CFAO—

(i) Shall not combine the cost impacts of any of the following:

(A) A required change and a unilateral change.

(B) A required change and a noncompliance.

(C) A desirable change and a unilateral change.

(D) A desirable change and a noncompliance.

(ii) Shall not combine the cost impacts of any of the following unless all of the cost impacts are increased costs to Government:

(A) One or more unilateral changes.

(B) One or more noncompliances.

(C) Unilateral changes and noncompliances; and

(iii) May consider the cost impacts of a unilateral change affecting two or more segments to be a single change if—

(A) The change affects the flow of costs between segments; or

(B) Implements a common cost accounting practice for two or more segments.

(4) For desirable changes, the CFAO should consider the estimated cost impact of associated management actions on contract costs in resolving the cost impact.

(b) *Negotiations.* The CFAO shall—

(1) Negotiate and resolve the cost impact on behalf of all Government agencies; and

(2) At the conclusion of negotiations, prepare a negotiation memorandum and send copies to the auditor and affected contracting officers.

(c) *Contract adjustments.* (1) The CFAO may adjust some or all contracts with a material cost impact, subject to the provisions in paragraphs (c)(2) through (c)(6) of this section.

(2) In selecting the contract or contracts to be adjusted, the CFAO should assure, to the maximum extent practical and subject to the provisions in paragraphs (c)(3) through (c)(6) of this section, that the adjustments reflect a *pro rata* share of the cost impact based on the ratio of the cost impact of each Executive agency to the total cost impact.

(3) For unilateral changes and noncompliances, the CFAO shall—

(i) To the maximum extent practical, not adjust the price upward for fixed-price contracts;

(ii) If contract adjustments are made, preclude payment of aggregate increased costs by taking one or both of the following actions:

(A) Reduce the contract price on fixed-price contracts.

(B) Disallow costs on flexibly-priced contracts; and

(iii) The CFAO may, in consultation with the affected contracting officers, increase or decrease individual contract prices, including contract cost ceilings or target costs on flexibly-priced contracts. In such cases, the CFAO shall limit any upward contract

price adjustments on affected contracts to the amount of downward price adjustments to other affected contracts, *i.e.*, the aggregate price of all contracts affected by a unilateral change shall not be increased (48 CFR 9903.201–6(b)).

(4) For noncompliances that involve estimating costs, the CFAO—

(i) Shall, to the extent practical, not adjust the price upward for fixed-price contracts;

(ii) Shall, if contract adjustments are made, preclude payment of aggregate increased costs by reducing the contract price on fixed-price contracts;

(iii) May, in consultation with the affected contracting officers, increase or decrease individual contract prices, including costs ceilings or target costs on flexibly-priced contracts. In such cases, the CFAO shall limit any upward contract price adjustments to affected contracts to the amount of downward price adjustments to other affected contracts, *i.e.*, the aggregate price of all contracts affected by a noncompliance that involves estimating costs shall not be increased (48 CFR 9903.201–6(d));

(iv) Shall require the contractor to correct the noncompliance, *i.e.*, ensure that compliant cost accounting practices will now be utilized to estimate proposed contract costs; and

(v) Shall require the contractor to adjust any invoices that were paid based on noncompliant contract prices to reflect the adjusted contract prices, after any contract price adjustments are made to resolve the noncompliance.

(5) For noncompliances that involve cost accumulation, the CFAO—

(i) Shall require the contractor to—

(A) Correct noncompliant contract cost accumulations in the contractor's cost accounting records for affected contracts to reflect compliant contract cost accumulations; and

(B) Adjust interim payment requests (public vouchers and/or progress payments) and final vouchers to reflect the difference between the costs paid using the noncompliant practice and the costs that should have been paid using the compliant practice; or

(ii) Shall adjust contract prices. In adjusting contract prices, the CFAO shall preclude payment of aggregate increased costs by disallowing costs on flexibly-priced contracts.

(A) The CFAO may, in consultation with the affected contracting officers, increase or decrease individual contract prices, including costs ceilings or target costs on flexibly-priced contracts. In such cases, the CFAO shall limit any upward contract price adjustments to affected contracts to the amount of downward price adjustments to other affected contracts, *i.e.*, the aggregate price of all contracts affected by a noncompliance that involves cost accumulation shall not be increased (48 CFR 9903.201–6(d)).

(B) Shall require the contractor to—

(*1*) Correct contract cost accumulations in the contractor's cost accounting records to reflect the contract price adjustments; and

(*2*) Adjust interim payment requests (public vouchers and/or progress payments) and final vouchers to reflect the contract price adjustments.

(6) When contract adjustments are made, the CFAO shall—

(i) Execute the bilateral modifications if the CFAO and contractor agree on the amount of the cost impact and the adjustments (see 42.302(a)(11)(iv)); or

(ii) When the CFAO and contractor do not agree on the amount of the cost impact or the contract adjustments, issue a final decision in accordance with 33.211 and unilaterally adjust the contract(s).

(d) *Alternate methods.* (1) The CFAO may use an alternate method instead of adjusting contracts to resolve the cost impact, provided the Government will not pay more, in the aggregate, than would be paid if the CFAO did not use the alternate method and the contracting parties agree on the use of that alternate method.

(2) The CFAO may not use an alternate method for contracts when application of the alternate method to contracts would result in—

(i) An under recovery of monies by the Government (*e.g.*, due to cost overruns); or

(ii) Distortions of incentive provisions and relationships between target costs, ceiling costs, and actual costs for incentive type contracts.

(3) When using an alternate method that excludes the costs from an indirect cost pool, the CFAO shall—

(i) Apply such exclusion only to the determination of final indirect cost rates (*see* 42.705); and

(ii) Adjust the exclusion to reflect the Government participation rate for flexibly-priced contracts and subcontracts. For example, if there are aggregate increased costs to the Government of $100,000, and the indirect cost pool where the adjustment is to be effected has a Government participation rate of 50 percent for flexibly-priced contracts and subcontracts, the contractor shall exclude $200,000 from the indirect cost pool ($100,000/50% = $200,000).

30.607 Subcontract administration.

When a negotiated CAS price adjustment or a determination of noncompliance is required at the subcontract level, the CFAO for the subcontractor shall furnish a copy of the negotiation memorandum or the determination to the CFAO for the contractor of the next higher-tier subcontractor. The CFAO of the contractor or the next higher-tier subcontractor shall not change the determination of the CFAO for the lower-tier subcontractor. If the subcontractor refuses to submit a GDM or DCI proposal, remedies are made at the prime contractor level.

PART 31—CONTRACT COST PRINCIPLES AND PROCEDURES

Sec.

Subpart 31.1—Applicability

Subpart 31.2—Contracts With Commercial Organizations

Subpart 31.3—Contracts With Educational Institutions

Subparts 31.4–31.5 [Reserved]

Subpart 31.6—Contracts With State, Local, and Federally Recognized Indian Tribal Governments

Subpart 31.7—Contracts With Nonprofit Organizations

AUTHORITY: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

SOURCE: 48 FR 42301, Sept. 19, 1983, unless otherwise noted.

31.000 Scope of part.

This part contains cost principles and procedures for (a) the pricing of contracts, subcontracts, and modifications to contracts and subcontracts whenever cost analysis is performed (see 15.404–1(c)) and (b) the determination, negotiation, or allowance of costs when required by a contract clause.

[48 FR 42301, Sept. 19, 1983, as amended at 62 FR 51271, Sept. 30, 1997]

31.001 Definitions.

As used in this part—

Accrued benefit cost method means an actuarial cost method under which units of benefits are assigned to each cost accounting period and are valued as they accrue; *i.e.*, based on the services performed by each employee in the period involved. The measure of normal cost under this method for each cost accounting period is the present value of the units of benefit deemed to be credited to employees for service in that period. The measure of the actuarial accrued liability at a plan's inception date is the present value of the units of benefit credited to employees for service prior to that date. (This method is also known as the unit credit cost method without salary projection.)

Accumulating costs means collecting cost data in an organized manner, such as through a system of accounts.

Actual cash value means the cost of replacing damaged property with other property of like kind and quality in the physical condition of the property immediately before the damage.

Actual costs means (except for subpart 31.6) amounts determined on the basis of costs incurred, as distinguished from forecasted costs. Actual costs include standard costs properly adjusted for applicable variances.

Actuarial accrued liability means pension cost attributable, under the actuarial cost method in use, to years prior to the current period considered by a particular actuarial valuation. As of such date, the actuarial accrued liability represents the excess of the present value of future benefits and administrative expenses over the present value of future normal costs for all plan participants and beneficiaries. The excess of the actuarial accrued liability over the actuarial value of the assets of a pension plan is the unfunded actuarial liability. The excess of the actuarial value of the assets of a pension plan over the actuarial accrued liability is an actuarial surplus and is treated as a negative unfunded actuarial liability.

Actuarial assumption means an estimate of future conditions affecting pension cost; e.g., mortality rate, employee turnover, compensation levels, earnings on pension plan assets, and

changes in values of pension plan assets.

Actuarial cost method means a technique which uses actuarial assumptions to measure the present value of future pension benefits and pension plan administrative expenses, and that assigns the cost of such benefits and expenses to cost accounting periods. The actuarial cost method includes the asset valuation method used to determine the actuarial value of the assets of a pension plan.

Actuarial gain and loss means the effect on pension cost resulting from differences between actuarial assumptions and actual experience.

Actuarial valuation means the determination, as of a specified date, of the normal cost, actuarial accrued liability, actuarial value of the assets of a pension plan, and other relevant values for the pension plan.

Allocate means to assign an item of cost, or a group of items of cost, to one or more cost objectives. This term includes both direct assignment of cost and the reassignment of a share from an indirect cost pool.

Compensated personal absence means any absence from work for reasons such as illness, vacation, holidays, jury duty, military training, or personal activities for which an employer pays compensation directly to an employee in accordance with a plan or custom of the employer.

Compensation for personal services means all remuneration paid currently or accrued, in whatever form and whether paid immediately or deferred, for services rendered by employees to the contractor.

Cost input means the cost, except general and administrative (G&A) expenses, which for contract costing purposes is allocable to the production of goods and services during a cost accounting period.

Cost objective means (except for subpart 31.6) a function, organizational subdivision, contract, or other work unit for which cost data are desired and for which provision is made to accumulate and measure the cost of processes, products, jobs, capitalized projects, etc.

Deferred compensation means an award made by an employer to compensate an employee in a future cost accounting period or periods for services rendered in one or more cost accounting periods before the date of the receipt of compensation by the employee. This definition shall not include the amount of year end accruals for salaries, wages, or bonuses that are to be paid within a reasonable period of time after the end of a cost accounting period.

Defined-benefit pension plan means a pension plan in which the benefits to be paid, or the basis for determining such benefits, are established in advance and the contributions are intended to provide the stated benefits.

Defined-contribution pension plan means a pension plan in which the contributions to be made are established in advance and the benefits are determined thereby.

Directly associated cost means any cost which is generated solely as a result of the incurrence of another cost, and which would not have been incurred had the other cost not been incurred.

Estimating costs means the process of forecasting a future result in terms of cost, based upon information available at the time.

Expressly unallowable cost means a particular item or type of cost which, under the express provisions of an applicable law, regulation, or contract, is specifically named and stated to be unallowable.

Final cost objective means (except for subparts 31.3 and 31.6) a cost objective that has allocated to it both direct and indirect costs and, in the contractors accumulation system, is one of the final accumulation points.

Fiscal year means the accounting period for which annual financial statements are regularly prepared, generally a period of 12 months, 52 weeks, or 53 weeks.

Funded pension cost means the portion of pension cost for a current or prior cost accounting period that has been paid to a funding agency.

Home office means an office responsible for directing or managing two or more, but not necessarily all, segments of an organization. It typically establishes policy for, and provides guidance to, the segments in their operations. It

usually performs management, supervisory, or administrative functions, and may also perform service functions in support of the operations of the various segments. An organization which has intermediate levels, such as groups, may have several home offices which report to a common home office. An intermediate organization may be both a segment and a home office.

Immediate-gain actuarial cost method means any of the several actuarial cost methods under which actuarial gains and losses are included as part of the unfunded actuarial liability of the pension plan, rather than as part of the normal cost of the plan.

Independent research and development (IR&D) cost means the cost of effort which is neither sponsored by a grant, nor required in performing a contract, and which falls within any of the following four areas: (a) basic research, (b) applied research, (c) development, and (d) systems and other concept formulation studies.

Indirect cost pools means (except for subparts 31.3 and 31.6) groupings of incurred costs identified with two or more cost objectives but not identified specifically with any final cost objective.

Insurance administration expenses means the contractor's costs of administering an insurance program; e.g., the costs of operating an insurance or risk-management department, processing claims, actuarial fees, and service fees paid to insurance companies, trustees, or technical consultants.

Intangible capital asset means an asset that has no physical substance, has more than minimal value, and is expected to be held by an enterprise for continued use or possession beyond the current accounting period for the benefits it yields.

Job means a homogeneous cluster of work tasks, the completion of which serves an enduring purpose for the organization. Taken as a whole, the collection of tasks, duties, and responsibilities constitutes the assignment for one or more individuals whose work is of the same nature and is performed at the same skill/ responsibility level—as opposed to a position, which is a collection of tasks assigned to a specific individual. Within a job, there may be pay categories which are dependent on the degree of supervision required by the employee while performing assigned tasks which are performed by all persons with the same job.

Job class of employees means employees performing in positions within the same job.

Labor cost at standard means a preestablished measure of the labor element of cost, computed by multiplying labor-rate standard by labor-time standard.

Labor market means a place where individuals exchange their labor for compensation. Labor markets are identified and defined by a combination of the following factors:

(1) Geography,

(2) Education and/or technical background required,

(3) Experience required by the job,

(4) Licensing or certification requirements,

(5) Occupational membership, and

(6) Industry.

Labor-rate standard means a preestablished measure, expressed in monetary terms, of the price of labor.

Labor-time standard means a preestablished measure, expressed in temporal terms, of the quantity of labor.

Material cost at standard means a preestablished measure of the material elements of cost, computed by multiplying material-price standard by material-quantity standard.

Material-price standard means a preestablished measure, expressed in monetary terms, of the price of material.

Material-quantity standard means a preestablished measure, expressed in physical terms, of the quantity of material.

Moving average cost means an inventory costing method under which an average unit cost is computed after each acquisition by adding the cost of the newly acquired units to the cost of the units of inventory on hand and dividing this figure by the new total number of units.

Nonqualified pension plan means any pension plan other than a qualified pension plan as defined in this part.

Normal cost means the annual cost attributable, under the actuarial cost

method in use, to current and future years as of a particular valuation date excluding any payment in respect of an unfunded actuarial liability.

Original complement of low cost equipment means a group of items acquired for the initial outfitting of a tangible capital asset or an operational unit, or a new addition to either. The items in the group individually cost less than the minimum amount established by the contractor for capitalization for the classes of assets acquired but in the aggregate they represent a material investment. The group, as a complement, is expected to be held for continued service beyond the current period. Initial outfitting of the unit is completed when the unit is ready and available for normal operations.

Pay-as-you-go cost method means a method of recognizing pension cost only when benefits are paid to retired employees or their beneficiaries.

Pension plan means a deferred compensation plan established and maintained by one or more employers to provide systematically for the payment of benefits to plan participants after their retirements, provided that the benefits are paid for life or are payable for life at the option of the employees. Additional benefits such as permanent and total disability and death payments, and survivorship payments to beneficiaries of deceased employees, may be an integral part of a pension plan.

Pension plan participant means any employee or former employee of an employer or any member or former member of an employee organization, who is or may become eligible to receive a benefit from a pension plan which covers employees of such employer or members of such organization who have satisfied the plan's participation requirements, or whose beneficiaries are receiving or may be eligible to receive any such benefit. A participant whose employment status with the employer has not been terminated is an active participant of the employer's pension plan.

Profit center means (except for subparts 31.3 and 31.6) the smallest organizationally independent segment of a company charged by management with profit and loss responsibilities.

Projected benefit cost method means either—

(1) Any of the several actuarial cost methods that distribute the estimated total cost of all of the employees' prospective benefits over a period of years, usually their working careers; or

(2) A modification of the accrued benefit cost method that considers projected compensation levels.

Proposal means any offer or other submission used as a basis for pricing a contract, contract modification, or termination settlement or for securing payments thereunder.

Qualified pension plan means a pension plan comprising a definite written program communicated to and for the exclusive benefit of employees that meets the criteria deemed essential by the Internal Revenue Service as set forth in the Internal Revenue Code for preferential tax treatment regarding contributions, investments, and distributions. Any other plan is a nonqualified pension plan.

Self-insurance charge means a cost which represents the projected average loss under a self-insurance plan.

Service life means the period of usefulness of a tangible capital asset (or group of assets) to its current owner. The period may be expressed in units of time or output. The estimated service life of a tangible capital asset (or group of assets) is a current forecast of its service life and is the period over which depreciation cost is to be assigned.

Spread-gain actuarial cost method means any of the several projected benefit actuarial cost methods under which actuarial gains and losses are included as part of the current and future normal costs of the pension plan.

Standard cost means any cost computed with the use of preestablished measures.

Tangible capital asset means an asset that has physical substance, more than minimal value, and is expected to be held by an enterprise for continued use or possession beyond the current accounting period for the services it yields.

Termination of employment gain or loss means an actuarial gain or loss resulting from the difference between the assumed and actual rates at which pension plan participants separate from

employment for reasons other than retirement, disability, or death.

Variance means the difference between a preestablished measure and an actual measure.

Weighted average cost means an inventory costing method under which an average unit cost is computed periodically by dividing the sum of the cost of beginning inventory plus the cost of acquisitions by the total number of units included in these two categories.

Welfare benefit fund means a trust or organization which receives and accumulates assets to be used either for the payment of postretirement benefits, or for the purchase of such benefits, provided such accumulated assets form a part of a postretirement benefit plan.

[48 FR 42301, Sept. 17, 1983, as amended at 54 FR 13024, Mar. 29, 1989; 61 FR 39217, July 26, 1996; 61 FR 69288, Dec. 31, 1996; 63 FR 58596, Oct. 30, 1998; 66 FR 2131, Jan. 10, 2001; 68 FR 28091, May 22, 2003; 68 FR 43866, July 24, 2003; 74 FR 65612, Dec. 10, 2009]

31.002 Availability of accounting guide.

Contractors needing assistance in developing or improving their accounting systems and procedures may request a copy of the Defense Contract Audit Agency Pamphlet No. 7641.90, Information for Contractors. The pamphlet is available via the Internet at *http://www.dcaa.mil*.

[67 FR 6120, Feb. 8, 2002]

Subpart 31.1—Applicability

31.100 Scope of subpart.

This subpart describes the applicability of the cost principles and procedures in succeeding subparts of this part to various types of contracts and subcontracts. It also describes the need for advance agreements.

31.101 Objectives.

In recognition of differing organizational characteristics, the cost principles and procedures in the succeeding subparts are grouped basically by organizational type; e.g., commercial concerns and educational institutions. The overall objective is to provide that, to the extent practicable, all organizations of similar types doing similar work will follow the same cost principles and procedures. To achieve this uniformity, individual deviations concerning cost principles require advance approval of the agency head or designee. Class deviations for the civilian agencies require advance approval of the Civilian Agency Acquisition Council. Class deviations for the National Aeronautics and Space Administration require advance approval of the Deputy Chief Acquisition Officer. Class deviations for the Department of Defense require advance approval of the Principal Director, Defense Pricing and Contracting, Office of the Under Secretary of Defense for Acquisition and Sustainment.

[48 FR 42301, Sept. 19, 1983, as amended at 56 FR 67133, Dec. 27, 1991; 61 FR 31655, June 20, 1996; 65 FR 24325, Apr. 25, 2000; 67 FR 13068, Mar. 20, 2002; 70 FR 11763, Mar. 9, 2005; 84 FR 19847, May 6, 2019]

31.102 Fixed-price contracts.

The applicable subparts of part 31 shall be used in the pricing of fixed-price contracts, subcontracts, and modifications to contracts and subcontracts whenever (a) cost analysis is performed, or (b) a fixed-price contract clause requires the determination or negotiation of costs. However, application of cost principles to fixed-price contracts and subcontracts shall not be construed as a requirement to negotiate agreements on individual elements of cost in arriving at agreement on the total price. The final price accepted by the parties reflects agreement only on the total price. Further, notwithstanding the mandatory use of cost principles, the objective will continue to be to negotiate prices that are fair and reasonable, cost and other factors considered.

31.103 Contracts with commercial organizations.

This category includes all contracts and contract modifications for supplies, services, or experimental, developmental, or research work negotiated

with organizations other than educational institutions (see 31.104), construction and architect-engineer contracts (see 31.105), State and local governments (see 31.107) and nonprofit organizations (see 31.108) on the basis of cost.

(a) The cost principles and procedures in subpart 31.2 and agency supplements shall be used in pricing negotiated supply, service, experimental, developmental, and research contracts and contract modifications with commercial organizations whenever cost analysis is performed as required by 15.404–1(c).

(b) In addition, the contracting officer shall incorporate the cost principles and procedures in subpart 31.2 and agency supplements by reference in contracts with commercial organizations as the basis for—

(1) Determining reimbursable costs under (i) cost-reimbursement contracts and cost-reimbursement subcontracts under these contracts performed by commercial organizations and (ii) the cost-reimbursement portion of time-and-materials contracts except when material is priced on a basis other than at cost (see 16.601(c)(3));

(2) Negotiating indirect cost rates (see subpart 42.7);

(3) Proposing, negotiating, or determining costs under terminated contracts (see 49.103 and 49.113);

(4) Price revision of fixed-price incentive contracts (see 16.204 and 16.403);

(5) Price redetermination of price redetermination contracts (see 16.205 and 16.206); and

(6) Pricing changes and other contract modifications.

[48 FR 42301, Sept. 19, 1983, as amended at 62 FR 51271, Sept. 30, 1997; 72 FR 6882, Feb. 13, 2007]

31.104 Contracts with educational institutions.

This category includes all contracts and contract modifications for research and development, training, and other work performed by educational institutions (defined as institutions of higher educations in the OMB Uniform Guidance at 2 CFR part 200, subpart A, and 20 U.S.C. 1001).

(a) The contracting officer shall incorporate the cost principles and procedures in subpart 31.3 by reference in cost-reimbursement contracts with educational institutions as the basis for—

(1) Determining reimbursable costs under the contracts and cost-reimbursement subcontracts thereunder performed by educational institutions;

(2) Negotiating indirect cost rates; and

(3) Settling costs of cost-reimbursement terminated contracts (see subpart 49.3 and 49.109–7).

(b) The cost principles in this subpart are to be used as a guide in evaluating costs in connection with negotiating fixed-price contracts and termination settlements.

[48 FR 42301, Sept. 19, 1983, as amended at 81 FR 45853, July 14, 2016]

31.105 Construction and architect-engineer contracts.

(a) This category includes all contracts and contract modifications negotiated on the basis of cost with organizations other than educational institutions (see 31.104), State and local governments (see 31.107), and nonprofit organizations except those exempted under OMB Uniform Guidance at 2 CFR part 200, appendix VIII (see 31.108) for construction management or construction, alteration or repair of buildings, bridges, roads, or other kinds of real property. It also includes architect-engineer contracts related to construction projects. It does not include contracts for vessels, aircraft, or other kinds of personal property.

(b) Except as otherwise provided in (d) below, the cost principles and procedures in subpart 31.2 shall be used in the pricing of contracts and contract modifications in this category if cost analysis is performed as required by 15.404–1(c).

(c) In addition, the contracting officer shall incorporate the cost principles and procedures in subpart 31.2 (as modified by (d) below) by reference in contracts in this category as the basis for—

(1) Determining reimbursable costs under cost-reimbursement contracts, including cost-reimbursement subcontracts thereunder;

(2) Negotiating indirect cost rates;

(3) Proposing, negotiating, or determining costs under terminated contracts;

(4) Price revision of fixed-price incentive contracts; and

(5) Pricing changes and other contract modifications.

(d) Except as otherwise provided in this paragraph (d), the allowability of costs for construction and architect-engineer contracts shall be determined in accordance with subpart 31.2.

(1) Because of widely varying factors such as the nature, size, duration, and location of the construction project, advance agreements as set forth in 31.109, for such items as home office overhead, partners' compensation, employment of consultants, and equipment usage costs, are particularly important in construction and architect-engineer contracts. When appropriate they serve to express the parties' understanding and avoid possible subsequent disputes or disallowances.

(2) *Construction equipment*, as used in this section, means equipment (including marine equipment) in sound workable condition, either owned or controlled by the contractor or the subcontractor at any tier, or obtained from a commercial rental source, and furnished for use under Government contracts.

(i) Allowable ownership and operating costs shall be determined as follows:

(A) Actual cost data shall be used when such data can be determined for both ownership and operating costs for each piece of equipment, or groups of similar serial or series equipment, from the contractor's accounting records. When such costs cannot be so determined, the contracting agency may specify the use of a particular schedule of predetermined rates or any part thereof to determine ownership and operating costs of construction equipment (see subdivisions (d)(2)(i)(B) and (C) of this section). However, costs otherwise unallowable under this part shall not become allowable through the use of any schedule (see 31.109(c)). For example, schedules need to be adjusted for Government contract costing purposes if they are based on replacement cost, include unallowable interest costs, or use improper cost of money rates or computations. Contracting officers should review the computations and factors included within the specified schedule and ensure that unallowable or unacceptably computed factors are not allowed in cost submissions.

(B) Predetermined schedules of construction equipment use rates (e.g., the Construction Equipment Ownership and Operating Expense Schedule published by the U.S. Army Corps of Engineers, industry sponsored construction equipment cost guides, or commercially published schedules of construction equipment use cost) provide average ownership and operating rates for construction equipment. The allowance for ownership costs should include the cost of depreciation and may include facilities capital cost of money. The allowance for operating costs may include costs for such items as fuel, filters, oil, and grease; servicing, repairs, and maintenance; and tire wear and repair. Costs of labor, mobilization, demobilization, overhead, and profit are generally not reflected in schedules, and separate consideration may be necessary.

(C) When a schedule of predetermined use rates for construction equipment is used to determine direct costs, all costs of equipment that are included in the cost allowances provided by the schedule shall be identified and eliminated from the contractor's other direct and indirect costs charged to the contract. If the contractor's accounting system provides for site or home office overhead allocations, all costs which are included in the equipment allowances may need to be included in any cost input base before computing the contractor's overhead rate. In periods of suspension of work pursuant to a contract clause, the allowance for equipment ownership shall not exceed an amount for standby cost as determined by the schedule or contract provision.

(ii) Reasonable costs of renting construction equipment are allowable (but see paragraph (C) below).

(A) Costs, such as maintenance and minor or running repairs incident to operating such rented equipment, that are not included in the rental rate are allowable.

(B) Costs incident to major repair and overhaul of rental equipment are unallowable.

(C) The allowability of charges for construction equipment rented from any division, subsidiary, or organization under common control, will be determined in accordance with 31.205–36(b)(3).

(3) Costs incurred at the job site incident to performing the work, such as the cost of superintendence, timekeeping and clerical work, engineering, utility costs, supplies, material handling, restoration and cleanup, etc., are allowable as direct or indirect costs, provided the accounting practice used is in accordance with the contractor's established and consistently followed cost accounting practices for all work.

(4) Rental and any other costs, less any applicable credits incurred in acquiring the temporary use of land, structures, and facilities are allowable. Costs, less any applicable credits, incurred in constructing or fabricating structures and facilities of a temporary nature are allowable.

[48 FR 42301, Sept. 19, 1983, as amended at 50 FR 23607, June 4, 1985; 52 FR 19804, May 27, 1987; 62 FR 51271, Sept. 30, 1997; 81 FR 45853, July 14, 2016]

31.106 [Reserved]

31.107 Contracts with State, local, and federally recognized Indian tribal governments.

(a) Subpart 31.6 provides principles and standards for determining costs applicable to contracts with State, local, and federally recognized Indian tribal governments. They provide the basis for a uniform approach to the problem of determining costs and to promote efficiency and better relationships between State, local, and federally recognized Indian tribal governments, and Federal Government entities. They apply to all programs that involve contracts with State, local, and federally recognized Indian tribal governments, except contracts with—

(1) Publicly financed educational institutions subject to subpart 31.3; or

(2) Publicly owned hospitals and other providers of medical care subject to requirements promulgated by the sponsoring Government agencies.

(b) The Office of Management and Budget will approve any other exceptions in particular cases when adequate justification is presented.

[48 FR 42301, Sept. 19, 1983, as amended at 52 FR 30076, Aug. 12, 1987]

31.108 Contracts with nonprofit organizations.

Subpart 31.7 provides principles and standards for determining costs applicable to contracts with nonprofit organizations other than educational institutions (see subpart 31.3), State and local governments (see subpart 31.6), and those nonprofit organizations exempted under the OMB Uniform Guidance at 2 CFR part 200, appendix VIII (see subpart 31.2 for the cost principles applicable to nonprofit organizations exempt from the cost principles in the OMB Uniform Guidance at 2 CFR part 200).

[81 FR 45853, July 14, 2016]

31.109 Advance agreements.

(a) The extent of allowability of the costs covered in this part applies broadly to many accounting systems in varying contract situations. Thus, the reasonableness, the allocability and the allowability under the specific cost principles at subparts 31.2, 31.3, 31.6, and 31.7 of certain costs may be difficult to determine. To avoid possible subsequent disallowance or dispute based on unreasonableness, unallocability or unallowability under the specific cost principles at subparts 31.2, 31.3, 31.6, and 31.7, contracting officers and contractors should seek advance agreement on the treatment of special or unusual costs and on statistical sampling methodologies at 31.201–6(c). However, an advance agreement is not an absolute requirement and the absence of an advance agreement on any cost will not, in itself, affect the reasonableness, allocability or the allowability under the specific cost principles at subparts 31.2, 31.3, 31.6, and 31.7 of that cost.

(b) Advance agreements may be negotiated either before or during a contract but should be negotiated before incurrence of the costs involved. The

agreements must be in writing, executed by both contracting parties, and incorporated into applicable current and future contracts. An advance agreement shall contain a statement of its applicability and duration.

(c) The contracting officer is not authorized by this 31.109 to agree to a treatment of costs inconsistent with this part. For example, an advance agreement may not provide that, notwithstanding 31.205–20, interest is allowable.

(d) Advance agreements may be negotiated with a particular contractor for a single contract, a group of contracts, or all the contracts of a contracting office, an agency, or several agencies.

(e) The cognizant administrative contracting officer (ACO), or other contracting officer established in part 42, shall negotiate advance agreements except that an advance agreement affecting only one contract, or class of contracts from a single contracting office, shall be negotiated by a contracting officer in the contracting office, or an ACO when delegated by the contracting officer. When the negotiation authority is delegated, the ACO shall coordinate the proposed agreement with the contracting officer before executing the advance agreement.

(f) Before negotiating an advance agreement, the Government negotiator shall—

(1) Determine if other contracting offices inside the agency or in other agencies have a significant unliquidated dollar balance in contracts with the same contractor;

(2) Inform any such office or agency of the matters under consideration for negotiation; and

(3) As appropriate, invite the office or agency and the responsible audit agency to participate in prenegotiation discussions and/or in the subsequent negotiations.

(g) Upon completion of the negotiation, the sponsor shall prepare and distribute to other interested agencies and offices, including the audit agency, copies of the executed agreement and a memorandum providing the information specified in 15.406–3, as applicable.

(h) Examples for which advance agreements may be particularly important are—

(1) Compensation for personal services, including but not limited to allowances for off-site pay, incentive pay, location allowances, hardship pay, cost of living differential, and termination of defined benefit pension plans;

(2) Use charges for fully depreciated assets;

(3) Deferred maintenance costs;

(4) Precontract costs;

(5) Independent research and development and bid and proposal costs;

(6) Royalties and other costs for use of patents;

(7) Selling and distribution costs;

(8) Travel and relocation costs, as related to special or mass personnel movements, as related to travel via contractor-owned, -leased, or -chartered aircraft, or as related to maximum per diem rates;

(9) Costs of idle facilities and idle capacity;

(10) Severance pay to employees on support service contracts;

(11) Plant reconversion;

(12) Professional services (e.g., legal, accounting, and engineering);

(13) General and administrative costs (e.g., corporate, division, or branch allocations) attributable to the general management, supervision, and conduct of the contractor's business as a whole. These costs are particularly significant in construction, job-site, architect-engineer, facilities, and Government-owned contractor operated (GOCO) plant contracts (see 31.203(h));

(14) Costs of construction plant and equipment (see 31.105(d)).

(15) Costs of public relations and advertising; and

(16) Statistical sampling methods (see 31.201–6(c)(4).

[48 FR 42301, Sept. 19, 1983, as amended at 51 FR 12298, Apr. 9, 1986; 51 FR 27489, July 31, 1986; 52 FR 9038, Mar. 20, 1987; 52 FR 27806, July 24, 1987; 54 FR 34755, Aug. 21, 1989; 59 FR 67045, Dec. 28, 1994; 61 FR 69288, Dec. 31, 1996; 62 FR 51271, Sept. 30, 1997; 63 FR 9061, Feb. 23, 1998; 69 FR 17767, Apr. 5, 2004; 70 FR 57466, Sept. 30, 2005; 79 FR 70348, Nov. 25, 2014]

31.110 Indirect cost rate certification and penalties on unallowable costs.

(a) Certain contracts require certification of the indirect cost rates proposed for final payment purposes. See 42.703–2 for administrative procedures regarding the certification provisions

and the related contract clause prescription.

(b) If unallowable costs are included in final indirect cost settlement proposals, penalties may be assessed. See 42.709 for administrative procedures regarding the penalty assessment provisions and the related contract clause prescription.

[60 FR 42658, Aug. 16, 1995, as amended at 62 FR 237, Jan. 2, 1997]

Subpart 31.2—Contracts With Commercial Organizations

31.201 General.

31.201–1 Composition of total cost.

(a) The total cost, including standard costs properly adjusted for applicable variances, of a contract is the sum of the direct and indirect costs allocable to the contract, incurred or to be incurred, plus any allocable cost of money pursuant to 31.205–10, less any allocable credits. In ascertaining what constitutes a cost, any generally accepted method of determining or estimating costs that is equitable and is consistently applied may be used.

(b) While the total cost of a contract includes all costs properly allocable to the contract, the allowable costs to the Government are limited to those allocable costs which are allowable pursuant to Part 31 and applicable agency supplements.

[69 FR 17767, Apr. 5, 2004]

31.201–2 Determining allowability.

(a) A cost is allowable only when the cost complies with all of the following requirements:

(1) Reasonableness.

(2) Allocability.

(3) Standards promulgated by the CAS Board, if applicable, otherwise, generally accepted accounting principles and practices appropriate to the circumstances.

(4) Terms of the contract.

(5) Any limitations set forth in this subpart.

(b) Certain cost principles in this subpart incorporate the measurement, assignment, and allocability rules of selected CAS and limit the allowability of costs to the amounts determined using the criteria in those selected standards. Only those CAS or portions of standards specifically made applicable by the cost principles in this subpart are mandatory unless the contract is CAS-covered (see 48 CFR 9903). Business units that are not otherwise subject to these standards under a CAS clause are subject to the selected standards only for the purpose of determining allowability of costs on Government contracts. Including the selected standards in the cost principles does not subject the business unit to any other CAS rules and regulations. The applicability of the CAS rules and regulations is determined by the CAS clause, if any, in the contract and the requirements of the standards themselves.

(c) When contractor accounting practices are inconsistent with this subpart 31.2, costs resulting from such inconsistent practices in excess of the amount that would have resulted from using practices consistent with this subpart are unallowable.

(d) 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 this subpart and agency supplements. The contracting officer may disallow all or part of a claimed cost that is inadequately supported.

[48 FR 42301, Sept. 19, 1983, as amended at 57 FR 39590, Aug. 31, 1992; 61 FR 31656, June 20, 1996; 69 FR 17767, Apr. 5, 2004]

31.201–3 Determining reasonableness.

(a) A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person in the conduct of competitive business. Reasonableness of specific costs must be examined with particular care in connection with firms or their separate divisions that may not be subject to effective competitive restraints. 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.

(b) What is reasonable depends upon a variety of considerations and circumstances, including—

(1) Whether it is the type of cost generally recognized as ordinary and necessary for the conduct of the contractor's business or the contract performance;

(2) Generally accepted sound business practices, arm's length bargaining, and Federal and State laws and regulations;

(3) The contractor's responsibilities to the Government, other customers, the owners of the business, employees, and the public at large; and

(4) Any significant deviations from the contractor's established practices.

[52 FR 19804, May 27, 1987]

31.201–4 Determining allocability.

A cost is allocable if it is assignable or chargeable to one or more cost objectives on the basis of relative benefits received or other equitable relationship. Subject to the foregoing, a cost is allocable to a Government contract if it—

(a) Is incurred specifically for the contract;

(b) Benefits both the contract and other work, and can be distributed to them in reasonable proportion to the benefits received; or

(c) Is necessary to the overall operation of the business, although a direct relationship to any particular cost objective cannot be shown.

31.201–5 Credits.

The applicable portion of any income, rebate, allowance, or other credit relating to any allowable cost and received by or accruing to the contractor shall be credited to the Government either as a cost reduction or by cash refund. See 31.205–6(j)(3) for rules governing refund or credit to the Government associated with pension adjustments and asset reversions.

[48 FR 42301, Sept. 19, 1983, as amended at 54 FR 34755, Aug. 21, 1989; 63 FR 58597, Oct. 30, 1998; 72 FR 46363, Aug. 17, 2007]

31.201–6 Accounting for unallowable costs.

(a) Costs that are expressly unallowable or mutually agreed to be unallowable, including mutually agreed to be unallowable directly associated costs, shall be identified and excluded from any billing, claim, or proposal applicable to a Government contract. A directly associated cost is any cost that is generated solely as a result of incurring another cost, and that would not have been incurred had the other cost not been incurred. When an unallowable cost is incurred, its directly associated costs are also unallowable.

(b) Costs that specifically become designated as unallowable or as unallowable directly associated costs of unallowable costs as a result of a written decision furnished by a contracting officer shall be identified if included in or used in computing any billing, claim, or proposal applicable to a Government contract. This identification requirement applies also to any costs incurred for the same purpose under like circumstances as the costs specifically identified as unallowable under either this paragraph or paragraph (a) above.

(c)(1) The practices for accounting for and presentation of unallowable costs must be those described in 48 CFR 9904.405, Accounting for Unallowable Costs.

(2) Statistical sampling is an acceptable practice for contractors to follow in accounting for and presenting unallowable costs provided the following criteria in paragraphs (c)(2)(i), (c)(2)(ii), and (c)(2)(iii) of this subsection are met:

(i) The statistical sampling results in an unbiased sample that is a reasonable representation of the sampling universe.

(ii) Any large dollar value or high risk transaction is separately reviewed for unallowable costs and excluded from the sampling process.

(iii) The statistical sampling permits audit verification.

(3) For any indirect cost in the selected sample that is subject to the penalty provisions at 42.709, the amount projected to the sampling universe from that sampled cost is also subject to the same penalty provisions.

(4) Use of statistical sampling methods for identifying and segregating unallowable costs should be the subject of an advance agreement under the provisions of 31.109 between the contractor and the cognizant administrative contracting officer or Federal official. The advance agreement should specify the basic characteristics of the sampling process. The cognizant administrative contracting officer or Federal official shall request input from the cognizant auditor before entering into any such agreements.

(5) In the absence of an advance agreement, if an initial review of the facts results in a challenge of the statistical sampling methods by the contracting officer or the contracting officer's representative, the burden of proof shall be on the contractor to establish that such a method meets the criteria in paragraph (c)(2) of this subsection.

(d) If a directly associated cost is included in a cost pool that is allocated over a base that includes the unallowable cost with which it is associated, the directly associated cost shall remain in the cost pool. Since the unallowable costs will attract their allocable share of costs from the cost pool, no further action is required to assure disallowance of the directly associated costs. In all other cases, the directly associated costs, if material in amount, must be purged from the cost pool as unallowable costs.

(e)(1) In determining the materiality of a directly associated cost, consideration should be given to the significance of (i) the actual dollar amount, (ii) the cumulative effect of all directly associated costs in a cost pool, and (iii) the ultimate effect on the cost of Government contracts.

(2) Salary expenses of employees who participate in activities that generate unallowable costs shall be treated as directly associated costs to the extent of the time spent on the proscribed activity, provided the costs are material in accordance with subparagraph (e)(1) above (except when such salary expenses are, themselves, unallowable). The time spent in proscribed activities should be compared to total time spent on company activities to determine if the costs are material. Time spent by employees outside the normal working hours should not be considered except when it is evident that an employee engages so frequently in company activities during periods outside normal working hours as to indicate that such activities are a part of the employee's regular duties.

(3) When a selected item of cost under 31.205 provides that directly associated costs be unallowable, such directly associated costs are unallowable only if determined to be material in amount in accordance with the criteria provided in paragraphs (e)(1) and (e)(2) of this subsection, except in those situations where allowance of any of the directly associated costs involved would be considered to be contrary to public policy.

[48 FR 42301, Sept. 19, 1983, as amended at 59 FR 67045, Dec. 28, 1994; 70 FR 57466, Sept. 30, 2005; 70 FR 69100, Nov. 14, 2005]

31.201–7 Construction and architect-engineer contracts.

Specific principles and procedures for evaluating and determining costs in connection with contracts and subcontracts for construction, and architect-engineer contracts related to construction projects, are in 31.105. The applicability of these principles and procedures is set forth in 31.000 and 31.100.

31.202 Direct costs.

(a) No final cost objective shall have allocated to it as a direct cost any cost, if other costs incurred for the same purpose in like circumstances have been included in any indirect cost pool to be allocated to that or any other final cost objective. Direct costs of the contract shall be charged directly to the contract. All costs specifically identified with other final cost objectives of the contractor are direct costs of those cost objectives and are not to be charged to the contract directly or indirectly.

(b) For reasons of practicality, the contractor may treat any direct cost of a minor dollar amount as an indirect cost if the accounting treatment—

(1) Is consistently applied to all final cost objectives; and

(2) Produces substantially the same results as treating the cost as a direct cost.

[69 FR 17767, Apr. 5, 2004]

31.203 Indirect costs.

(a) For contracts subject to full CAS coverage, allocation of indirect costs shall be based on the applicable provisions. For all other contracts, the applicable CAS provisions in paragraphs (b) through (h) of this section apply.

(b) After direct costs have been determined and charged directly to the contract or other work, indirect costs are those remaining to be allocated to intermediate or two or more final cost objectives. No final cost objective shall have allocated to it as an indirect cost any cost, if other costs incurred for the same purpose, in like circumstances, have been included as a direct cost of that or any other final cost objective.

(c) The contractor shall accumulate indirect costs by logical cost groupings with due consideration of the reasons for incurring such costs. The contractor shall determine each grouping so as to permit use of an allocation base that is common to all cost objectives to which the grouping is to be allocated. The base selected shall allocate the grouping on the basis of the benefits accruing to intermediate and final cost objectives. When substantially the same results can be achieved through less precise methods, the number and composition of cost groupings should be governed by practical considerations and should not unduly complicate the allocation.

(d) Once an appropriate base for allocating indirect costs has been accepted, the contractor shall not fragment the base by removing individual elements. All items properly includable in an indirect cost base shall bear a pro rata share of indirect costs irrespective of their acceptance as Government contract costs. For example, when a cost input base is used for the allocation of G&A costs, the contractor shall include in the base all items that would properly be part of the cost input base, whether allowable or unallowable, and these items shall bear their pro rata share of G&A costs.

(e) The method of allocating indirect costs may require revision when there is a significant change in the nature of the business, the extent of subcontracting, fixed-asset improvement programs, inventories, the volume of sales and production, manufacturing processes, the contractor's products, or other relevant circumstances.

(f) Separate cost groupings for costs allocable to offsite locations may be necessary to permit equitable distribution of costs on the basis of the benefits accruing to the several cost objectives.

(g) A base period for allocating indirect costs is the cost accounting period during which such costs are incurred and accumulated for allocation to work performed in that period.

(1) For contracts subject to full or modified CAS coverage, the contractor shall follow the criteria and guidance in 48 CFR 9904.406 for selecting the cost accounting periods to be used in allocating indirect costs.

(2) For contracts other than those subject to paragraph (g)(1) of this section, the base period for allocating indirect costs shall be the contractor's fiscal year used for financial reporting purposes in accordance with generally accepted accounting principles. The fiscal year will normally be 12 months, but a different period may be appropriate (*e.g.*, when a change in fiscal year occurs due to a business combination or other circumstances).

(h) Special care should be exercised in applying the principles of paragraphs (c), (d), and (e) of this section when Government-owned contractor-operated (GOCO) plants are involved. The distribution of corporate, division or branch office G&A expenses to such plants operating with little or no dependence on corporate administrative activities may require more precise cost groupings, detailed accounts screening, and carefully developed distribution bases.

(i) Indirect costs that meet the definition of ''excessive pass-through charge'' in 52.215–23, are unallowable.

[69 FR 17767, Apr. 5, 2004, as amended at 74 FR 52855, Oct. 14, 2009]

31.204 Application of principles and procedures.

(a) Costs are allowable to the extent they are reasonable, allocable, and determined to be allowable under 31.201, 31.202, 31.203, and 31.205. These criteria apply to all of the selected items that follow, even if particular guidance is provided for certain items for emphasis or clarity.

(b)(1) For the following subcontract types, costs incurred as reimbursements or payments to a subcontractor are allowable to the extent the reimbursements or payments are for costs incurred by the subcontractor that are consistent with this part:

(i) Cost-reimbursement.

(ii) Fixed-price incentive.

(iii) Price redeterminable (*i.e.*, fixed-price contracts with prospective price redetermination and fixed-ceiling-price contracts with retroactive price redetermination).

(2) The requirements of paragraph (b)(1) of this section apply to any tier above the first firm-fixed-price subcontract or fixed-price subcontract with economic price adjustment provisions.

(c) Costs incurred as payments under firm-fixed-price subcontracts or fixed-price subcontracts with economic price adjustment provisions or modifications thereto, for which subcontract cost analysis was performed are allowable if the price was negotiated in accordance with 31.102.

(d) Section 31.205 does not cover every element of cost. Failure to include any item of cost does not imply that it is either allowable or unallowable. The determination of allowability shall be based on the principles and standards in this subpart and the treatment of similar or related selected items. When more than one subsection in 31.205 is relevant to a contractor cost, the cost shall be apportioned among the applicable subsections, and the determination of allowability of each portion shall be based on the guidance contained in the applicable subsection. When a cost, to which more than one subsection in 31.205 is relevant, cannot be apportioned, the determination of allowability shall be based on the guidance contained in the subsection that most specifically deals with, or best captures the essential nature of, the cost at issue.

[48 FR 42301, Sept. 19, 1983, as amended at 53 FR 17858, May 18, 1988; 62 FR 51271, Sept. 30, 1997; 69 FR 34242, June 18, 2004]

31.205 Selected costs.

31.205–1 Public relations and advertising costs.

(a) *Public relations* means all functions and activities dedicated to—

(1) Maintaining, protecting, and enhancing the image of a concern or its products; or

(2) Maintaining or promoting reciprocal understanding and favorable relations with the public at large, or any segment of the public. The term public relations includes activities associated with areas such as advertising, customer relations, etc.

(b) *Advertising* means the use of media to promote the sale of products or services and to accomplish the activities referred to in paragraph (d) of this subsection, regardless of the medium employed, when the advertiser has control over the form and content of what will appear, the media in which it will appear, and when it will appear. Advertising media include but are not limited to conventions, exhibits, free goods, samples, magazines, newspapers, trade papers, direct mail, dealer cards, window displays, outdoor advertising, radio, and television.

(c) Public relations and advertising costs include the costs of media time and space, purchased services performed by outside organizations, as well as the applicable portion of salaries, travel, and fringe benefits of employees engaged in the functions and activities identified in paragraphs (a) and (b) of this subsection.

(d) The only allowable advertising costs are those that are—

(1) Specifically required by contract, or that arise from requirements of Government contracts, and that are exclusively for—

(i) Acquiring scarce items for contract performance; or

(ii) Disposing of scrap or surplus materials acquired for contract performance;

(2) Costs of activities to promote sales of products normally sold to the

U.S. Government, including trade shows, which contain a significant effort to promote exports from the United States. Such costs are allowable, notwithstanding paragraphs (f)(1), (f)(3), (f)(4)(ii), and (f)(5) of this subsection. However, such costs do not include the costs of memorabilia (e.g., models, gifts, and souvenirs), alcoholic beverages, entertainment, and physical facilities that are used primarily for entertainment rather than product promotion; or

(3) Allowable in accordance with 31.205–34.

(e) Allowable public relations costs include the following:

(1) Costs specifically required by contract.

(2) Costs of—

(i) Responding to inquiries on company policies and activities;

(ii) Communicating with the public, press, stockholders, creditors, and customers; and

(iii) Conducting general liaison with news media and Government public relations officers, to the extent that such activities are limited to communication and liaison necessary to keep the public informed on matters of public concern such as notice of contract awards, plant closings or openings, employee layoffs or rehires, financial information, etc.

(3) Costs of participation in community service activities (*e.g.*, blood bank drives, charity drives, savings bond drives, disaster assistance, etc.) (But see paragraph (f)(8) of this section.)

(4) Costs of plant tours and open houses (but see subparagraph (f)(5) of this subsection).

(5) Costs of keel laying, ship launching, commissioning, and roll-out ceremonies, to the extent specifically provided for by contract.

(f) Unallowable public relations and advertising costs include the following:

(1) All public relations and advertising costs, other than those specified in paragraphs (d) and (e) of this subsection, whose primary purpose is to promote the sale of products or services by stimulating interest in a product or product line (except for those costs made allowable under 31.205–38(b)(5)), or by disseminating messages calling favorable attention to the contractor for purposes of enhancing the company image to sell the company's products or services.

(2) All costs of trade shows and other special events which do not contain a significant effort to promote the export sales of products normally sold to the U.S. Government.

(3) Costs of sponsoring meetings, conventions, symposia, seminars, and other special events when the principal purpose of the event is other than dissemination of technical information or stimulation of production.

(4) Costs of ceremonies such as (i) corporate celebrations and (ii) new product announcements.

(5) Costs of promotional material, motion pictures, videotapes, brochures, handouts, magazines, and other media that are designed to call favorable attention to the contractor and its activities.

(6) Costs of souvenirs, models, imprinted clothing, buttons, and other mementos provided to customers or the public.

(7) Costs of memberships in civic and community organizations.

(8) Costs associated with the donation of excess food to nonprofit organizations in accordance with the Federal Food Donation Act of 2008 (42 U.S.C. 1792, see subpart 26.4).

[51 FR 12298, Apr. 9, 1986, as amended at 53 FR 12130, Apr. 12, 1988; 53 FR 13274, Apr. 22, 1988; 54 FR 34755, Aug. 21, 1989; 56 FR 15153, Apr. 15, 1991; 60 FR 42660, Aug. 16, 1995; 61 FR 67423, Dec. 20, 1996; 62 FR 12704, Mar. 17, 1997; 64 FR 10547, Mar. 4, 1999; 68 FR 43872, July 24, 2003; 74 FR 11831, Mar. 19, 2009; 79 FR 24211, Apr. 29, 2014]

31.205–2 [Reserved]

31.205–3 Bad debts.

Bad debts, including actual or estimated losses arising from uncollectible accounts receivable due from customers and other claims, and any directly associated costs such as collection costs, and legal costs are unallowable.

31.205–4 Bonding costs.

(a) Bonding costs arise when the Government requires assurance against financial loss to itself or others by reason of the act or default of the contractor. They arise also in instances

where the contractor requires similar assurance. Included are such bonds as bid, performance, payment, advance payment, infringement, and fidelity bonds.

(b) Costs of bonding required pursuant to the terms of the contract are allowable.

(c) Costs of bonding required by the contractor in the general conduct of its business are allowable to the extent that such bonding is in accordance with sound business practice and the rates and premiums are reasonable under the circumstances.

31.205–5 [Reserved]

31.205–6 Compensation for personal services.

(a) *General.* Compensation for personal services is allowable subject to the following general criteria and additional requirements contained in other parts of this cost principle:

(1) Compensation for personal services must be for work performed by the employee in the current year and must not represent a retroactive adjustment of prior years' salaries or wages (but see paragraphs (g), (h), (j), (k), (m), and (o) of this subsection).

(2) The total compensation for individual employees or job classes of employees must be reasonable for the work performed; however, specific restrictions on individual compensation elements apply when prescribed.

(3) The compensation must be based upon and conform to the terms and conditions of the contractor's established compensation plan or practice followed so consistently as to imply, in effect, an agreement to make the payment.

(4) No presumption of allowability will exist where the contractor introduces major revisions of existing compensation plans or new plans and the contractor has not provided the cognizant ACO, either before implementation or within a reasonable period after it, an opportunity to review the allowability of the changes.

(5) Costs that are unallowable under other paragraphs of this Subpart 31.2 are not allowable under this subsection 31.205–6 solely on the basis that they constitute compensation for personal services.

(6)(i) Compensation costs for certain individuals give rise to the need for special consideration. Such individuals include:

(A) Owners of closely held corporations, members of limited liability companies, partners, sole proprietors, or members of their immediate families; and

(B) Persons who are contractually committed to acquire a substantial financial interest in the contractor's enterprise.

(ii) For these individuals, compensation must—

(A) Be reasonable for the personal services rendered; and

(B) Not be a distribution of profits (which is not an allowable contract cost).

(iii) For owners of closely held companies, compensation in excess of the costs that are deductible as compensation under the Internal Revenue Code (26 U.S.C.) and regulations under it is unallowable.

(b) *Reasonableness*—(1) *Compensation pursuant to labor-management agreements.* If costs of compensation established under ''arm's length'' labor-management agreements negotiated under the terms of the Federal Labor Relations Act or similar state statutes are otherwise allowable, the costs are reasonable unless, as applied to work in performing Government contracts, the costs are unwarranted by the character and circumstances of the work or discriminatory against the Government. The application of the provisions of a labor-management agreement designed to apply to a given set of circumstances and conditions of employment (*e.g.*, work involving extremely hazardous activities or work not requiring recurrent use of overtime) is unwarranted when applied to a Government contract involving significantly different circumstances and conditions of employment (*e.g.*, work involving less hazardous activities or work continually requiring use of overtime). It is discriminatory against the Government if it results in employee compensation (in whatever form or name) in excess of that being paid for similar

non-Government work under comparable circumstances.

(2) *Compensation not covered by labor-management agreements.* Compensation for each employee or job class of employees must be reasonable for the work performed. Compensation is reasonable if the aggregate of each measurable and allowable element sums to a reasonable total. In determining the reasonableness of total compensation, consider only allowable individual elements of compensation. In addition to the provisions of 31.201–3, in testing the reasonableness of compensation for particular employees or job classes of employees, consider factors determined to be relevant by the contracting officer. Factors that may be relevant include, but are not limited to, conformity with compensation practices of other firms—

(i) Of the same size;

(ii) In the same industry;

(iii) In the same geographic area; and

(iv) Engaged in similar non-Government work under comparable circumstances.

(c) [Reserved]

(d) *Form of payment.* (1) Compensation for personal services includes compensation paid or to be paid in the future to employees in the form of—

(i) Cash;

(ii) Corporate securities, such as stocks, bonds, and other financial instruments (see paragraph (d)(2) of this subsection regarding valuation); or

(iii) Other assets, products, or services.

(2) When compensation is paid with securities of the contractor or of an affiliate, the following additional restrictions apply:

(i) Valuation placed on the securities is the fair market value on the first date the number of shares awarded is known, determined upon the most objective basis available.

(ii) Accruals for the cost of securities before issuing the securities to the employees are subject to adjustment according to the possibilities that the employees will not receive the securities and that their interest in the accruals will be forfeited.

(e) *Income tax differential pay.* (1) Differential allowances for additional income taxes resulting from foreign assignments are allowable.

(2) Differential allowances for additional income taxes resulting from domestic assignments are unallowable. (However, payments for increased employee income or Federal Insurance Contributions Act taxes incident to allowable reimbursed relocation costs are allowable under 31.205–35(a)(10).)

(f) *Bonuses and incentive compensation.* (1) Bonuses and incentive compensation are allowable provided the—

(i) Awards are paid or accrued under an agreement entered into in good faith between the contractor and the employees before the services are rendered or pursuant to an established plan or policy followed by the contractor so consistently as to imply, in effect, an agreement to make such payment; and

(ii) Basis for the award is supported.

(2) When the bonus and incentive compensation payments are deferred, the costs are subject to the requirements of paragraphs (f)(1) and (k) of this subsection.

(g) *Severance pay.* (1) Severance pay is a payment in addition to regular salaries and wages by contractors to workers whose employment is being involuntarily terminated. Payments for early retirement incentive plans are covered in paragraph (j)(6) of this subsection.

(2) Severance pay is allowable only to the extent that, in each case, it is required by—

(i) Law;

(ii) Employer-employee agreement;

(iii) Established policy that constitutes, in effect, an implied agreement on the contractor's part; or

(iv) Circumstances of the particular employment.

(3) Payments made in the event of employment with a replacement contractor where continuity of employment with credit for prior length of service is preserved under substantially equal conditions of employment, or continued employment by the contractor at another facility, subsidiary, affiliate, or parent company of the contractor are not severance pay and are unallowable.

(4) Actual normal turnover severance payments shall be allocated to all work

performed in the contractor's plant. However, if the contractor uses the accrual method to account for normal turnover severance payments, that method will be acceptable if the amount of the accrual is—

(i) Reasonable in light of payments actually made for normal severances over a representative past period; and

(ii) Allocated to all work performed in the contractor's plant.

(5) Abnormal or mass severance pay is of such a conjectural nature that accruals for this purpose are not allowable. However, the Government recognizes its obligation to participate, to the extent of its fair share, in any specific payment. Thus, the Government will consider allowability on a case-by-case basis.

(6) Under 10 U.S.C. 2324(e)(1)(M) and 41 U.S.C. 4304(a)(13), the costs of severance payments to foreign nationals employed under a service contract performed outside the United States are unallowable to the extent that such payments exceed amounts typically paid to employees providing similar services in the same industry in the United States. Further, under 10 U.S.C. 2324(e)(1)(N) and 41 U.S.C. 4304(a)(14), all such costs of severance payments that are otherwise allowable are unallowable if the termination of employment of the foreign national is the result of the closing of, or the curtailment of activities at, a United States facility in that country at the request of the government of that country; this does not apply if the closing of a facility or curtailment of activities is made pursuant to a status-of-forces or other country-to-country agreement entered into with the government of that country before November 29, 1989. 10 U.S.C. 2324(e)(3) and 41 U.S.C. 4304(b) permit the head of the agency to waive these cost allowability limitations under certain circumstances (see 37.113 and the solicitation provision at 52.237–8).

(h) *Backpay*. Backpay is a retroactive adjustment of prior years' salaries or wages. Backpay is unallowable except as follows:

(1) Payments to employees resulting from underpaid work actually performed are allowable, if required by a negotiated settlement, order, or court decree.

(2) Payments to union employees for the difference in their past and current wage rates for working without a contract or labor agreement during labor management negotiation are allowable.

(3) Payments to nonunion employees based upon results of union agreement negotiation are allowable only if—

(i) A formal agreement or understanding exists between management and the employees concerning these payments; or

(ii) An established policy or practice exists and is followed by the contractor so consistently as to imply, in effect, an agreement to make such payments.

(i) Compensation based on changes in the prices of corporate securities or corporate security ownership, such as stock options, stock appreciation rights, phantom stock plans, and junior stock conversions.

(1) Any compensation which is calculated, or valued, based on changes in the price of corporate securities is unallowable.

(2) Any compensation represented by dividend payments or which is calculated based on dividend payments is unallowable.

(3) If a contractor pays an employee in lieu of the employee receiving or exercising a right, option, or benefit which would have been unallowable under this paragraph (i), such payments are also unallowable.

(j) *Pension costs*. (1) Pension plans are normally segregated into two types of plans: defined-benefit and defined-contribution pension plans. The contractor shall measure, assign, and allocate the costs of all defined-benefit pension plans and the costs of all defined-contribution pension plans in compliance with 48 CFR 9904.412—Cost Accounting Standard for Composition and Measurement of Pension Cost, and 48 CFR 9904.413—Adjustment and Allocation of Pension Cost. Pension costs are allowable subject to the referenced standards and the cost limitations and exclusions set forth in paragraph (j)(1)(i) and in paragraphs (j)(2) through (j)(6) of this subsection.

(i) Except for nonqualified pension plans using the pay-as-you-go cost method, to be allowable in the current year, the contractor shall fund pension

costs by the time set for filing of the Federal income tax return or any extension. Pension costs assigned to the current year, but not funded by the tax return time, are not allowable in any subsequent year. For nonqualified pension plans using the pay-as-you-go method, to be allowable in the current year, the contractor shall allocate pension costs in the cost accounting period that the pension costs are assigned.

(ii) Pension payments must be paid pursuant to an agreement entered into in good faith between the contractor and employees before the work or services are performed and to the terms and conditions of the established plan. The cost of changes in pension plans are not allowable if the changes are discriminatory to the Government or are not intended to be applied consistently for all employees under similar circumstances in the future.

(iii) Except as provided for early retirement benefits in paragraph (j)(6) of this subsection, one-time-only pension supplements not available to all participants of the basic plan are not allowable as pension costs, unless the supplemental benefits represent a separate pension plan and the benefits are payable for life at the option of the employee.

(iv) Increases in payments to previously retired plan participants covering cost-of-living adjustments are allowable if paid in accordance with a policy or practice consistently followed.

(2) *Defined-benefit pension plans.* The cost limitations and exclusions pertaining to defined-benefit plans are as follows:

(i)(A) Except for nonqualified pension plans, pension costs (see 48 CFR 9904.412–40(a)(1)) assigned to the current accounting period, but not funded during it, are not allowable in subsequent years (except that a payment made to a fund by the time set for filing the Federal income tax return or any extension thereof is considered to have been made during such taxable year). However, any portion of pension cost computed for a cost accounting period, that exceeds the amount required to be funded pursuant to a waiver granted under the provisions of the Employee Retirement Income Security Act of 1974 (ERISA), will be allowable in those future accounting periods in which the funding of such excess amounts occurs (see 48 CFR 9904.412–50(c)(5)).

(B) For nonqualified pension plans, except those using the pay-as-you-go cost method, allowable costs are limited to the amount allocable in accordance with 48 CFR 9904.412–50(d)(2).

(C) For nonqualified pension plans using the pay-as-you-go cost method, allowable costs are limited to the amounts allocable in accordance with 48 CFR 9904.412–50(d)(3).

(ii) Any amount funded in excess of the pension cost assigned to a cost accounting period is not allowable in that period and shall be accounted for as set forth at 48 CFR 9904.412–50(a)(4). The excess amount is allowable in the future period to which it is assigned, to the extent it is not otherwise unallowable.

(iii) Increased pension costs are unallowable if the increase is caused by a delay in funding beyond 30 days after each quarter of the year to which they are assignable. If a composite rate is used for allocating pension costs between the segments of a company and if, because of differences in the timing of the funding by the segments, an inequity exists, allowable pension costs for each segment will be limited to that particular segment's calculation of pension costs as provided for in 48 CFR 9904.413–50(c). The contractor shall make determinations of unallowable costs in accordance with the actuarial method used in calculating pension costs.

(iv) The contracting officer will consider the allowability of the cost of indemnifying the Pension Benefit Guaranty Corporation (PBGC) under ERISA section 4062 or 4064 arising from terminating an employee deferred compensation plan on a case-by-case basis, provided that if insurance was required by the PBGC under ERISA section 4023, it was so obtained and the indemnification payment is not recoverable under the insurance. Consideration under the foregoing circumstances will be primarily for the purpose of appraising

the extent to which the indemnification payment is allocable to Government work. If a beneficial or other equitable relationship exists, the Government will participate, despite the requirements of 31.205–19(c)(3) and (d)(3), in the indemnification payment to the extent of its fair share.

(v) Increased pension costs resulting from the withdrawal of assets from a pension fund and transfer to another employee benefit plan fund, or transfer of assets to another account within the same fund, are unallowable except to the extent authorized by an advance agreement. If the withdrawal of assets from a pension fund is a plan termination under ERISA, the provisions of paragraph (j)(3) of this subsection apply. The advance agreement shall—

(A) State the amount of the Government's equitable share in the gross amount withdrawn or transferred; and

(B) Provide that the Government receives a credit equal to the amount of the Government's equitable share of the gross withdrawal or transfer.

(3) *Pension adjustments and asset reversions.* (i) For segment closings, pension plan terminations, or curtailment of benefits, the amount of the adjustment shall be—

(A) For contracts and subcontracts that are subject to full coverage under the Cost Accounting Standards (CAS) Board rules and regulations, the amount measured, assigned, and allocated in accordance with 48 CFR 9904.413–50(c)(12); and

(B) For contracts and subcontracts that are not subject to full coverage under the CAS, the amount measured, assigned, and allocated in accordance with 48 CFR 9904.413–50(c)(12), except the numerator of the fraction at 48 CFR 9904.413–50(c)(12)(vi) is the sum of the pension plan costs allocated to all non-CAS-covered contracts and subcontracts that are subject to Subpart 31.2 or for which certified cost or pricing data were submitted.

(ii) For all other situations where assets revert to the contractor, or such assets are constructively received by it for any reason, the contractor shall, at the Government's option, make a refund or give a credit to the Government for its equitable share of the gross amount withdrawn. The Government's equitable share shall reflect the Government's participation in pension costs through those contracts for which certified cost or pricing data were submitted or that are subject to Subpart 31.2. Excise taxes on pension plan asset reversions or withdrawals under this paragraph (j)(3)(ii) are unallowable in accordance with 31.205–41(b)(6).

(4) *Defined-contribution pension plans.* In addition to defined-contribution pension plans, this paragraph also covers profit sharing, savings plans, and other such plans, provided the plans fall within the definition of a pension plan at 31.001.

(i) Allowable pension cost is limited to the net contribution required to be made for a cost accounting period after taking into account dividends and other credits, where applicable. However, any portion of pension cost computed for a cost accounting period that exceeds the amount required to be funded pursuant to a waiver granted under the provisions of ERISA will be allowable in those future accounting periods in which the funding of such excess amounts occurs (see 48 CFR 9904.412–50(c)(5)).

(ii) The provisions of paragraphs (j)(2)(ii) and (iv) of this subsection apply to defined-contribution plans.

(5) *Pension plans using the pay-as-you-go cost method.* When using the pay-as-you-go cost method, the contractor shall measure, assign, and allocate the cost of pension plans in accordance with 48 CFR 9904.412 and 9904.413. Pension costs for a pension plan using the pay-as-you-go cost method are allowable to the extent they are not otherwise unallowable.

(6) *Early retirement incentives.* An early retirement incentive is an incentive given to an employee to retire early. For contract costing purposes, costs of early retirement incentives are allowable subject to the pension cost criteria contained in paragraphs (j)(2)(i) through (iv) of this subsection provided—

(i) The contractor measures, assigns, and allocates the costs in accordance with the contractor's accounting practices for pension costs;

(ii) The incentives are in accordance with the terms and conditions of an early retirement incentive plan;

(iii) The contractor applies the plan only to active employees. The cost of extending the plan to employees who retired or were terminated before the adoption of the plan is unallowable; and

(iv) The present value of the total incentives given to any employee in excess of the amount of the employee's annual salary for the previous fiscal year before the employee's retirement is unallowable. The contractor shall compute the present value in accordance with its accounting practices for pension costs. The contractor shall account for any unallowable costs in accordance with 48 CFR 9904.412–50(a)(2).

(k) *Deferred compensation other than pensions.* The costs of deferred compensation awards are allowable subject to the following limitations:

(1) The costs shall be measured, assigned, and allocated in accordance with 48 CFR 9904.415, Accounting for the Cost of Deferred Compensation.

(2) The costs of deferred compensation awards are unallowable if the awards are made in periods subsequent to the period when the work being remunerated was performed.

(l) *Compensation incidental to business acquisitions.* The following costs are unallowable:

(1) Payments to employees under agreements in which they receive special compensation, in excess of the contractor's normal severance pay practice, if their employment terminates following a change in the management control over, or ownership of, the contractor or a substantial portion of its assets.

(2) Payments to employees under plans introduced in connection with a change (whether actual or prospective) in the management control over, or ownership of, the contractor or a substantial portion of its assets in which those employees receive special compensation, which is contingent upon the employee remaining with the contractor for a specified period of time.

(m) *Fringe benefits.* (1) Fringe benefits are allowances and services provided by the contractor to its employees as compensation in addition to regular wages and salaries. Fringe benefits include, but are not limited to, the cost of vacations, sick leave, holidays, military leave, employee insurance, and supplemental unemployment benefit plans. Except as provided otherwise in subpart 31.2, the costs of fringe benefit are allowable to the extent that they are reasonable and are required by law, employer-employee agreement, or an established policy of the contractor.

(2) That portion of the cost of company-furnished automobiles that relates to personal use by employees (including transportation to and from work) is unallowable regardless of whether the cost is reported as taxable income to the employees (see 31.205–46(d)).

(n) *Employee rebate and purchase discount plans.* Rebates and purchase discounts, in whatever form, granted to employees on products or services produced by the contractor or affiliates are unallowable.

(o) *Postretirement benefits other than pensions (PRB).* (1) PRB covers all benefits, other than cash benefits and life insurance benefits paid by pension plans, provided to employees, their beneficiaries, and covered dependents during the period following the employees' retirement. Benefits encompassed include, but are not limited to, postretirement health care; life insurance provided outside a pension plan; and other welfare benefits such as tuition assistance, day care, legal services, and housing subsidies provided after retirement.

(2) To be allowable, PRB costs shall be incurred pursuant to law, employer-employee agreement, or an established policy of the contractor, and shall comply with paragraphs (o)(2)(i), (ii), or (iii) of this subsection.

(i) *Pay-as-you-go.* PRB costs are not accrued during the working lives of employees. Costs are assigned to the period in which—

(A) Benefits are actually provided; or

(B) The costs are paid to an insurer, provider, or other recipient for current year benefits or premiums.

(ii) *Terminal funding.* PRB costs are not accrued during the working lives of the employees.

(A) Terminal funding occurs when the entire PRB liability is paid in a

lump sum upon the termination of employees (or upon conversion to such a terminal-funded plan) to an insurer or trustee to establish and maintain a fund or reserve for the sole purpose of providing PRB to retirees.

(B) Terminal funded costs shall be amortized over a period of 15 years.

(iii) *Accrual basis.* PRB costs are accrued during the working lives of employees. Accrued PRB costs shall comply with the following:

(A) Be measured and assigned in accordance with one of the following two methods described under paragraphs (o)(2)(iii)(A)(*1*) or (o)(2)(iii)(A)(*2*) of this subsection:

(*1*) Generally accepted accounting principles. However, transitions from the pay-as-you-go method to the accrual accounting method must be handled according to paragraphs (o)(2)(iii)(A)(*1*)(*i*) through (*iii*) of this subsection.

(*i*) In the year of transition from the pay-as-you-go method to accrual accounting for purposes of Government contract cost accounting, the transition obligation shall be the excess of the accumulated PRB obligation over the fair value of plan assets determined in accordance with subparagraph (o)(2)(iii)(E) of this section; the fair value must be reduced by the prepayment credit as determined in accordance with subparagraph (o)(2)(iii)(F) of this subsection.

(*ii*) PRB cost attributable to the transition obligation assigned to the current year that is in excess of the amount assignable to accounting periods on the basis of a straight line amortization of the transition obligation over the average remaining working lives of active employees covered by the PRB plan or a 20-year period, whichever period is longer, is unallowable. However, if the plan is comprised of inactive participants only, the PRB cost attributable to the transition obligation assigned to the current year that is in excess of the amount assignable to accounting periods on a straight line amortization of the transition obligation over the average future life expectancy of the participants is unallowable.

(*iii*) For a plan that transitioned from pay-as-you-go to accrual accounting for Government contract cost accounting prior to July 22, 2013, the unallowable amount of PRB cost attributable to the transition obligation amortization shall continue to be based on the cost principle in effect at the time of the transition until the original transition obligation schedule is fully amortized.

(*2*) Contributions to a welfare benefit fund determined in accordance with applicable Internal Revenue Code. Allowable PRB costs based on such contributions shall—

(*i*) Be measured using reasonable actuarial assumptions, which shall include a health care inflation assumption unless prohibited by the Internal Revenue Code provisions governing welfare benefit funds;

(*ii*) Be assigned to accounting periods on the basis of the average working lives of active employees covered by the PRB plan or a 15 year period, whichever period is longer. However, if the plan is comprised of inactive participants only, the cost shall be spread over the average future life expectancy of the participants; and

(*iii*) Exclude Federal income taxes, whether incurred by the fund or the contractor (including any increase in PRB costs associated with such taxes), unless the fund holding the plan assets is tax-exempt under the provisions of 26 U.S.C 501(c).

(B) Be paid to an insurer or trustee to establish and maintain a fund or reserve for the sole purpose of providing PRB to retirees. The assets shall be segregated in the trust, or otherwise effectively restricted, so that they cannot be used by the employer for other purposes.

(C) Be calculated in accordance with generally accepted actuarial principles and practices as promulgated by the Actuarial Standards Board.

(D) Eliminate from costs of current and future periods the accumulated value of any prior period costs that were unallowable in accordance with paragraph (o)(3) of this section, adjusted for interest under paragraph (o)(4) of this section.

(E) Calculate the unfunded actuarial liability (unfunded accumulated postretirement benefit obligation) using the market (fair) value of assets that

have been accumulated by funding costs assigned to prior periods for contract accounting purposes.

(F) Recognize as a prepayment credit the market (fair) value of assets that were accumulated by deposits or contributions that were not used to fund costs assigned to previous periods for contract accounting purposes.

(G) Comply with the following when changing from one accrual accounting method to another: the contractor shall—

(*1*) Treat the change in the unfunded actuarial liability (unfunded accumulated postretirement benefit obligation) as a gain or loss; and

(*2*) Present an analysis demonstrating that all costs assigned to prior periods have been accounted for in accordance with paragraphs (o)(2)(iii)(D), (E), and (F) of this section to ensure that no duplicate recovery of costs exists. Any duplicate recovery of costs due to the change from one method to another is unallowable. The analysis and new accrual accounting method may be a subject appropriate for an advance agreement in accordance with 31.109.

(3) To be allowable, PRB costs must be funded by the time set for filing the Federal income tax return or any extension thereof, or paid to an insurer, provider, or other recipient by the time set for filing the Federal income tax return or extension thereof. PRB costs assigned to the current year, but not funded, paid or otherwise liquidated by the tax return due date as extended are not allowable in any subsequent year.

(4) Increased PRB costs caused by delay in funding beyond 30 days after each quarter of the year to which they are assignable are unallowable.

(5) The Government shall receive an equitable share of any amount of previously funded PRB costs which revert or inure to the contractor. Such equitable share shall reflect the Government's previous participation in PRB costs through those contracts for which certified cost or pricing data were required or which were subject to Subpart 31.2.

(p) *Limitation on allowability of compensation.*

TABLE 31–1—EMPLOYEE COMPENSATION LIMITS

Contract award date	Applicable agencies	Covered employees	31.205–6
Before June 24, 2014	Executive Agencies Other than DoD, NASA and Coast Guard.	Senior Executive	(p)(2).
Before December 31, 2011	DoD, NASA and Coast Guard	Senior Executive	(p)(2).
On/after December 31, 2011, and before June 24, 2014.	DoD, NASA, and Coast Guard	All Employees	(p)(3).
On/after June 24, 2014	All Executive Agencies	All Employees	(p)(4).

(1) *Definitions.* As used in this paragraph (p)—

(i) *Compensation* means the total amount of wages, salary, bonuses, deferred compensation (see paragraph (k) of this subsection), and employer contributions to defined contribution pension plans (see paragraphs (j)(4) and (q) of this subsection), for the fiscal year, whether paid, earned, or otherwise accruing, as recorded in the contractor's cost accounting records for the fiscal year.

(ii) *Senior executive* means—

(A) Prior to January 2, 1999—

(*1*) The Chief Executive Officer (CEO) or any individual acting in a similar capacity at the contractor's headquarters;

(*2*) The four most highly compensated employees in management positions at the contractor's headquarters, other than the CEO; and

(*3*) If the contractor has intermediate home offices or segments that report directly to the contractor's headquarters, the five most highly compensated employees in management positions at each such intermediate home office or segment.

(B) Effective January 2, 1999, the five most highly compensated employees in management positions at each home office and each segment of the contractor, whether or not the home office or segment reports directly to the contractor's headquarters.

(iii) *Fiscal year* means the fiscal year established by the contractor for accounting purposes.

(iv) *Contractor's headquarters* means the highest organizational level from which executive compensation costs are allocated to Government contracts.

(2) *Senior executive compensation limit for contracts awarded before June 24, 2014*—(i) *Applicability*. This paragraph (p)(2) applies to the following:

(A) To all executive agencies, other than DoD, NASA and the Coast Guard, for contracts awarded before June 24, 2014;

(B) To DoD, NASA, and the Coast Guard for contracts awarded before December 31, 2011;

(ii) Costs incurred after January 1, 1998, for the compensation of a senior executive in excess of the benchmark compensation amount determined applicable for the contractor fiscal year by the Administrator, Office of Federal Procurement Policy (OFPP), under 41 U.S.C. 1127 as in effect prior to June 24, 2014, are unallowable (10 U.S.C. 2324(e)(1)(P) and 41 U.S.C. 4304(a)(16), as in effect prior to June 24, 2014). This limitation is the sole statutory limitation on allowable senior executive compensation costs incurred after January 1, 1998, under contracts awarded before June 24, 2014, and applies whether or not the affected contracts were previously subject to a statutory limitation on such costs. (Note that pursuant to section 804 of Pub. L. 105–261, the definition of ''senior executive'' in paragraph (p)(1) of this section has been changed for compensation costs incurred after January 1, 1999.) See *https://www.whitehouse.gov/wp-content/uploads/2017/11/ContractorCompensationCapContractsAwardedBeforeJune24.pdf*.

(3) All employee compensation limit for contracts awarded before June 24, 2014.

(i) *Applicability*. This paragraph (p)(3) applies to DOD, NASA, and the Coast Guard for contracts awarded on or after December 31, 2011, and before June 24, 2014.

(ii) Costs incurred after January 1, 2012, for the compensation of any contractor employee in excess of the benchmark compensation amount, determined applicable for the contractor fiscal year by the Administrator, Office of Federal Procurement Policy (OFPP) under 41 U.S.C. 1127 as in effect prior to June 24, 2014 are unallowable (10 U.S.C. 2324(e)(1)(P) as in effect prior to June 24, 2014.) This limitation is the sole statutory limitation on allowable employee compensation costs incurred after January 1, 2012, under contracts awarded on or after December 31, 2011 and before June 24, 2014. (Note that pursuant to section 803 of Pub. L. 112–81, 10 U.S.C. 2324, Allowable costs under defense contracts, was amended by striking ''senior executives'' and inserting ''any contractor employee'', making unallowable the excess compensation costs incurred after January 1, 2012, under affected contracts.) See *https://www.whitehouse.gov/wp-content/uploads/2017/11/ContractorCompensationCapContractsAwardedBeforeJune24.pdf*.

(4) All employee compensation limit for contracts awarded on or after June 24, 2014.

(i) *Applicability*. This paragraph (p)(4) applies to all executive agency contracts awarded on or after June 24, 2014, and any subcontracts thereunder.

(ii) Costs incurred on or after June 24, 2014, for the compensation of all employees in excess of the benchmark compensation amount determined applicable for the contractor fiscal year by the Administrator, Office of Federal Procurement Policy (OFPP) are unallowable under 10 U.S.C. 2324(e)(1)(P) and 41 U.S.C. 4304(a)(16), as in effect on or after June 24, 2014, pursuant to section 702 of Public Law 113–67. This limitation is the sole statutory limitation on allowable employee compensation costs incurred on or after June 24, 2014, under contracts awarded on or after June 24, 2014. See *https://www.whitehouse.gov/wp-content/uploads/2017/11/ContractorCompensationCapContractsAwardedafterJune24.pdf*.

(iii) *Exceptions*. An agency head may establish one or more narrowly targeted exceptions for scientists, engineers, or other specialists upon a determination that such exceptions are needed to ensure that the executive agency has continued access to needed skills and capabilities. In making such a determination, the agency shall consider, at a minimum, for each contractor employee in a narrowly targeted excepted position—

(A) The amount of taxpayer funded compensation to be received by each employee; and

(B) The duties and services performed by each employee.

(q) *Employee stock ownership plans (ESOP).* (1) An ESOP is a stock bonus plan designed to invest primarily in the stock of the employer corporation. The contractor's contributions to an Employee Stock Ownership Trust (ESOT) may be in the form of cash, stock, or property.

(2) Costs of ESOPs are allowable subject to the following conditions:

(i) The contractor measures, assigns, and allocates costs in accordance with 48 CFR 9904.415.

(ii) Contributions by the contractor in any one year that exceed the deductibility limits of the Internal Revenue Code for that year are unallowable.

(iii) When the contribution is in the form of stock, the value of the stock contribution is limited to the fair market value of the stock on the date that title is effectively transferred to the trust.

(iv) When the contribution is in the form of cash—

(A) Stock purchases by the ESOT in excess of fair market value are unallowable; and

(B) When stock purchases are in excess of fair market value, the contractor shall credit the amount of the excess to the same indirect cost pools that were charged for the ESOP contributions in the year in which the stock purchase occurs. However, when the trust purchases the stock with borrowed funds which will be repaid over a period of years by cash contributions from the contractor to the trust, the contractor shall credit the excess price over fair market value to the indirect cost pools pro rata over the period of years during which the contractor contributes the cash used by the trust to repay the loan.

(v) When the fair market value of unissued stock or stock of a closely held corporation is not readily determinable, the valuation will be made on a case-by-case basis taking into consideration the guidelines for valuation used by the IRS.

[48 FR 42301, Sept. 19, 1983]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting section 31.205–6, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at *www.govinfo.gov*.

31.205–7 Contingencies.

(a) *Contingency*, as used in this subpart, means a possible future event or condition arising from presently known or unknown causes, the outcome of which is indeterminable at the present time.

(b) Costs for contingencies are generally unallowable for historical costing purposes because such costing deals with costs incurred and recorded on the contractor's books. However, in some cases, as for example, terminations, a contingency factor may be recognized when it is applicable to a past period to give recognition to minor unsettled factors in the interest of expediting settlement.

(c) In connection with estimates of future costs, contingencies fall into two categories:

(1) Those that may arise from presently known and existing conditions, the effects of which are foreseeable within reasonable limits of accuracy; e.g., anticipated costs of rejects and defective work. Contingencies of this category are to be included in the estimates of future costs so as to provide the best estimate of performance cost.

(2) Those that may arise from presently known or unknown conditions, the effect of which cannot be measured so precisely as to provide equitable results to the contractor and to the Government; e.g., results of pending litigation. Contingencies of this category are to be excluded from cost estimates under the several items of cost, but should be disclosed separately (including the basis upon which the contingency is computed) to facilitate the negotiation of appropriate contractual coverage. (See, for example, 31.205–6(g) and 31.205–19.)

[69 FR 34243, June 18, 2004]

31.205–8 Contributions or donations.

Contributions or donations, including cash, property and services, regardless of recipient, are unallowable, except as provided in 31.205–1(e)(3).

[51 FR 12300, Apr. 9, 1986]

31.205–9 [Reserved]

31.205–10 Cost of money.

(a) *General.* Cost of money—

(1) Is an imputed cost that is not a form of interest on borrowings (see 31.205–20);

(2) Is an ''incurred cost'' for cost-reimbursement purposes under applicable cost-reimbursement contracts and for progress payment purposes under fixed-price contracts; and

(3) Refers to—

(i) Facilities capital cost of money (48 CFR 9904.414); and

(ii) Cost of money as an element of the cost of capital assets under construction (48 CFR 9904.417).

(b) Cost of money is allowable, provided—

(1) It is measured, assigned, and allocated to contracts in accordance with 48 CFR 9904.414 or measured and added to the cost of capital assets under construction in accordance with 48 CFR 9904.417, as applicable;

(2) The requirements of 31.205–52, which limit the allowability of cost of money, are followed; and

(3) The estimated facilities capital cost of money is specifically identified and proposed in cost proposals relating to the contract under which the cost is to be claimed.

(c) Actual interest cost in lieu of the calculated imputed cost of money is unallowable.

[68 FR 28091, May 22, 2003]

31.205–11 Depreciation.

(a) Depreciation on a contractor's plant, equipment, and other capital facilities is an allowable contract cost, subject to the limitations contained in this cost principle. For tangible personal property, only estimated residual values that exceed 10 percent of the capitalized cost of the asset need be used in establishing depreciable costs. Where either the declining balance method of depreciation or the class life asset depreciation range system is used, the residual value need not be deducted from capitalized cost to determine depreciable costs. Depreciation cost that would significantly reduce the book value of a tangible capital asset below its residual value is unallowable.

(b) Contractors having contracts subject to 48 CFR 9904.409, Depreciation of Tangible Capital Assets, shall adhere to the requirement of that standard for all fully CAS-covered contracts and may elect to adopt the standard for all other contracts. All requirements of 48 CFR 9904.409 are applicable if the election is made, and contractors must continue to follow it until notification of final acceptance of all deliverable items on all open negotiated Government contracts.

(c) For contracts to which 48 CFR 9904.409 is not applied, except as indicated in paragraphs (g) and (h) of this subsection, allowable depreciation shall not exceed the amount used for financial accounting purposes, and shall be determined in a manner consistent with the depreciation policies and procedures followed in the same segment on non-Government business.

(d) Depreciation, rental, or use charges are unallowable on property acquired from the Government at no cost by the contractor or by any division, subsidiary, or affiliate of the contractor under common control.

(e) The depreciation on any item which meets the criteria for allowance at price under 31.205–26(e) may be based on that price, provided the same policies and procedures are used for costing all business of the using division, subsidiary, or organization under common control.

(f) No depreciation or rental is allowed on property fully depreciated by the contractor or by any division, subsidiary, or affiliate of the contractor under common control. However, a reasonable charge for using fully depreciated property may be agreed upon and allowed (but, see 31.109(h)(2)). In determining the charge, consideration shall be given to cost, total estimated useful life at the time of negotiations, effect of any increased maintenance charges or decreased efficiency due to age, and the amount of depreciation previously charged to Government contracts or subcontracts.

(g) Whether or not the contract is otherwise subject to CAS the following apply:

(1) The requirements of 31.205–52 shall be observed.

(2) In the event of a write-down from carrying value to fair value as a result of impairments caused by events or changes in circumstances, allowable depreciation of the impaired assets is limited to the amounts that would have been allowed had the assets not been written down (see 31.205–16(g)). However, this does not preclude a change in depreciation resulting from other causes such as permissible changes in estimates of service life, consumption of services, or residual value.

(3)(i) In the event the contractor reacquires property involved in a sale and leaseback arrangement, allowable depreciation of reacquired property shall be based on the net book value of the asset as of the date the contractor originally became a lessee of the property in the sale and leaseback arrangement—

(A) Adjusted for any allowable gain or loss determined in accordance with 31.205–16(b); and

(B) Less any amount of depreciation expense included in the calculation of the amount that would have been allowed had the contractor retained title under 31.205–11(h)(1) and 31.205–36(b)(2).

(ii) As used in this paragraph (g)(3), reacquired property is property that generated either any depreciation expense or any cost of money considered in the calculation of the limitations under 31.205–11(h)(1) and 31.205–36(b)(2) during the most recent accounting period prior to the date of reacquisition.

(h) A ''capital lease,'' as defined in Financial Accounting Standards Board's Accounting Standards Codification (FASB ASC) 840, Leases, is subject to the requirements of this cost principle. (See 31.205–36 for Operating Leases.) FASB ASC 840 requires that capital leases be treated as purchased assets, *i.e.*, be capitalized, and the capitalized value of such assets be distributed over their useful lives as depreciation charges or over the leased life as amortization charges, as appropriate, except that—

(1) Lease costs under a sale and leaseback arrangement are allowable only up to the amount that would be allowed if the contractor retained title, computed based on the net book value of the asset on the date the contractor becomes a lessee of the property adjusted for any gain or loss recognized in accordance with 31.205–16(b); and

(2) If it is determined that the terms of the capital lease have been significantly affected by the fact that the lessee and lessor are related, depreciation charges are not allowable in excess of those that would have occurred if the lease contained terms consistent with those found in a lease between unrelated parties.

[68 FR 69247, Dec. 11, 2003, as amended at 70 FR 33675, June 8, 2005; 71 FR 36940, June 28, 2006; 77 FR 203, Jan. 3, 2012]

31.205–12 Economic planning costs.

Economic planning costs are the costs of general long-range management planning that is concerned with the future overall development of the contractor's business and that may take into account the eventual possibility of economic dislocations or fundamental alterations in those markets in which the contractor currently does business. Economic planning costs are allowable. Economic planning costs do not include organization or reorganization costs covered by 31.205–27. See 31.205–38 for market planning costs other than economic planning costs.

[68 FR 56688, Oct. 1, 2003]

31.205–13 Employee morale, health, welfare, food service, and dormitory costs and credits.

(a) Aggregate costs incurred on activities designed to improve working conditions, employer-employee relations, employee morale, and employee performance (less income generated by these activities) are allowable, subject to the limitations contained in this subsection. Some examples of allowable activities are—

(1) House publications;

(2) Health clinics;

(3) Wellness/fitness centers;

(4) Employee counseling services; and

(5) Food and dormitory services for the contractor's employees at or near the contractor's facilities. These services include—

(i) Operating or furnishing facilities for cafeterias, dining rooms, canteens, lunch wagons, vending machines, living accommodations; and

(ii) Similar types of services.

(b) Costs of gifts are unallowable. (Gifts do not include awards for performance made pursuant to 31.205–6(f) or awards made in recognition of employee achievements pursuant to an established contractor plan or policy.)

(c) Costs of recreation are unallowable, except for the costs of employees' participation in company sponsored sports teams or employee organizations designed to improve company loyalty, team work, or physical fitness.

(d)(1) The allowability of food and dormitory losses are determined by the following factors:

(i) Losses from operating food and dormitory services are allowable only if the contractor's objective is to operate such services on a break-even basis.

(ii) Losses sustained because food services or lodging accommodations are furnished without charge or at prices or rates which obviously would not be conducive to the accomplishment of the objective in paragraph (d)(1)(i) of this subsection are not allowable, except as described in paragraph (d)(1)(iii) of this subsection.

(iii) A loss may be allowed to the extent that the contractor can demonstrate that unusual circumstances exist such that even with efficient management, operating the services on a break-even basis would require charging inordinately high prices, or prices or rates higher than those charged by commercial establishments offering the same services in the same geographical areas. The following are examples of unusual circumstances:

(A) The contractor must provide food or dormitory services at remote locations where adequate commercial facilities are not reasonably available.

(B) The contractor's charged (but unproductive) labor costs would be excessive if the services were not available.

(C) If cessation or reduction of food or dormitory operations will not otherwise yield net cost savings.

(2) Costs of food and dormitory services shall include an allocable share of indirect expenses pertaining to these activities.

(e) When the contractor has an arrangement authorizing an employee association to provide or operate a service, such as vending machines in the contractor's plant, and retain the profits, such profits shall be treated in the same manner as if the contractor were providing the service (but see paragraph (f) of this subsection).

(f) Contributions by the contractor to an employee organization, including funds from vending machine receipts or similar sources, are allowable only to the extent that the contractor demonstrates that an equivalent amount of the costs incurred by the employee organization would be allowable if directly incurred by the contractor.

[60 FR 42662, Aug. 16, 1995, as amended at 68 FR 56688, Oct. 1, 2003]

31.205–14 Entertainment costs.

Costs of amusement, diversions, social activities, and any directly associated costs such as tickets to shows or sports events, meals, lodging, rentals, transportation, and gratuities are unallowable. Costs made specifically unallowable under this cost principle are not allowable under any other cost principle. Costs of membership in social, dining, or country clubs or other organizations having the same purposes are also unallowable, regardless of whether the cost is reported as taxable income to the employees.

[60 FR 42663, Aug. 16, 1995]

31.205–15 Fines, penalties, and mischarging costs.

(a) Costs of fines and penalties resulting from violations of, or failure of the contractor to comply with, Federal, State, local, or foreign laws and regulations, are unallowable except when incurred as a result of compliance with specific terms and conditions of the contract or written instructions from the contracting officer.

(b) Costs incurred in connection with, or related to, the mischarging of costs on Government contracts are unallowable when the costs are caused by, or result from, alteration or destruction of records, or other false or improper charging or recording of costs. Such costs include those incurred to measure or otherwise determine the magnitude of the improper charging, and costs incurred to remedy or correct the

mischarging, such as costs to rescreen and reconstruct records.

[51 FR 12301, Apr. 9, 1986, as amended at 54 FR 13024, Mar. 29, 1989; 55 FR 52793, Dec. 21, 1990]

31.205–16 Gains and losses on disposition or impairment of depreciable property or other capital assets.

(a) Gains and losses from the sale, retirement, or other disposition (but see 31.205–19) of depreciable property shall be included in the year in which they occur as credits or charges to the cost grouping(s) in which the depreciation or amortization applicable to those assets was included (but see paragraph (f) of this subsection). However, no gain or loss shall be recognized as a result of the transfer of assets in a business combination (see 31.205–52).

(b) Notwithstanding the provisions in paragraph (c) of this subsection, when costs of depreciable property are subject to the sale and leaseback limitations in 31.205–11(h)(1) or 31.205–36(b)(2)—

(1) The gain or loss is the difference between the net amount realized and the undepreciated balance of the asset on the date the contractor becomes a lessee; and

(2) When the application of (b)(1) of this subsection results in a loss—

(i) The allowable portion of the loss is zero if the fair market value exceeds the undepreciated balance of the asset on the date the contractor becomes a lessee; and

(ii) The allowable portion of the loss is limited to the difference between the fair market value and the undepreciated balance of the asset on the date the contractor becomes a lessee if the fair market value is less than the undepreciated balance of the asset on the date the contractor becomes a lessee.

(c) Gains and losses on disposition of tangible capital assets, including those acquired under capital leases (see 31.205–11(h), shall be considered as adjustments of depreciation costs previously recognized. The gain or loss for each asset disposed of is the difference between the net amount realized, including insurance proceeds from involuntary conversions, and its undepreciated balance.

(d) The gain recognized for contract costing purposes shall be limited to the difference between the acquisition cost (or for assets acquired under a capital lease, the value at which the leased asset is capitalized) of the asset and its undepreciated balance (except see paragraphs (e)(2)(i) or (ii) of this subsection).

(e) Special considerations apply to an involuntary conversion which occurs when a contractor's property is destroyed by events over which the owner has no control, such as fire, windstorm, flood, accident, theft, etc., and an insurance award is recovered. The following govern involuntary conversions:

(1) When there is a cash award and the converted asset is not replaced, gain or loss shall be recognized in the period of disposition. The gain recognized for contract costing purposes shall be limited to the difference between the acquisition cost of the asset and its undepreciated balance.

(2) When the converted asset is replaced, the contractor shall either—

(i) Adjust the depreciable basis of the new asset by the amount of the total realized gain or loss; or

(ii) Recognize the gain or loss in the period of disposition, in which case the Government shall participate to the same extent as outlined in paragraph (e)(1) of this subsection.

(f) Gains and losses on the disposition of depreciable property shall not be recognized as a separate charge or credit when—

(1) Gains and losses are processed through the depreciation reserve account and reflected in the depreciation allowable under 31.205–11; or

(2) The property is exchanged as part of the purchase price of a similar item, and the gain or loss is taken into consideration in the depreciation cost basis of the new item.

(g) Gains and losses arising from mass or extraordinary sales, retirements, or other disposition other than through business combinations shall be considered on a case-by-case basis.

(h) Gains and losses of any nature arising from the sale or exchange of capital assets other than depreciable property shall be excluded in computing contract costs.

(i) With respect to long-lived tangible and identifiable intangible assets held for use, no loss shall be allowed for a write-down from carrying value to fair value as a result of impairments caused by events or changes in circumstances (e.g., environmental damage, idle facilities arising from a declining business base, etc.). If depreciable property or other capital assets have been written down from carrying value to fair value due to impairments, gains or losses upon disposition shall be the amounts that would have been allowed had the assets not been written down.

[48 FR 42301, Sept. 19, 1983, as amended at 55 FR 25530, June 21, 1990; 60 FR 64255, Dec. 14, 1995; 61 FR 67424, Dec. 20, 1996; 68 FR 69248, Dec. 11, 2003; 70 FR 33675, June 8, 2005; 71 FR 36941, June 28, 2006; 75 FR 34291, June 16, 2010]

31.205–17 Idle facilities and idle capacity costs.

(a) *Definitions.* As used in this subsection—

Costs of idle facilities or idle capacity means costs such as maintenance, repair, housing, rent, and other related costs; e.g., property taxes, insurance, and depreciation.

Facilities means plant or any portion thereof (including land integral to the operation), equipment, individually or collectively, or any other tangible capital asset, wherever located, and whether owned or leased by the contractor.

Idle capacity means the unused capacity of partially used facilities. It is the difference between that which a facility could achieve under 100 percent operating time on a one-shift basis, less operating interruptions resulting from time lost for repairs, setups, unsatisfactory materials, and other normal delays, and the extent to which the facility was actually used to meet demands during the accounting period. A multiple-shift basis may be used in the calculation instead of a one-shift basis if it can be shown that this amount of usage could normally be expected for the type of facility involved.

Idle facilities means completely unused facilities that are excess to the contractor's current needs.

(b) The costs of idle facilities are unallowable unless the facilities—

(1) Are necessary to meet fluctuations in workload; or

(2) Were necessary when acquired and are now idle because of changes in requirements, production economies, reorganization, termination, or other causes which could not have been reasonably foreseen. (Costs of idle facilities are allowable for a reasonable period, ordinarily not to exceed 1 year, depending upon the initiative taken to use, lease, or dispose of the idle facilities (but see 31.205–42)).

(c) Costs of idle capacity are costs of doing business and are a factor in the normal fluctuations of usage or overhead rates from period to period. Such costs are allowable provided the capacity is necessary or was originally reasonable and is not subject to reduction or elimination by subletting, renting, or sale, in accordance with sound business, economics, or security practices. Widespread idle capacity throughout an entire plant or among a group of assets having substantially the same function may be idle facilities.

(d) Any costs to be paid directly by the Government for idle facilities or idle capacity reserved for defense mobilization production shall be the subject of a separate agreement.

[48 FR 42301, Sept. 19, 1983, as amended at 66 FR 2131, Jan. 10, 2001; 67 FR 6120, Feb. 8, 2002]

31.205–18 Independent research and development and bid and proposal costs.

(a) *Definitions.* As used in this subsection—

Applied research means that effort which (1) normally follows basic research, but may not be severable from the related basic research, (2) attempts to determine and exploit the potential of scientific discoveries or improvements in technology, materials, processes, methods, devices, or techniques, and (3) attempts to advance the state of the art. Applied research does not include efforts whose principal aim is design, development, or test of specific items or services to be considered for sale; these efforts are within the definition of the term *development*, defined in this subsection.

Basic research, (See 2.101).

Bid and proposal (B&P) costs means the costs incurred in preparing, submitting, and supporting bids and proposals (whether or not solicited) on potential Government or non-Government contracts. The term does not include the costs of effort sponsored by a grant or cooperative agreement, or required in the performance of a contract.

Company means all divisions, subsidiaries, and affiliates of the contractor under common control.

Development means the systematic use, under whatever name, of scientific and technical knowledge in the design, development, test, or evaluation of a potential new product or service (or of an improvement in an existing product or service) for the purpose of meeting specific performance requirements or objectives. Development includes the functions of design engineering, prototyping, and engineering testing. Development excludes: (1) Subcontracted technical effort which is for the sole purpose of developing an additional source for an existing product, or (2) development effort for manufacturing or production materials, systems, processes, methods, equipment, tools, and techniques not intended for sale.

Independent research and development (IR&D) means a contractor's IR&D cost that consists of projects falling within the four following areas: (1) Basis research, (2) applied research, (3) development, and (4) systems and other concept formulation studies. The term does not include the costs of effort sponsored by a grant or required in the performance of a contract. IR&D effort shall not include technical effort expended in developing and preparing technical data specifically to support submitting a bid or proposal.

Systems and other concept formulation studies means analyses and study efforts either related to specific IR&D efforts or directed toward identifying desirable new systems, equipment or components, or modifications and improvements to existing systems, equipment, or components.

(b) *Composition and allocation of costs.* The requirements of 48 CFR 9904.420, Accounting for independent research and development costs and bid and proposal costs, are incorporated in their entirety and shall apply as follows—

(1) *Fully-CAS-covered contracts.* Contracts that are fully-CAS-covered shall be subject to all requirements of 48 CFR 9904.420.

(2) *Modified CAS-covered and non-CAS-covered contracts.* Contracts that are not CAS-covered or that contain terms or conditions requiring modified CAS coverage shall be subject to all requirements of 48 CFR 9904.420 *except* 48 CFR 9904.420–50(e)(2) and 48 CFR 9904.420–50(f)(2), which are not then applicable. However, non-CAS-covered or modified CAS-covered contracts awarded at a time the contractor has CAS-covered contracts requiring compliance with 48 CFR 9904.420, shall be subject to all the requirements of 48 CFR 9904.420. When the requirements of 48 CFR 9904.420–50(e)(2) and 48 CFR 9904.420–50(f)(2) are not applicable, the following apply:

(i) IR&D and B&P costs shall be allocated to final cost objectives on the same basis of allocation used for the G&A expense grouping of the profit center (see 31.001) in which the costs are incurred. However, when IR&D and B&P costs clearly benefit other profit centers or benefit the entire company, those costs shall be allocated through the G&A of the other profit centers or through the corporate G&A, as appropriate.

(ii) If allocations of IR&D or B&P through the G&A base do not provide equitable cost allocation, the contracting officer may approve use of a different base.

(c) *Allowability.* Except as provided in paragraphs (d) and (e) of this subsection, or as provided in agency regulations, costs for IR&D and B&P are allowable as indirect expenses on contracts to the extent that those costs are allocable and reasonable.

(d) *Deferred IR&D costs.* (1) IR&D costs that were incurred in previous accounting periods are unallowable, except when a contractor has developed a specific product at its own risk in anticipation of recovering the development costs in the sale price of the product provided that—

(i) The total amount of IR&D costs applicable to the product can be identified;

(ii) The proration of such costs to sales of the product is reasonable;

(iii) The contractor had no Government business during the time that the costs were incurred or did not allocate IR&D costs to Government contracts except to prorate the cost of developing a specific product to the sales of that product; and

(iv) No costs of current IR&D programs are allocated to Government work except to prorate the costs of developing a specific product to the sales of that product.

(2) When deferred costs are recognized, the contract (except firm-fixed-price and fixed-price with economic price adjustment) will include a specific provision setting forth the amount of deferred IR&D costs that are allocable to the contract. The negotiation memorandum will state the circumstances pertaining to the case and the reason for accepting the deferred costs.

(e) *Cooperative arrangements.* (1) IR&D costs may be incurred by contractors working jointly with one or more non-Federal entities pursuant to a cooperative arrangement (for example, joint ventures, limited partnerships, teaming arrangements, and collaboration and consortium arrangements). IR&D costs also may include costs contributed by contractors in performing cooperative research and development agreements, or similar arrangements, entered into under—

(i) Section 12 of the Stevenson-Wydler Technology Transfer Act of 1980 (15 U.S.C. 3710(a));

(ii) Sections 203(c) (5) and (6) of the National Aeronautics and Space Act of 1958, as amended (42 U.S.C. 2473(c) (5) and (6));

(iii) 10 U.S.C. 2371 for the Defense Advanced Research Projects Agency; or

(iv) Other equivalent authority.

(2) IR&D costs incurred by a contractor pursuant to these types of cooperative arrangements should be considered as allowable IR&D costs if the work performed would have been allowed as contractor IR&D had there been no cooperative arrangement.

(3) Costs incurred in preparing, submitting, and supporting offers on potential cooperative arrangements are allowable to the extent they are allocable, reasonable, and not otherwise unallowable.

[57 FR 44265, Sept. 24, 1992, as amended at 59 FR 11379, Mar. 10, 1994; 62 FR 12705, Mar. 17, 1997; 62 FR 51271, Sept. 30, 1997; 62 FR 64932, Dec. 9, 1997; 66 FR 2131, Jan. 10, 2001]

31.205–19 Insurance and indemnification.

(a) Insurance by purchase or by self-insuring includes—

(1) Coverage the contractor is required to carry or to have approved, under the terms of the contract; and

(2) Any other coverage the contractor maintains in connection with the general conduct of its business.

(b) For purposes of applying the provisions of this subsection, the Government considers insurance provided by captive insurers (insurers owned by or under control of the contractor) as self-insurance, and charges for it shall comply with the provisions applicable to self-insurance costs in this subsection. However, if the captive insurer also sells insurance to the general public in substantial quantities and it can be demonstrated that the charge to the contractor is based on competitive market forces, the Government will consider the insurance as purchased insurance.

(c) Whether or not the contract is subject to CAS, self-insurance charges are allowable subject to paragraph (e) of this subsection and the following limitations:

(1) The contractor shall measure, assign, and allocate costs in accordance with 48 CFR 9904.416, Accounting for Insurance Costs.

(2) The contractor shall comply with (48 CFR) part 28. However, approval of a contractor's insurance program in accordance with part 28 does not constitute a determination as to the allowability of the program's cost.

(3) If purchased insurance is available, any self-insurance charge plus insurance administration expenses in excess of the cost of comparable purchased insurance plus associated insurance administration expenses is unallowable.

(4) Self-insurance charges for risks of catastrophic losses are unallowable (*see* 28.308(e)).

(d) Purchased insurance costs are allowable, subject to paragraph (e) of this subsection and the following limitations:

(1) For contracts subject to full CAS coverage, the contractor shall measure, assign, and allocate costs in accordance with 48 CFR 9904.416.

(2) For all contracts, premiums for insurance purchased from fronting insurance companies (insurance companies not related to the contractor but who reinsure with a captive insurer of the contractor) are unallowable to the extent they exceed the sum of—

(i) The amount that would have been allowed had the contractor insured directly with the captive insurer; and

(ii) Reasonable fronting company charges for services rendered.

(3) Actual losses are unallowable unless expressly provided for in the contract, except—

(i) Losses incurred under the nominal deductible provisions of purchased insurance, in keeping with sound business practice, are allowable; and

(ii) Minor losses, such as spoilage, breakage, and disappearance of small hand tools that occur in the ordinary course of business and that are not covered by insurance, are allowable.

(e) Self-insurance and purchased insurance costs are subject to the cost limitations in the following paragraphs:

(1) Costs of insurance required or approved pursuant to the contract are allowable.

(2) Costs of insurance maintained by the contractor in connection with the general conduct of its business are allowable subject to the following limitations:

(i) Types and extent of coverage shall follow sound business practice, and the rates and premiums shall be reasonable.

(ii) Costs allowed for business interruption or other similar insurance shall be limited to exclude coverage of profit.

(iii) The cost of property insurance premiums for insurance coverage in excess of the acquisition cost of the insured assets is allowable only when the contractor has a formal written policy assuring that in the event the insured property is involuntarily converted, the new asset shall be valued at the book value of the replaced asset plus or minus adjustments for differences between insurance proceeds and actual replacement cost. If the contractor does not have such a formal written policy, the cost of premiums for insurance coverage in excess of the acquisition cost of the insured asset is unallowable.

(iv) Costs of insurance for the risk of loss of Government property are allowable to the extent that—

(A) The contractor is liable for such loss;

(B) The contracting officer has not revoked the Government's assumption of risk (see 45.104(b)); and

(C) Such insurance does not cover loss of Government property that results from willful misconduct or lack of good faith on the part of any of the contractor's managerial personnel (as described in FAR 52.245–1 (h)(1)(ii)).

(v) Costs of insurance on the lives of officers, partners, proprietors, or employees are allowable only to the extent that the insurance represents additional compensation (*see* 31.205–6).

(3) The cost of insurance to protect the contractor against the costs of correcting its own defects in materials and workmanship is unallowable. However, insurance costs to cover fortuitous or casualty losses resulting from defects in materials or workmanship are allowable as a normal business expense.

(4) Premiums for retroactive or backdated insurance written to cover losses that have occurred and are known are unallowable.

(5) The Government is obligated to indemnify the contractor only to the extent authorized by law, as expressly provided for in the contract, except as provided in paragraph (d)(3) of this subsection.

(6) Late premium payment charges related to employee deferred compensation plan insurance incurred pursuant to section 4007 (29 U.S.C. 1307) or section 4023 (29 U.S.C. 1323) of the Employee Retirement Income Security Act of 1974 are unallowable.

[68 FR 69256, Dec. 11, 2003, as amended at 72 FR 27384, May 15, 2007; 75 FR 38679, July 2, 2010; 77 FR 12941, Mar. 2, 2012]

31.205–20 Interest and other financial costs.

Interest on borrowings (however represented), bond discounts, costs of financing and refinancing capital (net worth plus long-term liabilities), legal and professional fees paid in connection with preparing prospectuses, and costs of preparing and issuing stock rights are unallowable (but see 31.205–28). However, interest assessed by State or local taxing authorities under the conditions specified in 31.205–41(a)(3) is allowable.

[64 FR 51844, Sept. 24, 1999]

31.205–21 Labor relations costs.

(a) Costs incurred in maintaining satisfactory relations between the contractor and its employees (other than those made unallowable in paragraph (b) of this section), including costs of shop stewards, labor management committees, employee publications, and other related activities, are allowable.

(b) As required by Executive Order 13494, Economy in Government Contracting, costs of any activities undertaken to persuade employees, of any entity, to exercise or not to exercise, or concerning the manner of exercising, the right to organize and bargain collectively through representatives of the employees' own choosing are unallowable. Examples of unallowable costs under this paragraph include, but are not limited to, the costs of—

(1) Preparing and distributing materials;

(2) Hiring or consulting legal counsel or consultants;

(3) Meetings (including paying the salaries of the attendees at meetings held for this purpose); and

(4) Planning or conducting activities by managers, supervisors, or union representatives during work hours.

[76 FR 68043, Nov. 2, 2011]

31.205–22 Lobbying and political activity costs.

(a) Costs associated with the following activities are unallowable:

(1) Attempts to influence the outcomes of any Federal, State, or local election, referendum, initiative, or similar procedure, through in kind or cash contributions, endorsements, publicity, or similar activities;

(2) Establishing, administering, contributing to, or paying the expenses of a political party, campaign, political action committee, or other organization established for the purpose of influencing the outcomes of elections;

(3) Any attempt to influence (i) the introduction of Federal, state, or local legislation, or (ii) the enactment or modification of any pending Federal, state, or local legislation through communication with any member or employee of the Congress or state legislature (including efforts to influence state or local officials to engage in similar lobbying activity), or with any government official or employee in connection with a decision to sign or veto enrolled legislation;

(4) Any attempt to influence (i) the introduction of Federal, state, or local legislation, or (ii) the enactment or modification of any pending Federal, state, or local legislation by preparing, distributing or using publicity or propaganda, or by urging members of the general public or any segment thereof to contribute to or participate in any mass demonstration, march, rally, fund raising drive, lobbying campaign or letter writing or telephone campaign;

(5) Legislative liaison activities, including attendance at legislative sessions or committee hearings, gathering information regarding legislation, and analyzing the effect of legislation, when such activities are carried on in support of or in knowing preparation for an effort to engage in unallowable activities; or

(6) Costs incurred in attempting to improperly influence (see 3.401), either directly or indirectly, an employee or officer of the Executive branch of the Federal Government to give consideration to or act regarding a regulatory or contract matter.

(b) The following activities are excepted from the coverage of (a) above:

(1) Providing a technical and factual presentation of information on a topic directly related to the performance of a contract through hearing testimony, statements or letters to the Congress or a state legislature, or subdivision, member, or cognizant staff member thereof, in response to a documented

request (including a Congressional Record notice requesting testimony or statements for the record at a regularly scheduled hearing) made by the recipient member, legislative body or subdivision, or a cognizant staff member thereof; provided such information is readily obtainable and can be readily put in deliverable form; and further provided that costs under this section for transportation, lodging or meals are unallowable unless incurred for the purpose of offering testimony at a regularly scheduled Congressional hearing pursuant to a written request for such presentation made by the Chairman or Ranking Minority Member of the Committee or Subcommittee conducting such hearing.

(2) Any lobbying made unallowable by paragraph (a)(3) of this subsection to influence state or local legislation in order to directly reduce contract cost, or to avoid material impairment of the contractor's authority to perform the contract.

(3) Any activity specifically authorized by statute to be undertaken with funds from the contract.

(c) When a contractor seeks reimbursement for indirect costs, total lobbying costs shall be separately identified in the indirect cost rate proposal, and thereafter treated as other unallowable activity costs.

(d) Contractors shall maintain adequate records to demonstrate that the certification of costs as being allowable or unallowable (see 42.703–2) pursuant to this subsection complies with the requirements of this subsection.

(e) Existing procedures should be utilized to resolve in advance any significant questions or disagreements concerning the interpretation or application of this subsection.

[49 FR 18278, Apr. 27, 1984, as amended at 51 FR 12301, Apr. 9, 1986; 52 FR 19804, May 27, 1987; 60 FR 42660, Aug. 16, 1995; 61 FR 31657, June 20, 1996; 61 FR 67425, Dec. 20, 1996; 62 FR 237, Jan. 2, 1997]

31.205–23 Losses on other contracts.

An excess of costs over income under any other contract (including the contractor's contributed portion under cost-sharing contracts) is unallowable.

31.205–24 [Reserved]

31.205–25 Manufacturing and production engineering costs.

(a) The costs of manufacturing and production engineering effort as described in (1) through (4) below are all allowable:

(1) Developing and deploying new or improved materials, systems, processes, methods, equipment, tools and techniques that are or are expected to be used in producing products or services;

(2) Developing and deploying pilot production lines;

(3) Improving current production functions, such as plant layout, production scheduling and control, methods and job analysis, equipment capabilities and capacities, inspection techniques, and tooling analysis (including tooling design and application improvements); and

(4) Material and manufacturing producibility analysis for production suitability and to optimize manufacturing processes, methods, and techniques.

(b) This cost principle does not cover:

(1) Basic and applied research effort (as defined in 31.205–18(a)) related to new technology, materials, systems, processes, methods, equipment, tools and techniques. Such technical effort is governed by 31.205–18, Independent research and development costs and bid and proposal costs; and

(2) Development effort for manufacturing or production materials, systems, processes, methods, equipment, tools and techniques that are intended for sale is also governed by 31.205–18.

(c) Where manufacturing or production development costs are capitalized or required to be capitalized under the contractor's capitalization policies, allowable cost will be determined in accordance with the requirements of 31.205–11, Depreciation.

31.205–26 Material costs.

(a) Material costs include the costs of such items as raw materials, parts, subassemblies, components, and manufacturing supplies, whether purchased or manufactured by the contractor, and may include such collateral items

as inbound transportation and in-transit insurance. In computing material costs, the contractor shall consider reasonable overruns, spoilage, or defective work (unless otherwise provided in any contract provision relating to inspecting and correcting defective work).

(b) The contractor shall—

(1) Adjust the costs of material for income and other credits, including available trade discounts, refunds, rebates, allowances, and cash discounts, and credits for scrap, salvage, and material returned to vendors; and

(2) Credit such income and other credits either directly to the cost of the material or allocate such income and other credits as a credit to indirect costs. When the contractor can demonstrate that failure to take cash discounts was reasonable, the contractor does not need to credit lost discounts.

(c) Reasonable adjustments arising from differences between periodic physical inventories and book inventories may be included in arriving at costs; provided such adjustments relate to the period of contract performance.

(d) When materials are purchased specifically for and are identifiable solely with performance under a contract, the actual purchase cost of those materials should be charged to the contract. If material is issued from stores, any generally recognized method of pricing such material is acceptable if that method is consistently applied and the results are equitable.

(e) Allowance for all materials, supplies and services that are sold or transferred between any divisions, subdivisions, subsidiaries, or affiliates of the contractor under a common control shall be on the basis of cost incurred in accordance with this subpart. However, allowance may be at price when—

(1) It is the established practice of the transferring organization to price interorganizational transfers at other than cost for commercial work of the contractor or any division, subsidiary or affiliate of the contractor under a common control; and

(2) The item being transferred qualifies for an exception under 15.403–1(b) and the contracting officer has not determined the price to be unreasonable.

(f) When a commercial item under paragraph (e) of this subsection is transferred at a price based on a catalog or market price, the contractor—

(1) Should adjust the price to reflect the quantities being acquired; and

(2) May adjust the price to reflect the actual cost of any modifications necessary because of contract requirements.

[69 FR 34243, June 18, 2004]

31.205–27 Organization costs.

(a) Except as provided in paragraph (b) of this section, expenditures in connection with (1) planning or executing the organization or reorganization of the corporate structure of a business, including mergers and acquisitions, (2) resisting or planning to resist the reorganization of the corporate structure of a business or a change in the controlling interest in the ownership of a business, and (3) raising capital (net worth plus long-term liabilities), are unallowable. Such expenditures include but are not limited to incorporation fees and costs of attorneys, accountants, brokers, promoters and organizers, management consultants and investment counselors, whether or not employees of the contractor. Unallowable *reorganization* costs include the cost of any change in the contractor's financial structure, excluding administrative costs of short-term borrowings for working capital, resulting in alterations in the rights and interests of security holders, whether or not additional capital is raised.

(b) The cost of activities primarily intended to provide compensation will not be considered organizational costs subject to this subsection, but will be governed by 31.205–6. These activities include acquiring stock for (1) executive bonuses, (2) employee savings plans, and (3) employee stock ownership plans.

[48 FR 42301, Sept. 19, 1983, as amended at 53 FR 10830, Apr. 1, 1988]

31.205–28 Other business expenses.

The following types of recurring costs are allowable

(a) Registry and transfer charges resulting from changes in ownership of securities issued by the contractor.

(b) Cost of shareholders' meetings.
(c) Normal proxy solicitations.
(d) Preparing and publishing reports to shareholders.
(e) Preparing and submitting required reports and forms to taxing and other regulatory bodies.
(f) Incidental costs of directors' and committee meetings.
(g) Other similar costs.

[48 FR 42301, Sept. 19, 1983, as amended at 68 FR 28092, May 22, 2003]

31.205–29 Plant protection costs.

Costs of items such as (a) wages, uniforms, and equipment of personnel engaged in plant protection, (b) depreciation on plant protection capital assets, and (c) necessary expenses to comply with military requirements, are allowable.

31.205–30 Patent costs.

(a) The following patent costs are allowable to the extent that they are incurred as requirements of a Government contract (but see 31.205–33):
(1) Costs of preparing invention disclosures, reports, and other documents.
(2) Costs for searching the art to the extent necessary to make the invention disclosures.
(3) Other costs in connection with the filing and prosecution of a United States patent application where title or royalty-free license is to be conveyed to the Government.
(b) General counseling services relating to patent matters, such as advice on patent laws, regulations, clauses, and employee agreements, are allowable (but see 31.205–33).
(c) Other than those for general counseling services, patent costs not required by the contract are unallowable. (See also 31.205–37.)

31.205–31 Plant reconversion costs.

Plant reconversion costs are those incurred in restoring or rehabilitating the contractor's facilities to approximately the same condition existing immediately before the start of the Government contract, fair wear and tear excepted. Reconversion costs are unallowable except for the cost of removing Government property and the restoration or rehabilitation costs caused by such removal. However, in special circumstances where equity so dictates, additional costs may be allowed to the extent agreed upon before costs are incurred. Care should be exercised to avoid duplication through allowance as contingencies, additional profit or fee, or in other contracts.

31.205–32 Precontract costs.

Precontract costs means costs incurred before the effective date of the contract directly pursuant to the negotiation and in anticipation of the contract award when such incurrence is necessary to comply with the proposed contract delivery schedule. These costs are allowable to the extent that they would have been allowable if incurred after the date of the contract (see 31.109).

[48 FR 42301, Sept. 19, 1983, as amended at 66 FR 2131, Jan. 10, 2001]

31.205–33 Professional and consultant service costs.

(a) *Definition.* Professional and consultant services, as used in this subsection, means those services rendered by persons who are members of a particular profession or possess a special skill and who are not officers or employees of the contractor. Examples include those services acquired by contractors or subcontractors in order to enhance their legal, economic, financial, or technical positions. Professional and consultant services are generally acquired to obtain information, advice, opinions, alternatives, conclusions, recommendations, training, or direct assistance, such as studies, analyses, evaluations, liaison with Government officials, or other forms of representation.
(b) Costs of professional and consultant services are allowable subject to this paragraph and paragraphs (c) through (f) of this subsection when reasonable in relation to the services rendered and when not contingent upon recovery of the costs from the Government (but see 31.205–30 and 31.205–47).
(c) Costs of professional and consultant services performed under any of the following circumstances are unallowable:
(1) Services to improperly obtain, distribute, or use information or data protected by law or regulation (e.g.,

52.215–1(e), Restriction on Disclosure and Use of Data).

(2) Services that are intended to improperly influence the contents of solicitations, the evaluation of proposals or quotations, or the selection of sources for contract award, whether award is by the Government, or by a prime contractor or subcontractor.

(3) Any other services obtained, performed, or otherwise resulting in violation of any statute or regulation prohibiting improper business practices or conflicts of interest.

(4) Services performed which are not consistent with the purpose and scope of the services contracted for or otherwise agreed to.

(d) In determining the allowability of costs (including retainer fees) in a particular case, no single factor or any special combination of factors is necessarily determinative. However, the contracting officer shall consider the following factors, among others:

(1) The nature and scope of the service rendered in relation to the service required.

(2) The necessity of contracting for the service, considering the contractor's capability in the particular area.

(3) The past pattern of acquiring such services and their costs, particularly in the years prior to the award of Government contracts.

(4) The impact of Government contracts on the contractor's business.

(5) Whether the proportion of Government work to the contractor's total business is such as to influence the contractor in favor of incurring the cost, particularly when the services rendered are not of a continuing nature and have little relationship to work under Government contracts.

(6) Whether the service can be performed more economically by employment rather than by contracting.

(7) The qualifications of the individual or concern rendering the service and the customary fee charged, especially on non-Government contracts.

(8) Adequacy of the contractual agreement for the service (e.g., description of the service, estimate of time required, rate of compensation, termination provisions).

(e) Retainer fees, to be allowable, must be supported by evidence that—

(1) The services covered by the retainer agreement are necessary and customary;

(2) The level of past services justifies the amount of the retainer fees (if no services were rendered, fees are not automatically unallowable);

(3) The retainer fee is reasonable in comparison with maintaining an in-house capability to perform the covered services, when factors such as cost and level of expertise are considered; and

(4) The actual services performed are documented in accordance with paragraph (f) of this subsection.

(f) Fees for services rendered are allowable only when supported by evidence of the nature and scope of the service furnished (see also 31.205–38(c)). However, retainer agreements generally are not based on specific statements of work. Evidence necessary to determine that work performed is proper and does not violate law or regulation shall include—

(1) Details of all agreements (e.g., work requirements, rate of compensation, and nature and amount of other expenses, if any) with the individuals or organizations providing the services and details of actual services performed;

(2) Invoices or billings submitted by consultants, including sufficient detail as to the time expended and nature of the actual services provided; and

(3) Consultants' work products and related documents, such as trip reports indicating persons visited and subjects discussed, minutes of meetings, and collateral memoranda and reports.

[55 FR 52793, Dec. 21, 1990; 57 FR 60610, Dec. 21, 1992; 62 FR 51271, Sept. 30, 1997, as amended at 66 FR 2131; 68 FR 43872, July 24, 2003]

31.205–34 Recruitment costs.

(a) Subject to paragraph (b) of this subsection, the following costs are allowable:

(1) Costs of help-wanted advertising.

(2) Costs of operating an employment office needed to secure and maintain an adequate labor force.

(3) Costs of operating an aptitude and educational testing program.

(4) Travel costs of employees engaged in recuiting personnel.

(5) Travel costs of applicants for interviews.

(6) Costs for employment agencies, not in excess of standard commercial rates.

(b) Help-wanted advertising costs are unallowable if the advertising—

(1) Does not describe specific positions or classes of positions; or

(2) Includes material that is not relevant for recruitment purposes, such as extensive illustrations or descriptions of the company's products or capabilities.

[48 FR 42301, Sept. 19, 1983, as amended at 64 FR 10547, Mar. 4, 1999]

31.205–35 Relocation costs.

(a) Relocation costs are costs incident to the permanent change of assigned work location (for a period of 12 months or more) of an existing employee or upon recruitment of a new employee. The following types of relocation costs are allowable as noted, subject to the limitations in paragraphs (b) and (f) of this subsection:

(1) Costs of travel of the employee and members of the employee's immediate family (see 31.205–46) and transportation of the household and personal effects to the new location.

(2) Costs of finding a new home, such as advance trips by the employee or the spouse, or both, to locate living quarters, and temporary lodging during the transition period for the employee and members of the employee's immediate family.

(3) Closing costs incident to the disposition of the actual residence owned by the employee when notified of the transfer (*e.g.*, brokerage fees, legal fees, appraisal fees, points, and finance charges), except that these costs, when added to the costs described in paragraph (a)(4) of this subsection, shall not exceed 14 percent of the sales price of the property sold.

(4) Continuing costs of ownership of the vacant former actual residence being sold, such as maintenance of building and grounds (exclusive of fixing up expenses), utilities, taxes, property insurance, and mortgage interest, after the settlement date or lease date of a new permanent residence, except that these costs, when added to the costs described in paragraph (a)(3) of this subsection, shall not exceed 14 percent of the sales price of the property sold.

(5) Other necessary and reasonable expenses normally incident to relocation, such as disconnecting and connecting household appliances; automobile registration; driver's license and use taxes; cutting and fitting rugs, draperies, and curtains; forfeited utility fees and deposits; and purchase of insurance against damage to or loss of personal property while in transit.

(6) Costs incident to acquiring a home in the new work location, except that—

(i) These costs are not allowable for existing employees or newly recruited employees who were not homeowners before the relocation; and

(ii) The total costs shall not exceed 5 percent of the purchase price of the new home.

(7) Mortgage interest differential payments, except that these costs are not allowable for existing or newly recruited employees who, before the relocation, were not homeowners and the total payments are limited to an amount determined as follows:

(i) The difference between the mortgage interest rates of the old and new residences times the current balance of the old mortgage times 3 years.

(ii) When mortgage differential payments are made on a lump-sum basis and the employee leaves or is transferred again in less than 3 years, the amount initially recognized shall be proportionately adjusted to reflect payments only for the actual time of the relocation.

(8) Rental differential payments covering situations where relocated employees retain ownership of a vacated home in the old location and rent at the new location. The rented quarters at the new location must be comparable to those vacated, and the allowable differential payments may not exceed the actual rental costs for the new home, less the fair market rent for the vacated home times 3 years.

(9) Costs of canceling an unexpired lease.

(10) Payments for increased employee income or Federal Insurance Contributions Act (26 U.S.C. chapter 21) taxes

incident to allowable reimbursed relocation costs.

(11) Payments for spouse employment assistance.

(b) The costs described in paragraph (a) of this subsection must also meet the following criteria to be considered allowable:

(1) The move must be for the benefit of the employer.

(2) Reimbursement must be in accordance with an established policy or practice that is consistently followed by the employer and is designed to motivate employees to relocate promptly and economically.

(3) The costs must not be otherwise unallowable under subpart 31.2.

(4) Amounts to be reimbursed shall not exceed the employee's actual expenses, except as provided for in paragraphs (b)(5) and (b)(6) of this subsection.

(5) For miscellaneous costs of the type discussed in paragraph (a)(5) of this subsection, a lump-sum amount, not to exceed $5,000, may be allowed in lieu of actual costs.

(6)(i) Reimbursement on a lump-sum basis may be allowed for any of the following relocation costs when adequately supported by data on the individual elements (e.g., transportation, lodging, and meals) comprising the build-up of the lump-sum amount to be paid based on the circumstances of the particular employee's relocation:

(A) Costs of finding a new home, as discussed in paragraph (a)(2) of this subsection.

(B) Costs of travel to the new location, as discussed in paragraph (a)(1) of this subsection (but not costs for the transportation of household goods).

(C) Costs of temporary lodging, as discussed in paragraph (a)(2) of this subsection.

(ii) When reimbursement on a lump-sum basis is used, any adjustments to reflect actual costs are unallowable.

(c) The following types of costs are unallowable:

(1) Loss on the sale of a home.

(2) Costs incident to acquiring a home in the new location as follows:

(i) Real estate brokers' fees and commissions.

(ii) Costs of litigation.

(iii) Real and personal property insurance against damage or loss of property.

(iv) Mortgage life insurance.

(v) Owner's title policy insurance when such insurance was not previously carried by the employee on the old residence. (However, the cost of a mortgage title policy is allowable.)

(vi) Property taxes and operating or maintenance costs.

(3) Continuing mortgage principal payments on a residence being sold.

(4) Costs incident to furnishing equity or nonequity loans to employees or making arrangements with lenders for employees to obtain lower-than-market rate mortgage loans.

(d) If relocation costs for an employee have been allowed either as an allocable indirect or direct cost, and the employee resigns within 12 months for reasons within the employee's control, the contractor shall refund or credit the relocation costs to the Government.

(e) Subject to the requirements of paragraphs (a) through (d) above, the costs of family movements and of personnel movements of a special or mass nature are allowable. The cost, however, should be assigned on the basis of work (contracts) or time period benefited.

(f) Relocation costs (both outgoing and return) of employees who are hired for performance on specific contracts or long-term field projects are allowable if—

(1) The term of employment is 12 months or more;

(2) The employment agreement specifically limits the duration of employment to the time spent on the contract or field project for which the employee is hired;

(3) The employment agreement provides for return relocation to the employee's permanent and principal home immediately prior to the outgoing relocation, or other location of equal or lesser cost; and

(4) The relocation costs are determined under the rules of paragraphs (a) through (d) above. However, the costs to return employees, who are released from employment upon completion of field assignments pursuant to their employment agreements, are not subject

to the refund or credit requirement of paragraph (d).

[48 FR 42301, Sept. 19, 1983, as amended at 52 FR 9038, Mar. 20, 1987; 67 FR 43519, June 27, 2002; 70 FR 57470, Sept. 30, 2005]

31.205–36 Rental costs.

(a) This subsection is applicable to the cost of renting or leasing real or personal property acquired under ''operating leases'' as defined in Financial Accounting Standards Board's Accounting Standards Codification (FASB ASC) 840, Leases. (See 31.205–11 for Capital Leases.)

(b) The following costs are allowable:

(1) Rental costs under operating leases, to the extent that the rates are reasonable at the time of the lease decision, after consideration of (i) rental costs of comparable property, if any; (ii) market conditions in the area; (iii) the type, life expectancy, condition, and value of the property leased; (iv) alternatives available; and (v) other provisions of the agreement.

(2) Rental costs under a sale and leaseback arrangement only up to the amount the contractor would be allowed if the contractor retained title, computed based on the net book value of the asset on the date the contractor becomes a lessee of the property adjusted for any gain or loss recognized in accordance with 31.205–16(b).

(3) Charges in the nature of rent for property between any divisions, subsidiaries, or organization under common control, to the extent that they do not exceed the normal costs of ownership, such as depreciation, taxes, insurance, facilities capital cost of money, and maintenance (excluding interest or other unallowable costs pursuant to part 31), provided that no part of such costs shall duplicate any other allowed cost. Rental cost of personal property leased from any division, subsidiary, or affiliate of the contractor under common control, that has an established practice of leasing the same or similar property to unaffiliated lessees shall be allowed in accordance with subparagraph (b)(1) above.

(c) The allowability of rental costs under unexpired leases in connection with terminations is treated in 31.205–42(e).

[48 FR 42301, Sept. 19, 1983, as amended at 51 FR 2665, Jan. 17, 1986; 61 FR 69288, Dec. 31, 1996; 68 FR 69248, Dec. 11, 2003; 70 FR 33676, June 8, 2005; 77 FR 203, Jan. 3, 2012]

31.205–37 Royalties and other costs for use of patents.

(a) Royalties on a patent or amortization of the cost of purchasing a patent or patent rights necessary for the proper performance of the contract and applicable to contract products or processes are allowable unless—

(1) The Government has a license or the right to a free use of the patent;

(2) The patent has been adjudicated to be invalid, or has been administratively determined to be invalid;

(3) The patent is considered to be unenforceable; or

(4) The patent is expired.

(b) Care should be exercised in determining reasonableness when the royalties may have been arrived at as a result of less-than-arm's-length bargaining; e.g., royalties—

(1) Paid to persons, including corporations, affiliated with the contractor;

(2) Paid to unaffiliated parties, including corporations, under an agreement entered into in contemplation that a Government contract would be awarded; or

(3) Paid under an agreement entered into after the contract award.

(c) In any case involving a patent formerly owned by the contractor, the royalty amount allowed should not exceed the cost which would have been allowed had the contractor retained title.

(d) See 31.109 regarding advance agreements.

31.205–38 Selling costs.

(a) ''Selling'' is a generic term encompassing all efforts to market the contractor's products or services, some of which are covered specifically in other subsections of 31.205. The costs of any selling efforts other than those addressed in this cost principle are unallowable.

(b) Selling activity includes the following broad categories:

(1) *Advertising.* Advertising is defined at 31.205-1(b), and advertising costs are subject to the allowability provisions of 31.205–1(d) and (f).

(2) *Corporate image enhancement.* Corporate image enhancement activities, including broadly targeted sales efforts, other than advertising, are included within the definition of public relations at 31.205–1(a), and the costs of such efforts are subject to the allowability provisions at 31.205–1(e) and (f).

(3) *Bid and proposal costs.* Bid and proposal costs are defined at 31.205–18 and are subject to the allowability provisions of that subsection.

(4) *Market planning.* Market planning involves market research and analysis and general management planning concerned with development of the contractor's business. Long-range market planning costs are subject to the allowability provisions of 31.205–12. Other market planning costs are allowable.

(5) *Direct selling.* Direct selling efforts are those acts or actions to induce particular customers to purchase particular products or services of the contractor. Direct selling is characterized by person-to-person contact and includes such efforts as familiarizing a potential customer with the contractor's products or services, conditions of sale, service capabilities, etc. It also includes negotiation, liaison between customer and contractor personnel, technical and consulting efforts, individual demonstrations, and any other efforts having as their purpose the application or adaptation of the contractor's products or services for a particular customer's use. The cost of direct selling efforts is allowable.

(c) Notwithstanding any other provision of this subsection, sellers' or agents' compensation, fees, commissions, percentages, retainer or brokerage fees, whether or not contingent upon the award of contracts, are allowable only when paid to bona fide employees or established commercial or selling agencies maintained by the contractor for the purpose of securing business.

[68 FR 43872, July 24, 2003]

31.205–39 Service and warranty costs.

Service and warranty costs include those arising from fulfillment of any contractual obligation of a contractor to provide services such as installation, training, correcting defects in the products, replacing defective parts, and making refunds in the case of inadequate performance. When not inconsistent with the terms of the contract, service and warranty costs are allowable. However, care should be exercised to avoid duplication of the allowance as an element of both estimated product cost and risk.

[48 FR 42301, Sept. 19, 1983, as amended at 66 FR 2131, Jan. 10, 2001]

31.205–40 Special tooling and special test equipment costs.

(a) The terms *special tooling* and *special test equipment* are defined in 2.101(b).

(b) The cost of special tooling and special test equipment used in performing one or more Government contracts is allowable and shall be allocated to the specific Government contract or contracts for which acquired, except that the cost of (1) items acquired by the contractor before the effective date of the contract (or replacement of such items), whether or not altered or adapted for use in performing the contract, and (2) items which the contract schedule specifically excludes, shall be allowable only as depreciation or amortization.

(c) When items are disqualified as special tooling or special test equipment because with relatively minor expense they can be made suitable for general purpose use and have a value as such commensurate with their value as special tooling or special test equipment, the cost of adapting the items for use under the contract and the cost of returning them to their prior configuration are allowable.

[48 FR 42301, Sept. 19, 1983, as amended at 72 FR 27384, May 15, 2007]

31.205–41 Taxes.

(a) The following types of costs are allowable:

(1) Federal, State, and local taxes (see part 29), except as otherwise provided in paragraph (b) below that are required to be and are paid or accrued in accordance with generally accepted

accounting principles. Fines and penalties are not considered taxes.

(2) Taxes otherwise allowable under subparagraph (a)(1) above, but upon which a claim of illegality or erroneous assessment exists; provided the contractor, before paying such taxes—

(i) Promptly requests instructions from the contracting officer concerning such taxes; and

(ii) Takes all action directed by the contracting officer arising out of subparagraph (2)(i) above or an independent decision of the Government as to the existence of a claim of illegality or erroneous assessment, to (A) determine the legality of the assessment or (B) secure a refund of such taxes.

(3) Pursuant to subparagraph (a)(2) above, the reasonable costs of any action taken by the contractor at the direction or with the concurrence of the contracting officer. Interest or penalties incurred by the contractor for non-payment of any tax at the direction of the contracting officer or by reason of the failure of the contracting officer to ensure timely direction after a prompt request.

(4) The Environmental Tax found at section 59A of the Internal Revenue Code, also called the ''Superfund Tax.''

(b) The following types of costs are not allowable:

(1) Federal income and excess profits taxes.

(2) Taxes in connection with financing, refinancing, refunding operations, or reorganizations (see 31.205–20 and 31.205–27).

(3) Taxes from which exemptions are available to the contractor directly, or available to the contractor based on an exemption afforded the Government, except when the contracting officer determines that the administrative burden incident to obtaining the exemption outweighs the corresponding benefits accruing to the Government. When partial exemption from a tax is attributable to Government contract activity, taxes charged to such work in excess of that amount resulting from application of the preferential treatment are unallowable. These provisions intend that tax preference attributable to Government contract activity be realized by the Government. The term *exemption* means freedom from taxation in whole or in part and includes a tax abatement or reduction resulting from mode of assessment, method of calculation, or otherwise.

(4) Special assessments on land that represent capital improvements.

(5) Taxes (including excises) on real or personal property, or on the value, use, possession or sale thereof, which is used solely in connection with work other than on Government contracts (see paragraph (c) below).

(6) Any excise tax in subtitle D, chapter 43 of the Internal Revenue Code of 1986, as amended. That chapter includes excise taxes imposed in connection with qualified pension plans, welfare plans, deferred compensation plans, or other similar types of plans.

(7) Income tax accruals designed to account for the tax effects of differences between taxable income and pretax income as reflected by the books of account and financial statements.

(8) Any tax imposed under 26 U.S.C. 5000C.

(c) Taxes on property (see subparagraph (b)(5) above) used solely in connection with either non-Government or Government work should be considered directly applicable to the respective category of work unless the amounts involved are insignificant or comparable results would otherwise be obtained; e.g., taxes on contractor-owned work-in-process which is used solely in connection with non-Government work should be allocated to such work; taxes on contractor-owned work-in-process inventory (and Government-owned work-in-process inventory when taxed) used solely in connection with Government work should be charged to such work. The cost of taxes incurred on property used in both Government and non-Government work shall be apportioned to all such work based upon the use of such property on the respective final cost objectives.

(d) Any taxes, interest, or penalties that were allowed as contract costs and are refunded to the contractor shall be credited or paid to the Government in the manner it directs. If a contractor or subcontractor obtains a foreign tax credit that reduces its U.S. Federal income tax return because of the payment of any tax or duty allowed as

contract costs, and if those costs were reimbursed by a foreign government, the amount of the reduction shall be paid to the Treasurer of the United States at the time the Federal income tax return is filed. However, any interest actually paid or credited to a contractor incident to a refund of tax, interest, or penalty shall be paid or credited to the Government only to the extent that such interest accrued over the period during which the contractor had been reimbursed by the Government for the taxes, interest, or penalties.

[48 FR 42301, Sept. 19, 1983, as amended at 55 FR 3884, Feb. 5, 1990; 55 FR 52794, Dec. 21, 1990; 61 FR 2641, Jan. 26, 1996; 78 FR 6191, Jan. 29, 2013]

31.205–42 Termination costs.

Contract terminations generally give rise to the incurrence of costs or the need for special treatment of costs that would not have arisen had the contract not been terminated. The following cost principles peculiar to termination situations are to be used in conjunction with the other cost principles in subpart 31.2:

(a) *Common items.* The costs of items reasonably usable on the contractor's other work shall not be allowable unless the contractor submits evidence that the items could not be retained at cost without sustaining a loss. The contracting officer should consider the contractor's plans and orders for current and planned production when determining if items can reasonably be used on other work of the contractor. Contemporaneous purchases of common items by the contractor shall be regarded as evidence that such items are reasonably usable on the contractor's other work. Any acceptance of common items as allocable to the terminated portion of the contract should be limited to the extent that the quantities of such items on hand, in transit, and on order are in excess of the reasonable quantitative requirements of other work.

(b) *Costs continuing after termination.* Despite all reasonable efforts by the contractor, costs which cannot be discontinued immediately after the effective date of termination are generally allowable. However, any costs continuing after the effective date of the termination due to the negligent or willful failure of the contractor to discontinue the costs shall be unallowable.

(c) *Initial costs.* Initial costs, including starting load and preparatory costs, are allowable as follows:

(1) Starting load costs not fully absorbed because of termination are nonrecurring labor, material, and related overhead costs incurred in the early part of production and result from factors such as—

(i) Excessive spoilage due to inexperienced labor;

(ii) Idle time and subnormal production due to testing and changing production methods;

(iii) Training; and

(iv) Lack of familiarity or experience with the product, materials, or manufacturing processes.

(2) Preparatory costs incurred in preparing to perform the terminated contract include such costs as those incurred for initial plant rearrangement and alterations, management and personnel organization, and production planning. They do not include special machinery and equipment and starting load costs.

(3) When initial costs are included in the settlement proposal as a direct charge, such costs shall not also be included in overhead. Initial costs attributable to only one contract shall not be allocated to other contracts.

(4) If initial costs are claimed and have not been segregated on the contractor's books, they shall be segregated for settlement purposes from cost reports and schedules reflecting that high unit cost incurred during the early stages of the contract.

(5) If the settlement proposal is on the inventory basis, initial costs should normally be allocated on the basis of total end items called for by the contract immediately before termination; however, if the contract includes end items of a diverse nature, some other equitable basis may be used, such as machine or labor hours.

(d) *Loss of useful value.* Loss of useful value of special tooling, and special machinery and equipment is generally allowable, provided—

(1) The special tooling, or special machinery and equipment is not reasonably capable of use in the other work of the contractor;

(2) The Government's interest is protected by transfer of title or by other means deemed appropriate by the contracting officer; and

(3) The loss of useful value for any one terminated contract is limited to that portion of the acquisition cost which bears the same ratio to the total acquisition cost as the terminated portion of the contract bears to the entire terminated contract and other Government contracts for which the special tooling, or special machinery and equipment was acquired.

(e) *Rental under unexpired leases.* Rental costs under unexpired leases, less the residual value of such leases, are generally allowable when shown to have been reasonably necessary for the performance of the terminated contract, if—

(1) The amount of rental claimed does not exceed the reasonable use value of the property leased for the period of the contract and such further period as may be reasonable; and

(2) The contractor makes all reasonable efforts to terminate, assign, settle, or otherwise reduce the cost of such lease.

(f) *Alterations of leased property.* The cost of alterations and reasonable restorations required by the lease may be allowed when the alterations were necessary for performing the contract.

(g) *Settlement expenses.* (1) Settlement expenses, including the following, are generally allowable:

(i) Accounting, legal, clerical, and similar costs reasonably necessary for—

(A) The preparation and presentation, including supporting data, of settlement claims to the contracting officer; and

(B) The termination and settlement of subcontracts.

(ii) Reasonable costs for the storage, transportation, protection, and disposition of property acquired or produced for the contract.

(iii) Indirect costs related to salary and wages incurred as settlement expenses in (i) and (ii); normally, such indirect costs shall be limited to payroll taxes, fringe benefits, occupancy costs, and immediate supervision costs.

(2) If settlement expenses are significant, a cost account or work order shall be established to separately identify and accumulate them.

(h) *Subcontractor claims.* Subcontractor claims, including the allocable portion of the claims common to the contract and to other work of the contractor, are generally allowable. An appropriate share of the contractor's indirect expense may be allocated to the amount of settlements with subcontractors; provided, that the amount allocated is reasonably proportionate to the relative benefits received and is otherwise consistent with 31.201–4 and 31.203(d). The indirect expense so allocated shall exclude the same and similar costs claimed directly or indirectly as settlement expenses.

[48 FR 42301, Sept. 19, 1983, as amended at 69 FR 17767, Apr. 5, 2004]

31.205–43 Trade, business, technical, and professional activity costs.

The following types of costs are allowable:

(a) Memberships in trade, business, technical, and professional organizations.

(b) Subscriptions to trade, business, professional, or other technical periodicals.

(c) When the principal purpose of a meeting, convention, conference, symposium, or seminar is the dissemination of trade, business, technical or professional information or the stimulation of production or improved productivity:

(1) Costs of organizing, setting up, and sponsoring the meetings, conventions, symposia, etc., including rental of meeting facilities, transportation, subsistence, and incidental costs;

(2) Costs of attendance by contractor employees, including travel costs (see 31.205–46); and

(3) Costs of attendance by individuals who are not employees of the contractor, *provided*;

(i) Such costs are not also reimbursed to the individual by the employing company or organization, and

(ii) The individual's attendance is essential to achieve the purpose of the

conference, meeting, convention, symposium, etc.

[48 FR 42301, Sept. 19, 1983, as amended at 53 FR 27467, July 20, 1988; 60 FR 42660, Aug. 16, 1995]

31.205–44 Training and education costs.

Costs of training and education that are related to the field in which the employee is working or may reasonably be expected to work are allowable, except as follows:

(a) Overtime compensation for training and education is unallowable.

(b) The cost of salaries for attending undergraduate level classes or part-time graduate level classes during working hours is unallowable, except when unusual circumstances do not permit attendance at such classes outside of regular working hours.

(c) Costs of tuition, fees, training materials and textbooks, subsistence, salary, and any other payments in connection with full-time graduate level education are unallowable for any portion of the program that exceeds two school years or the length of the degree program, whichever is less.

(d) Grants to educational or training institutions, including the donation of facilities or other properties, scholarships, and fellowships are considered contributions and are unallowable.

(e) Training or education costs for other than bona fide employees are unallowable, except that the costs incurred for educating employee dependents (primary and secondary level studies) when the employee is working in a foreign country where suitable public education is not available may be included in overseas differential pay.

(f) Contractor contributions to college savings plans for employee dependents are unallowable.

[70 FR 57472, Sept. 30, 2005]

31.205–45 [Reserved]

31.205–46 Travel costs.

(a) *Costs for transportation, lodging, meals, and incidental expenses.* (1) Costs incurred by contractor personnel on official company business are allowable, subject to the limitations contained in this subsection. Costs for transportation may be based on mileage rates, actual costs incurred, or on a combination thereof, provided the method used results in a reasonable charge. Costs for lodging, meals, and incidental expenses may be based on per diem, actual expenses, or a combination thereof, provided the method used results in a reasonable charge.

(2) Except as provided in paragraph (a)(3) of this section, costs incurred for lodging, meals, and incidental expenses (as defined in the regulations cited in paragraphs (a)(2)(i) through (iii) of this section) shall be considered to be reasonable and allowable only to the extent that they do not exceed on a daily basis the maximum per diem rates in effect at the time of travel as set forth in the—

(i) Federal Travel Regulation, prescribed by the General Services Administration, for travel in the contiguous United States, available on a subscription basis from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402, Stock No. 922–002–00000–2;

(ii) Joint Travel Regulations, Volume 2, DoD Civilian Personnel, Appendix A, prescribed by the Department of Defense, for travel in Alaska, Hawaii, and outlying areas of the United States, available on a subscription basis from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402, Stock No. 908–010–00000–1; or

(iii) Standarized Regulations (Government Civilians, Foreign Areas), section 925, *Maximum Travel Per Diem Allowances of Foreign Areas*, prescribed by the Department of State, for travel in areas not covered in paragraphs (a)(2)(i) and (ii) of this section, available on a subscription basis from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402, Stock No. 744–088–00000–0.

(3) In special or unusual situations, actual costs in excess of the above-referenced maximum per diem rates are allowable provided that such amounts do not exceed the higher amounts authorized for Federal civilian employees as permitted in the regulations referenced in paragraph (a)(2)(i), (ii), or (iii) of this section. For such higher

amounts to be allowable, all of the following conditions must be met:

(i) One of the conditions warranting approval of the actual expense method, as set forth in the regulations referred in paragraph (a)(2)(i), (ii), or (iii) of this section, must exist.

(ii) A written justification for use of the higher amounts must be approved by an officer of the contractor's organization or designee to ensure that the authority is properly administered and controlled to prevent abuse.

(iii) If it becomes necessary to exercise the authority to use the higher actual expense method repetitively or on a continuing basis in a particular area, the contractor must obtain advance approval from the contracting officer.

(iv) Documentation to support actual costs incurred shall be in accordance with the contractor's established practices, subject to paragraph (a)(7) of this section, and provided that a receipt is required for each expenditure of $75.00 or more. The approved justification required by paragraph (a)(3)(ii) of this section and, if applicable, paragraph (a)(3)(iii) of this section must be retained.

(4) Paragraphs (a)(2) and (3) of this section and paragraphs(a)(2)(i), (ii), and (iii) of this sectiondo not incorporate the regulations cited in paragraphs (a)(2)(i), (ii), and (iii) of this section in their entirety. Only the maximum per diem rates, the definitions of lodging, meals, and incidental expenses, and the regulatory coverage dealing with special or unusual situations are incorporated herein.

(5) An advance agreement (see 31.109) with respect to compliance with paragraphs (a)(2) and (3) of this section may be useful and desirable.

(6) The maximum per diem rates referenced in subparagraph (a)(2) of this subsection generally would not constitute a reasonable daily charge—

(i) When no lodging costs are incurred; and/or

(ii) On partial travel days (e.g., day of departure and return).

Appropriate downward adjustments from the maximum per diem rates would normally be required under these circumstances. While these adjustments need not be calculated in accordance with the Federal Travel Regulation or Joint Travel Regulations, they must result in a reasonable charge.

(7) Costs shall be allowable only if the following information is documented:

(i) Date and place (city, town, or other similar designation) of the expenses;

(ii) Purpose of the trip; and

(iii) Name of person on trip and that person's title or relationship to the contractor.

(b) Airfare costs in excess of the lowest priced airfare available to the contractor during normal business hours are unallowable except when such accommodations require circuitous routing, require travel during unreasonable hours, excessively prolong travel, result in increased cost that would offset transportation savings, are not reasonably adequate for the physical or medical needs of the traveler, or are not reasonably available to meet mission requirements. However, in order for airfare costs in excess of the above airfare to be allowable, the applicable condition(s) set forth above must be documented and justified.

(c)(1) *Cost of travel by contractor-owned, -leased, or -chartered aircraft,* as used in this paragraph (c), includes the cost of lease, charter, operation (including personnel), maintenance, depreciation, insurance, and other related costs.

(2) The costs of travel by contractor-owned, -leased, or -chartered aircraft are limited to the allowable airfare described in paragraph (b) of this section for the flight destination unless travel by such aircraft is specifically required by contract specification, term, or condition, or a higher amount is approved by the contracting officer. A higher amount may be agreed to when one or more of the circumstances for justifying higher than allowable airfare listed in paragraph (b) of this section are applicable, or when an advance agreement under paragraph (c)(3) of this section has been executed. In all cases, travel by contractor-owned, -leased, or -chartered aircraft must be fully documented and justified. For each contractor-owned, -leased, or -chartered aircraft used for any business purpose which is charged

or allocated, directly or indirectly, to a Government contract, the contractor must maintain and make available manifest/logs for all flights on such company aircraft. As a minimum, the manifest/log shall indicate—

(i) Date, time, and points of departure;

(ii) Destination, date, and time of arrival;

(iii) Name of each passenger and relationship to the contractor;

(iv) Authorization for trip; and

(v) Purpose of trip.

(3) Where an advance agreement is proposed (see 31.109), consideration may be given to the following:

(i) Whether scheduled commercial airlines or other suitable, less costly, travel facilities are available at reasonable times, with reasonable frequency, and serve the required destinations conveniently.

(ii) Whether increased flexibility in scheduling results in time savings and more effective use of personnel that would outweigh additional travel costs.

(d) Costs of contractor-owned or leased automobiles, as used in this paragraph, include the costs of lease, operation (including personnel), maintenance, depreciation, insurance, etc. These costs are allowable, if reasonable, to the extent that the automobiles are used for company business. That portion of the cost of company-furnished automobiles that relates to personal use by employees (including transportation to and from work) is compensation for personal services and is unallowable as stated in 31.205–6(m)(2).

[48 FR 42301, Sept. 19, 1983, as amended at 51 FR 12301, Apr. 9, 1986; 51 FR 27489, July 31, 1986; 51 FR 36972, Oct. 16, 1986; 56 FR 41739, Aug. 22, 1991; 57 FR 20377, May 12, 1992; 61 FR 31657, June 20, 1996; 62 FR 40237, July 25, 1997; 62 FR 64933, Dec. 9, 1997; 68 FR 28083, May 22, 2003; 68 FR 56688, Oct. 1, 2003; 74 FR 65614, Dec. 10, 2009; 84 FR 19847, May 6, 2019]

31.205–47 Costs related to legal and other proceedings.

(a) *Definitions.* As used in this subsection—

Costs include, but are not limited to, administrative and clerical expenses; the costs of legal services, whether performed by in-house or private counsel; the costs of the services of accountants, consultants, or others retained by the contractor to assist it; costs of employees, officers, and directors; and any similar costs incurred before, during, and after commencement of a judicial or administrative proceeding which bears a direct relationship to the proceedings.

Fraud means —

(1) Acts of fraud or corruption or attempts to defraud the Government or to corrupt its agents;

(2) Acts which constitute a cause for debarment or suspension under 9.406–2(a) and 9.407–2(a); and

(3) Acts which violate the False Claims Act, 31 U.S.C., sections 3729–3731, or 41 U.S.C. chapter 87, Kickbacks.

Penalty does not include restitution, reimbursement, or compensatory damages.

Proceeding includes an investigation.

(b) Costs incurred in connection with any proceeding brought by: A Federal, State, local, or foreign government for a violation of, or failure to comply with, law or regulation by the contractor (including its agents or employees) (41 U.S.C. 4310 and 10 U.S.C. 2324(k)); a contractor or subcontractor employee submitting a whistleblower complaint of reprisal in accordance with 41 U.S.C. 4712 or 10 U.S.C. 2409; or a third party in the name of the United States under the False Claims Act, 31 U.S.C. 3730, are unallowable if the result is—

(1) In a criminal proceeding, a conviction;

(2) In a civil or administrative proceeding, either a finding of contractor liability where the proceeding involves an allegation of fraud or similar misconduct; or imposition of a monetary penalty, or an order issued by the agency head to the contractor or subcontractor to take corrective action under 41 U.S.C. 4712 or 10 U.S.C. 2409, where the proceeding does not involve an allegation of fraud or similar misconduct;

(3) A final decision by an appropriate official of an executive agency to:

(i) Debar or suspend the contractor;

(ii) Rescind or void a contract; or

(iii) Terminate a contract for default by reason of a violation or failure to comply with a law or regulation;

(4) Disposition of the matter by consent or compromise if the proceeding could have led to any of the outcomes listed in subparagraphs (b) (1) through (3) of this subsection (but see paragraphs (c) and (d) of this subsection); or

(5) Not covered by subparagraphs (b) (1) through (4) of this subsection, but where the underlying alleged contractor misconduct was the same as that which led to a different proceeding whose costs are unallowable by reason of subparagraphs (b) (1) through (4) of this subsection.

(c)(1) To the extent they are not otherwise unallowable, costs incurred in connection with any proceeding under paragraph (b) of this subsection commenced by the United States that is resolved by consent or compromise pursuant to an agreement entered into between the contractor and the United States, and which are unallowable solely because of paragraph (b) of this subsection, may be allowed to the extent specifically provided in such agreement.

(2)(i) In the event of a settlement of any proceeding brought by a third party under the False Claims Act in which the United States did not intervene, reasonable costs incurred by the contractor in connection with such a proceeding that are not otherwise unallowable by regulation or by separate agreement with the United States may be allowed if the contracting officer, in consultation with his or her legal advisor, determines that there was very little likelihood that the third party would have been successful on the merits.

(ii) In the event of disposition by consent or compromise of a proceeding brought by a whistleblower for alleged reprisal in accordance with 41 U.S.C. 4712 or 10 U.S.C. 2409, reasonable costs incurred by a contractor or subcontractor in connection with such a proceeding that are not otherwise unallowable by regulation or by agreement with the United States may be allowed if the contracting officer, in consultation with his or her legal advisor, determined that there was very little likelihood that the claimant would have been successful on the merits.

(d) To the extent that they are not otherwise unallowable, costs incurred in connection with any proceeding under paragraph (b) of this subsection commenced by a State, local, or foreign government may be allowable when the contracting officer (or other official specified in agency procedures) determines, that the costs were incurred either:

(1) As a direct result of a specific term or condition of a Federal contract; or

(2) As a result of compliance with specific written direction of the cognizant contracting officer.

(e) Costs incurred in connection with proceedings described in paragraph (b) of this subsection, but which are not made unallowable by that paragraph, may be allowable to the extent that:

(1) The costs are reasonable in relation to the activities required to deal with the proceeding and the underlying cause of action;

(2) The costs are not otherwise recovered from the Federal Government or a third party, either directly as a result of the proceeding or otherwise; and

(3) The percentage of costs allowed does not exceed the percentage determined to be appropriate considering the complexity of procurement litigation, generally accepted principles governing the award of legal fees in civil actions involving the United States as a party, and such other factors as may be appropriate. Such percentage shall not exceed 80 percent. Agreements reached under paragraph (c) of this subsection shall be subject to this limitation. If, however, an agreement described in paragraph (c)(1) of this subsection explicitly states the amount of otherwise allowable incurred legal fees and limits the allowable recovery to 80 percent or less of the stated legal fees, no additional limitation need be applied. The amount of reimbursement allowed for legal costs in connection with any proceeding described in paragraph (c)(2) of this subsection shall be determined by the cognizant contracting officer, but shall not exceed 80 percent of otherwise allowable legal costs incurred.

(f) Costs not covered elsewhere in this subsection are unallowable if incurred in connection with—

(1) Defense against Federal Government claims or appeals or the prosecution of claims or appeals against the Federal Government (see 2.101).

(2) Organization, reorganization, (including mergers and acquisitions) or resisting mergers and acquisitions (see also 31.205–27).

(3) Defense of antitrust suits.

(4) Defense of suits brought by employees or ex-employees of the contractor under section 2 of the Major Fraud Act of 1988 where the contractor was found liable or settled.

(5) Costs of legal, accounting, and consultant services and directly associated costs incurred in connection with the defense or prosecution of lawsuits or appeals between contractors arising from either (i) an agreement or contract concerning a teaming arrangement, a joint venture, or similar arrangement of shared interest; or (ii) dual sourcing, coproduction, or similar programs, are unallowable, except when (A) incurred as a result of compliance with specific terms and conditions of the contract or written instructions from the contracting officer, or (B) when agreed to in writing by the contracting officer.

(6) Patent infringement litigation, unless otherwise provided for in the contract.

(7) Representation of, or assistance to, individuals, groups, or legal entities which the contractor is not legally bound to provide, arising from an action where the participant was convicted of violation of a law or regulation or was found liable in a civil or administrative proceeding.

(8) Protests of Federal Government solicitations or contract awards, or the defense against protests of such solicitations or contract awards, unless the costs of defending against a protest are incurred pursuant to a written request from the cognizant contracting officer.

(9) A Congressional investigation or inquiry into an issue that is the subject matter of a proceeding resulting in a disposition as described in paragraphs (b)(1) through (5) of this section (see 10 U.S.C. 2324(e)(1)(Q)).

(g) Costs which may be unallowable under 31.205–47, including directly associated costs, shall be segregated and accounted for by the contractor separately. During the pendency of any proceeding covered by paragraph (b) and subparagraphs (f)(4) and (f)(7) of this subsection, the contracting officer shall generally withhold payment of such costs. However, if in the best interests of the Government, the contracting officer may provide for conditional payment upon provision of adequate security, or other adequate assurance, and agreement by the contractor to repay all unallowable costs, plus interest, if the costs are subsequently determined to be unallowable.

[48 FR 42301, Sept. 19, 1983]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting section 31.205–47, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at *www.govinfo.gov*.

31.205–48 Research and development costs.

Research and development, as used in this subsection, means the type of technical effort described in 31.205–18 but sponsored by a grant or required in the performance of a contract. When costs are incurred in excess of either the price of a contract or amount of a grant for research and development effort, the excess is unallowable under any other Government contract.

[65 FR 46072, July 26, 2000, as amended at 68 FR 28092, May 22, 2003]

31.205–49 Goodwill.

Goodwill, an unidentifiable intangible asset, originates under the purchase method of accounting for a business combination when the price paid by the acquiring company exceeds the sum of the identifiable individual assets acquired less liabilities assumed, based upon their fair values. The excess is commonly referred to as goodwill. Goodwill may arise from the acquisition of a company as a whole or a portion thereof. Any costs for amortization, expensing, write-off, or write-down of goodwill (however represented) are unallowable.

[49 FR 26743, June 29, 1984]

31.205–50 [Reserved]

31.205–51 Costs of alcoholic beverages.

Costs of alcoholic beverages are unallowable.

[51 FR 12302, Apr. 9, 1986]

31.205–52 Asset valuations resulting from business combinations.

(a) For tangible capital assets, when the purchase method of accounting for a business combination is used, whether or not the contract or subcontract is subject to CAS, the allowable depreciation and cost of money shall be based on the capitalized asset values measured and assigned in accordance with 48 CFR 9904.404–50(d), if allocable, reasonable, and not otherwise unallowable.

(b) For intangible capital assets, when the purchase method of accounting for a business combination is used, allowable amortization and cost of money shall be limited to the total of the amounts that would have been allowed had the combination not taken place.

[63 FR 9068, Feb. 23, 1998]

Subpart 31.3—Contracts With Educational Institutions

31.301 Purpose.

This subpart provides the principles for determining the cost of research and development, training, and other work performed by educational institutions under contracts with the Government.

31.302 General.

The OMB Uniform Guidance at 2 CFR part 200, subpart E and appendix III, provides principles for determining the costs applicable to research and development, training, and other work performed by educational institutions (defined as institutions of higher education in the OMB Uniform Guidance at 2 CFR part 200, subpart A, and 20 U.S.C. 1001) under contracts with the Government.

[81 FR 45853, July 14, 2016]

31.303 Requirements.

(a) Contracts that refer to this subpart 31.3 for determining allowable costs under contracts with educational institutions (defined as institutions of higher education in the OMB Uniform Guidance at 2 CFR part 200, subpart A, and 20 U.S.C. 1001) shall be deemed to refer to, and shall have the allowability of costs determined by the contracting officer in accordance with, the OMB Uniform Guidance at 2 CFR part 200, subpart E and appendix III, in effect on the date of the contract.

(b) Agencies are not expected to place additional restrictions on individual items of cost.

[48 FR 42301, Sept. 19, 1983, as amended at 81 FR 45853, July 14, 2016]

Subparts 31.4–31.5 [Reserved]

Subpart 31.6—Contracts With State, Local, and Federally Recognized Indian Tribal Governments

31.601 Purpose.

This subpart provides the principles for determining allowable cost of contracts and subcontracts with State, local, and federally recognized Indian tribal governments.

31.602 General.

The OMB Uniform Guidance at 2 CFR part 200, subpart E and appendices V and VII sets forth the principles for determining the allowable costs of contracts and subcontracts with State, local, and federally recognized Indian tribal governments. These principles are for cost determination and are not intended to identify the circumstances or dictate the extent of Federal and State or local participation in financing a particular contract.

[48 FR 42301, Sept. 19, 1983, as amended at 81 FR 45853, July 14, 2016]

31.603 Requirements.

(a) Contracts that refer to this subpart 31.6 for determining allowable costs under contracts with State, local and Indian tribal governments shall be deemed to refer to, and shall have the allowability of costs determined by the

contracting officer in accordance with, the OMB Uniform Guidance at 2 CFR part 200, subpart E and appendices V and VII, in effect on the date of the contract.

(b) Agencies are not expected to place additional restrictions on individual items of cost. However, under 10 U.S.C. 2324, 41 U.S.C. 4304, 31 U.S.C. 3730, and 41 U.S.C. 4310, the following costs are unallowable:

(1) Costs of entertainment, including amusement, diversion, and social activities, and any costs directly associated with such costs (such as tickets to shows or sports events, meals, lodging, rentals, transportation, and gratuities).

(2) Costs incurred to influence (directly or indirectly) legislative action on any matter pending before Congress, a State legislature, or a legislative body of a political subdivision of a State.

(3) Costs incurred in defense of any civil or criminal fraud proceeding or similar proceeding (including filing of any false certification) brought by the United States where the contractor is found liable or has pleaded *nolo contendere* to a charge of fraud or similar proceeding (including filing of a false certification).

(4) Payments of fines and penalties resulting from violations of, or failure to comply with, Federal, state, local, or foreign laws and regulations, except when incurred as a result of compliance with specific terms and conditions of the contract or specific written instructions from the contracting officer authorizing in advance such payments in accordance with applicable regulations in the FAR or an executive agency supplement to the FAR.

(5) Costs of any membership in any social, dining, or country club or organization.

(6) Costs of alcoholic beverages.

(7) Contributions or donations, regardless of the recipient.

(8) Costs of advertising designed to promote the contractor or its products.

(9) Costs of promotional items and memorabilia, including models, gifts, and souvenirs.

(10) Costs for travel by commercial aircraft which exceed the amount of the standard commercial fare.

(11) Costs incurred in making any payment (commonly known as a ''golden parachute payment'') which is—

(i) In an amount in excess of the normal severance pay paid by the contractor to an employee upon termination of employment; and

(ii) Is paid to the employee contingent upon, and following, a change in management control over, or ownership of, the contractor or a substantial portion of the contractor's assets.

(12) Costs of commercial insurance that protects against the costs of the contractor for correction of the contractor's own defects in materials or workmanship.

(13) Costs of severance pay paid by the contractor to foreign nationals employed by the contractor under a service contract performed outside the United States, to the extent that the amount of the severance pay paid in any case exceeds the amount paid in the industry involved under the customary or prevailing practice for firms in that industry providing similar services in the United States, as determined by regulations in the FAR or in an executive agency supplement to the FAR.

(14) Costs of severance pay paid by the contractor to a foreign national employed by the contractor under a service contract performed in a foreign country if the termination of the employment of the foreign national is the result of the closing of, or curtailment of activities at, a United States facility in that country at the request of the government of that country.

(15) Unless any of the exceptions at 31.205–47(c) or (d) apply, costs incurred by a contractor in connection with any criminal, civil, or administrative proceedings that result in dispositions described at 31.205–47(b)(1) through (5) commenced by: A Federal, State, local, or foreign government, for a violation of, or failure to comply with, law or regulation by the contractor (including its agents or employees); a contractor or subcontractor employee submitting a whistleblower complaint of reprisal in accordance with 41 U.S.C. 4712 or 10 U.S.C. 2409; or a third party in the name of the United States under the False Claims Act, 31 U.S.C. 3730. For

any such proceeding that does not result in a disposition described at 31.205–47(b)(1) through (5), or to which 31.205–47(c) exceptions apply, the cost of that proceeding shall be subject to the limitations in 31.205–47(e).

(16) Costs incurred in connection with a Congressional investigation or inquiry into an issue that is the subject matter of a proceeding resulting in a disposition as described at 31.205–47(b)(1) through (5).

[48 FR 42301, Sept. 19, 1983, as amended at 42660, Aug. 16, 1995; 79 FR 24211, Apr. 29, 2014; 81 FR 45853, July 14, 2016; 82 FR 4734, Jan. 13, 2017]

Subpart 31.7—Contracts With Nonprofit Organizations

31.701 Purpose.

This subpart provides the principles for determining the cost applicable to work performed by nonprofit organizations under contracts with the Government. A nonprofit organization, for purpose of identification, is defined as a business entity organized and operated exclusively for charitable, scientific, or educational purposes, of which no part of the net earnings inure to the benefit of any private shareholder or individual, of which no substantial part of the activities is carrying on propaganda or otherwise attempting to influence legislation or participating in any political campaign on behalf of any candidate for public office, and which are exempt from federal income taxation under section 501 of the Internal Revenue Code.

31.702 General.

The OMB Uniform Guidance at 2 CFR part 200, subpart E and appendix IV, sets forth principles for determining the costs applicable to work performed by nonprofit organizations (as defined in the OMB Uniform Guidance at 2 CFR part 200) under contracts (as well as grants and other agreements) with the Government. See 31.108 for exceptions to the cost principles for nonprofit organizations.

[81 FR 45853, July 14, 2016]

31.703 Requirements.

(a) Contracts which refer to this subpart 31.7 for determining allowable costs shall be deemed to refer to, and shall have the allowability of costs determined by the contracting officer in accordance with, the OMB Uniform Guidance at 2 CFR part 200, subpart E and appendix IV in effect on the date of the contract.

(b) Agencies are not expected to place additional restrictions on individual items of cost. However, under 10 U.S.C. 2324(e) and 41 U.S.C. 4304, the costs cited in 31.603(b) are unallowable.

[48 FR 42301, Sept. 19, 1983, as amended at 60 FR 42661, Aug. 16, 1995; 79 FR 24211, Apr. 29, 2014; 81 FR 45853, July 14, 2016]

PART 32—CONTRACT FINANCING

Sec.

Subpart 32.1—Non-Commercial Item Purchase Financing

Subpart 32.2—Commercial Item Purchase Financing

Subpart 32.3—Loan Guarantees for Defense Production

Subpart 32.4—Advance Payments for Non-Commercial Items

Subpart 32.5—Progress Payments Based on Costs

Subpart 32.6—Contract Debts

AUTHORITY: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

SOURCE: 48 FR 42328, Sept. 19, 1983, unless otherwise noted.

32.000 Scope of part.

This part prescribes policies and procedures for contract financing and other payment matters. This part addresses—

(a) Payment methods, including partial payments and progress payments based on percentage or stage of completion;

(b) Loan guarantees, advance payments, and progress payments based on costs;

(c) Administration of debts to the Government arising out of contracts;

(d) Contract funding, including the use of contract clauses limiting costs or funds;

(e) Assignment of claims to aid in private financing;

(f) Selected payment clauses;

(g) Financing of purchases of commercial items;

(h) Performance-based payments; and

(i) Electronic funds transfer payments.

[48 FR 42328, Sept. 19, 1983, as amended at 60 FR 49710, Sept. 26, 1995; 61 FR 45772, Aug. 29, 1996; 67 FR 13054, Mar. 20, 2002]

32.001 Definitions.

As used in this part—

Commercial interim payment means any payment that is not a commercial

advance payment or a delivery payment. These payments are contract financing payments for prompt payment purposes (*i.e.*, not subject to the interest penalty provisions of the Prompt Payment Act in accordance with subpart 32.9). A commercial interim payment is given to the contractor after some work has been done, whereas a commercial advance payment is given to the contractor when no work has been done.

Contract action means an action resulting in a contract, as defined in subpart 2.1, including actions for additional supplies or services outside the existing contract scope, but not including actions that are within the scope and under the terms of the existing contract, such as contract modifications issued pursuant to the Changes clause, or funding and other administrative changes.

Contract financing payment means an authorized Government disbursement of monies to a contractor prior to acceptance of supplies or services by the Government.

(1) Contract financing payments include—

(i) Advance payments;

(ii) Performance-based payments;

(iii) Commercial advance and interim payments;

(iv) Progress payments based on cost under the clause at 52.232–16, Progress Payments;

(v) Progress payments based on a percentage or stage of completion (see 32.102(e)), except those made under the clause at 52.232–5, Payments Under Fixed-Price Construction Contracts, or the clause at 52.232–10, Payments Under Fixed-Price Architect-Engineer Contracts; and

(vi) Interim payments under a cost reimbursement contract, except for a cost reimbursement contract for services when *Alternate I* of the clause at 52.232–25, Prompt Payment, is used.

(2) Contract financing payments do not include—

(i) Invoice payments;

(ii) Payments for partial deliveries; or

(iii) Lease and rental payments.

Customary contract financing means that financing deemed by an agency to be available for routine use by contracting officers. Most customary contract financing arrangements should be usable by contracting officers without specific reviews or approvals by higher management.

Delivery payment means a payment for accepted supplies or services, including payments for accepted partial deliveries. Commercial financing payments are liquidated by deduction from these payments. Delivery payments are invoice payments for prompt payment purposes.

Designated billing office means the office or person (governmental or nongovernmental) designated in the contract where the contractor first submits invoices and contract financing requests. The contract might designate different offices to receive invoices and contract financing requests. The designated billing office might be—

(1) The Government disbursing office;

(2) The contract administration office;

(3) The office accepting the supplies delivered or services performed by the contractor;

(4) The contract audit office; or

(5) A nongovernmental agent.

Designated payment office means the office designated in the contract to make invoice payments or contract financing payments. Normally, this will be the Government disbursing office.

Due date means the date on which payment should be made.

Invoice payment means a Government disbursement of monies to a contractor under a contract or other authorization for supplies or services accepted by the Government.

(1) Invoice payments include—

(i) Payments for partial deliveries that have been accepted by the Government;

(ii) Final cost or fee payments where amounts owed have been settled between the Government and the contractor;

(iii) For purposes of subpart 32.9 only, all payments made under the clause at 52.232–5, Payments Under Fixed-Price Construction Contracts, and the clause at 52.232–10, Payments Under Fixed-Price Architect-Engineer Contracts; and

(iv) Interim payments under a cost-reimbursement contract for services

when *Alternate I* of the clause at 52.232–25, Prompt Payment, is used.

(2) Invoice payments do not include contract financing payments.

Liquidate means to decrease a payment for an accepted supply item or service under a contract for the purpose of recouping financing payments previously paid to the contractor.

Unusual contract financing means any financing not deemed customary contract financing by the agency. Unusual contract financing is financing that is legal and proper under applicable laws, but that the agency has not authorized contracting officers to use without specific reviews or approvals by higher management.

[52 FR 30077, Aug. 12, 1987, as amended at 60 FR 49710, Sept. 26, 1995; 66 FR 2131, Jan. 10, 2001; 66 FR 65354, Dec. 18, 2001; 67 FR 13054, Mar. 20, 2002; 74 FR 28431, June 15, 2009]

32.002 Applicability of subparts.

(a) The following sections and subparts of this part are applicable to all purchases subject to part 32:

(1) Sections 32.000 through 32.009.

(2) Subpart 32.3, Loan Guarantees for Defense Production.

(3) Subpart 32.6, Contract Debts.

(4) Subpart 32.7, Contract Funding.

(5) Subpart 32.8, Assignment of Claims.

(6) Subpart 32.9, Prompt Payment.

(7) Subpart 32.11, Electronic Funds Transfer.

(b) Subpart 32.2, Commercial Item Purchase Financing, is applicable only to purchases of commercial items under authority of part 12.

(c) The following subparts of this part are applicable to all purchases made under any authority other than part 12:

(1) Subpart 32.1, Non-Commercial Item Purchase Financing.

(2) Subpart 32.4, Advance Payments For Non-Commercial Items.

(3) Subpart 32.5, Progress Payments Based on Costs.

(4) Subpart 32.10, Performance-Based Payments.

[60 FR 49710, Sept. 26, 1995, as amended at 61 FR 45772, Aug. 29, 1996; 78 FR 70479, Nov. 25, 2013]

32.003 Simplified acquisition procedures financing.

Unless agency regulations otherwise permit, contract financing shall not be provided for purchases made under the authority of part 13.

[60 FR 49710, Sept. 26, 1995]

32.004 Contract performance in foreign countries.

The enforceability of contract provisions for security of Government financing in a foreign jurisdiction is dependent upon local law and procedure. Prior to providing contract financing where foreign jurisdictions may become involved, the contracting officer shall ensure the Government's security is enforceable. This may require the provision of additional or different security than that normally provided for in the standard contract clauses.

[60 FR 49710, Sept. 26, 1995]

32.005 Consideration for contract financing.

(a) *Requirement.* When a contract financing clause is included at the inception of a contract, there shall be no separate consideration for the contract financing clause. The value of the contract financing to the contractor is expected to be reflected in either

(1) A bid or negotiated price that will be lower than such price would have been in the absence of the contract financing, or

(2) Contract terms and conditions, other than price, that are more beneficial to the Government than they would have been in the absence of the contract financing. Adequate new consideration is required for changes to, or the addition of, contract financing after award.

(b) *Amount of new consideration.* The contractor may provide new consideration by monetary or nonmonetary means, provided the value is adequate. The fair and reasonable consideration should approximate the amount by which the price would have been less had the contract financing terms been contained in the initial contract. In the absence of definite information on this point, the contracting officer should apply the following criteria in

evaluating whether the proposed new consideration is adequate:

(1) The value to the contractor of the anticipated amount and duration of the contract financing at the imputed financial costs of the equivalent working capital.

(2) The estimated profit rate to be earned through contract performance.

(c) *Interest*. Except as provided in subpart 32.4, Advance Payments for Non-Commercial Items, the contract shall not provide for any other type of specific charges, such as interest, for contract financing.

[60 FR 49710, Sept. 26, 1995]

32.006 Reduction or suspension of contract payments upon finding of fraud.

32.006–1 General.

(a) Under 10 U.S.C. 2307(i)(8), the statutory authority implemented by this section is available to the Department of Defense and the National Aeronautics and Space Administration; this statutory authority is not available to the United States Coast Guard. Under 41 U.S.C. 4506, this statutory authority is available to all agencies subject to Division C of subtitle I of title 41.

(b) 10 U.S.C. 2307(i)(2) and 41 U.S.C. 4506 provide for a reduction or suspension of further payments to a contractor when the agency head determines there is substantial evidence that the contractor's request for advance, partial, or progress payments is based on fraud. This authority does not apply to commercial interim payments under subpart 32.2, or performance-based payments under subpart 32.10.

(c) The agency head may not delegate his or her responsibilities under these statutes below Level IV of the Executive Schedule.

(d) Authority to reduce or suspend payments under these statutes is in addition to other Government rights, remedies, and procedures.

(e) In accordance with these statutes, agency head determinations and decisions under this section may be made for an individual contract or any group of contracts affected by the fraud.

[60 FR 49728, Sept. 26, 1995, as amended at 72 FR 46363, Aug. 17, 2007; 79 FR 24211, Apr. 29, 2014]

32.006–2 Definition.

Remedy coordination official, as used in this section, means the person or entity in the agency who coordinates within that agency the administration of criminal, civil, administrative, and contractual remedies resulting from investigations of fraud or corruption related to procurement activities. (See 10 U.S.C. 2307(i)(10) and 41 U.S.C. 4506(a).)

[60 FR 49729, Sept. 26, 1995, as amended at 66 FR 2132, Jan. 10, 2001; 72 FR 46363, Aug. 17, 2007; 79 FR 24211, Apr. 29, 2014]

32.006–3 Responsibilities.

(a) Agencies shall establish appropriate procedures to implement the policies and procedures of this section.

(b) Government personnel shall report suspected fraud related to advance, partial, or progress payments in accordance with agency regulations.

[60 FR 49729, Sept. 26, 1995]

32.006–4 Procedures.

(a) In any case in which an agency's remedy coordination official finds substantial evidence that a contractor's request for advance, partial, or progress payments under a contract awarded by that agency is based on fraud, the remedy coordination official shall recommend that the agency head reduce or suspend further payments to the contractor. The remedy coordination official shall submit to the agency head a written report setting forth the remedy coordination official's findings that support each recommendation.

(b) Upon receiving a recommendation from the remedy coordination official under paragraph (a) of this subsection, the agency head shall determine whether substantial evidence exists that the request for payment under a contract is based on fraud.

(c) If the agency head determines that substantial evidence exists, the agency head may reduce or suspend further payments to the contractor under the affected contract(s). Such reduction or suspension shall be reasonably commensurate with the anticipated loss to the Government resulting from the fraud.

(d) In determining whether to reduce or suspend further payment(s), as a

minimum, the agency head shall consider—

(1) A recommendation from investigating officers that disclosure of the allegations of fraud to the contractor may compromise an ongoing investigation;

(2) The anticipated loss to the Government as a result of the fraud;

(3) The contractor's overall financial condition and ability to continue performance if payments are reduced or suspended;

(4) The contractor's essentiality to the national defense, or to the execution of the agency's official business; and

(5) Assessment of all documentation concerning the alleged fraud, including documentation submitted by the contractor in its response to the notice required by paragraph (e) of this subsection.

(e) Before making a decision to reduce or suspend further payments, the agency head shall, in accordance with agency procedures—

(1) Notify the contractor in writing of the action proposed by the remedy coordination official and the reasons therefor (such notice must be sufficiently specific to permit the contractor to collect and present evidence addressing the aforesaid reasons); and

(2) Provide the contractor an opportunity to submit information within a reasonable time, in response to the action proposed by the remedy coordination official.

(f) When more than one agency has contracts affected by the fraud, the agencies shall consider designating one agency as the lead agency for making the determination and decision.

(g) The agency shall retain in its files the written justification for each—

(1) Decision of the agency head whether to reduce or suspend further payments; and

(2) Recommendation received by an agency head in connection with such decision.

(h) Not later than 180 calendar days after the date of the reduction or suspension action, the remedy coordination official shall—

(1) Review the agency head's determination on which the reduction or suspension decision is based; and

(2) Transmit a recommendation to the agency head as to whether the reduction or suspension should continue.

[60 FR 49729, Sept. 26, 1995]

32.006–5 Reporting.

(a) In accordance with 41 U.S.C. 4506(h), the head of an agency, other than the Department of Defense, shall prepare a report for each fiscal year in which a recommendation has been received pursuant to 32.006–4(a). Reports within the Department of Defense shall be prepared in accordance with 10 U.S.C. 2307(i)(7).

(b) In accordance with 41 U.S.C. 4506(h) and 10 U.S.C. 2307(i)(7), each report shall contain—

(1) Each recommendation made by the remedy coordination official;

(2) The actions taken on the recommendation(s), with reasons for such actions; and

(3) An assessment of the effects of each action on the Government.

[60 FR 49729, Sept. 26, 1995, as amended at 79 FR 24211, Apr. 29, 2014]

32.007 Contract financing payments.

(a)(1) Unless otherwise prescribed in agency policies and procedures or otherwise specified in paragraph (b) of this section, the due date for making contract financing payments by the designated payment office is the 30th day after the designated billing office receives a proper contract financing request.

(2) If an audit or other review of a specific financing request is required to ensure compliance with the terms and conditions of the contract, the designated payment office is not compelled to make payment by the specified due date.

(3) Agency heads may prescribe shorter periods for payment based on contract pricing or administrative considerations. For example, a shorter period may be justified by an agency if the nature and extent of contract financing arrangements are integrated with agency contract pricing policies.

(4) Agency heads must not prescribe a period shorter than 7 days or longer than 30 days.

(b) For advance payments, loans, or other arrangements that do not involve

recurrent submission of contract financing requests, the designated payment office will make payment in accordance with the applicable contract financing terms or as directed by the contracting officer.

(c) A proper contract financing request must comply with the terms and conditions specified by the contract. The contractor must correct any defects in requests submitted in the manner specified in the contract or as directed by the contracting officer.

(d) The designated billing office and designated payment office must annotate each contract financing request with the date their respective offices received the request.

(e) The Government will not pay an interest penalty to the contractor as a result of delayed contract financing payments.

[66 FR 65355, Dec. 18, 2001]

32.008 Notification of overpayment.

If the contractor notifies the contracting officer of a duplicate payment or that the Government has otherwise overpaid, the contracting officer shall follow the procedures at 32.604.

[73 FR 54002, Sept. 17, 2008]

32.009 Providing accelerated payments to small business subcontractors.

32.009–1 General.

Pursuant to the policy provided by OMB Memorandum M–12–16, Providing Prompt Payment to Small Business Subcontractors (and as extended by OMB Memoranda M–13–15 and M–14–10, both titled Extension of Policy to Provide Accelerated Payment to Small Business Subcontractors), agencies shall take measures to ensure that prime contractors pay small business subcontractors on an accelerated timetable to the maximum extent practicable, and upon receipt of accelerated payments from the Government. This acceleration does not provide any new rights under the Prompt Payment Act and does not affect the application of the Prompt Payment Act late payment interest provisions.

[78 FR 70479, Nov. 25, 2013, as amended at 79 FR 43591, July 25, 2014]

32.009–2 Contract clause.

Insert clause 52.232–40, Providing Accelerated Payments to Small Business Subcontractors, in all solicitations and contracts.

[78 FR 70479, Nov. 25, 2013]

Subpart 32.1—Non-Commercial Item Purchase Financing

32.100 Scope of subpart.

This subpart provides policies and procedures applicable to contract financing and payment for any purchases other than purchases of commercial items in accordance with part 12.

[60 FR 49710, Sept. 26, 1995]

32.101 Authority.

The basic authority for the contract financing described in this part is contained in 41 U.S.C. chapter 45, Contract Financing, 10 U.S.C. 2307, and Title III of the Defense Production Act of 1950 (50 U.S.C. App. 2091).

[79 FR 24211, Apr. 29, 2014]

32.102 Description of contract financing methods.

(a) Advance payments are advances of money by the Government to a prime contractor before, in anticipation of, and for the purpose of complete performance under one or more contracts. They are expected to be liquidated from payments due to the contractor incident to performance of the contracts. Since they are not measured by performance, they differ from partial, progress, or other payments based on the performance or partial performance of a contract. Advance payments may be made to prime contractors for the purpose of making advances to subcontractors.

(b) Progress payments based on costs are made on the basis of costs incurred by the contractor as work progresses under the contract. This form of contract financing does not include—

(1) Payments based on the percentage or stage of completion accomplished;

(2) Payments for partial deliveries accepted by the Government;

(3) Partial payments for a contract termination proposal; or

(4) Performance-based payments.

(c) Loan guarantees are made by Federal Reserve banks, on behalf of designated guaranteeing agencies, to enable contractors to obtain financing from private sources under contracts for the acquisition of supplies or services for the national defense.

(d) Payments for accepted supplies and services that are only a part of the contract requirements (*i.e.*, partial deliveries) are authorized under 41 U.S.C. chapter 45 and 10 U.S.C. 2307. In accordance with 5 CFR 1315.4(k), agencies must pay for partial delivery of supplies or partial performance of services unless specifically prohibited by the contract. Although payments for partial deliveries generally are treated as a method of payment and not as a method of contract financing, using partial delivery payments can assist contractors to participate in contracts without, or with minimal, contract financing. When appropriate, contract statements of work and pricing arrangements must permit acceptance and payment for discrete portions of the work, as soon as accepted (see 32.906(c)).

(e)(1) Progress payments based on a percentage or stage of completion are authorized by the statutes cited in 32.101.

(2) This type of progress payment may be used as a payment method under agency procedures. Agency procedures must ensure that payments are commensurate with work accomplished, which meets the quality standards established under the contract. Furthermore, progress payments may not exceed 80 percent of the eligible costs of work accomplished on undefinitized contract actions.

(f) Performance-based payments are contract financing payments made on the basis of—

(1) Performance measured by objective, quantifiable methods;

(2) Accomplishment of defined events; or

(3) Other quantifiable measures of results.

[48 FR 42328, Sept. 19, 1987, as amended at 52 FR 30077, Aug. 12, 1987; 60 FR 49711, Sept. 26, 1995; 62 FR 12706, Mar. 17, 1997; 66 FR 65355, Dec. 18, 2001; 79 FR 24211, Apr. 29, 2014]

32.103 Progress payments under construction contracts.

When satisfactory progress has not been achieved by a contractor during any period for which a progress payment is to be made, a percentage of the progress payment may be retained. Retainage should not be used as a substitute for good contract management, and the contracting officer should not withhold funds without cause. Determinations to retain and the specific amount to be withheld shall be made by the contracting officer on a case-by-case basis. Such decisions will be based on the contracting officer's assessment of past performance and the likelihood that such performance will continue. The amount of retainage withheld shall not exceed 10 percent of the approved estimated amount in accordance with the terms of the contract and may be adjusted as the contract approaches completion to recognize better than expected performance, the ability to rely on alternative safeguards, and other factors. Upon completion of all contract requirements, retained amounts shall be paid promptly.

[51 FR 19716, May 30, 1986, as amended at 60 FR 49711, Sept. 26, 1995]

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 predelivery 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 $2.5 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 $2.5 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.

[65 FR 16278, Mar. 27, 2000, as amended at 71 FR 57368, Sept. 28, 2006]

32.105 Uses of contract financing.

(a) Contract financing methods covered in this part are intended to be self-liquidating through contract performance. Consequently, agencies shall only use the methods for financing of contractor working capital, not for the expansion of contractor-owned facilities or the acquisition of fixed assets. However, under loan guarantees, exceptions may be made for—

(1) Facilities expansion of a minor or incidental nature, if a relatively small part of the guaranteed loan is used for the expansion and the contractor's repayment would not be delayed or impaired; or

(2) Other instances of facilities expansion for which contract financing is appropriate under agency procedures.

(b) The limitations in this section do not apply to contracts under which facilities are being acquired for Government ownership.

32.106 Order of preference.

The contracting officer must consider the following order of preference when a contractor requests contract financing, unless an exception would be in the Government's best interest in a specific case:

(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).

(c) Loan guarantees.

(d) Unusual contract financing (see 32.114).

(e) Advance payments (see exceptions in 32.402(b)).

[48 FR 42328, Sept. 19, 1983, as amended at 60 FR 49711, Sept. 26, 1995; 65 FR 16279, Mar. 27, 2000]

32.107 Need for contract financing not a deterrent.

(a) If the contractor or offeror meets the standards prescribed for responsible prospective contractors at 9.104, the contracting officer shall not treat the contractor's need for contract financing as a handicap for a contract award; e.g., as a responsibility factor or evaluation criterion.

(b) The contractor should not be disqualified from contract financing solely because the contractor failed to indicate a need for contract financing before the contract was awarded.

32.108 Financial consultation.

Each contracting office should have available and use the services of contract financing personnel competent to evaluate credit and financial problems. In resolving any questions concerning (a) the financial capability of an offeror or contractor to perform a contract or (b) what form of contract financing is appropriate in a given case, the contracting officer should consult the appropriate contract financing office.

32.109 Termination financing.

To encourage contractors to invest their own funds in performance despite the susceptibility of the contract to termination for the convenience of the Government, the contract financing procedures under this part may be applied to the financing of terminations either in connection with or independently of financing for contract performance (see 49.112–1).

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.

[65 FR 16279, Mar. 27, 2000]

32.111 Contract clauses for non-commercial purchases.

(a) The contracting officer shall insert the following clauses, appropriately modified with respect to payment due dates, in accordance with agency regulations—

(1) The clause at 52.232–1, Payments, in solicitations and contracts when a fixed-price supply contract, a fixed-price service contract, or a contract for nonregulated communication services is contemplated;

(2) The clause at 52.232–2, Payment under Fixed-Price Research and Development Contracts, in solicitations and contracts when a fixed-price research and development contract is contemplated;

(3) The clause at 52.232–3, Payments under Personal Services Contracts, in solicitations and contracts for personal services;

(4) The clause at 52.232–4, Payments under Transportation Contracts and Transportation-Related Services Contracts, in solicitations and contracts for transportation or transportation-related services;

(5) The clause at 52.232–5, Payments under Fixed-Price Construction Contracts, in solicitations and contracts for construction when a fixed-price contract is contemplated;

(6) The clause at 52.232–6, Payments under Communication Service Contracts with Common Carriers, in solicitations and contracts for regulated communication services by common carriers; and

(7) The clause at 52.232–7, Payments under Time-and-Materials and Labor-Hour Contracts, in solicitations and contracts when a time-and-materials or labor-hour contract is contemplated. If the contracting officer determines that it is necessary to withhold payment to protect the Government's interests, paragraph (a)(7) of the clause permits the contracting officer to unilaterally issue a modification requiring the contractor to withhold 5 percent of amounts due, up to a maximum of $50,000 under the contract. The contracting officer shall ensure that the modification specifies the percentage and total amount of the withheld payment. Normally, there should be no need to withhold payment for a contractor with a record of timely submittal of the release discharging the Government from all liabilities, obligations, and claims, as required by paragraph (g) of the clause.

(b) The contracting officer shall insert the following clauses, appropriately modified with respect to payment due dates in accordance with agency regulations:

(1) The clause at 52.232–8, Discounts for Prompt Payment, in solicitations and contracts when a fixed-price supply contract or fixed-price service contract is contemplated.

(2) A clause, substantially the same as the clause at 52.232–9, Limitation on Withholding of Payments, in solicitations and contracts when a supply contract, research and development contract, service contract, time-and-materials contract, or labor-hour contract is contemplated that includes two or more terms authorizing the temporary withholding of amounts otherwise payable to the contractor for supplies delivered or services performed.

(c) The contracting officer shall insert the following clauses, appropriately modified with respect to payments due dates in accordance with agency regulations:

(1) The clause at 52.232–10, Payments under Fixed-Price Architect-Engineer Contracts, in fixed-price architect-engineer contracts.

(2) The clause at 52.232–11, Extras, in solicitations and contracts when a fixed-price supply contract, fixed-price service contract, or a transportation contract is contemplated.

[48 FR 42328, Sept. 19, 1983, as amended at 51 FR 2665, Jan. 17, 1986; 60 FR 49711, Sept. 26, 1995; 70 FR 43581, July 27, 2005; 71 FR 74665, Dec. 12, 2006; 72 FR 6882, Feb. 13, 2007; 77 FR 44061, July 26, 2012]

32.112 Nonpayment of subcontractors under contracts for noncommercial items.

32.112–1 Subcontractor assertions of nonpayment.

(a) In accordance with Section 806(a)(4) of Pub. L. 102–190, as amended by Sections 2091 and 8105 of Pub. L. 103–355 (10 U.S.C. 2302 note), upon the assertion by a subcontractor or supplier of a Federal contractor that the subcontractor or supplier has not been paid in accordance with the payment terms of the subcontract, purchase order, or other agreement with the prime contractor, the contracting officer may determine—

(1) For a construction contract, whether the contractor has made—

(i) Progress payments to the subcontractor or supplier in compliance with Chapter 39 of Title 31, United States Code (Prompt Payment Act); or

(ii) Final payment to the subcontractor or supplier in compliance with the terms of the subcontract, purchase order, or other agreement with the prime contractor;

(2) For a contract other than construction, whether the contractor has made progress payments, final payments, or other payments to the subcontractor or supplier in compliance with the terms of the subcontract, purchase order, or other agreement with the prime contractor; or

(3) For any contract, whether the contractor's certification of payment of a subcontractor or supplier accompanying its payment request to the Government is accurate.

(b) If, in making the determination in paragraphs (a)(1) and (2) of this section, the contracting officer finds the prime contractor is not in compliance, the contracting officer may—

(1) Encourage the contractor to make timely payment to the subcontractor or supplier; or

(2) If authorized by the applicable payment clauses, reduce or suspend progress payments to the contractor.

(c) If the contracting officer determines that a certification referred to in paragraph (a)(3) of this section is inaccurate in any material respect, the contracting officer shall initiate administrative or other remedial action.

[60 FR 48274, Sept. 18, 1995, as amended at 79 FR 24211, Apr. 29, 2014]

32.112–2 Subcontractor requests for information.

(a) In accordance with Section 806(a)(1) of Pub. L. 102–190, as amended by Sections 2091 and 8105 of Pub. L. 103–355 (10 U.S.C. 2302 note), upon the request of a subcontractor or supplier under a Federal contract for a noncommercial item, the contracting officer shall promptly advise the subcontractor or supplier as to—

(1) Whether the prime contractor has submitted requests for progress payments or other payments to the Federal Government under the contract; and

(2) Whether final payment under the contract has been made by the Federal Government to the prime contractor.

(b) In accordance with 5 U.S.C. 552(b)(1), this subsection does not apply to matters that are—

(1) Specifically authorized under criteria established by an Executive order to be kept classified in the interest of national defense or foreign policy; and

(2) Properly classified pursuant to such Executive order.

[60 FR 48274, Sept. 18, 1995, as amended at 79 FR 24211, Apr. 29, 2014]

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 2.101 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.

[65 FR 16279, Mar. 27, 2000, as amended at 66 FR 2132, Jan. 10, 2001]

32.114 Unusual contract financing.

Any contract financing arrangement that deviates from this part is unusual contract financing. Unusual contract financing shall be authorized only after approval by the head of the agency or as provided for in agency regulations.

[60 FR 49711, Sept. 26, 1995]

Subpart 32.2—Commercial Item Purchase Financing

SOURCE: 60 FR 49711, Sept. 26, 1995, unless otherwise noted.

32.200 Scope of subpart.

This subpart provides policies and procedures for commercial financing arrangements under commercial purchases pursuant to Part 12.

32.201 Statutory authority.

10 U.S.C. 2307(f) and 41 U.S.C. 4505 provide that payment for commercial items may be made under such terms and conditions as the head of the agency determines are appropriate or customary in the commercial marketplace and are in the best interest of the United States.

[60 FR 49711, Sept. 26, 1995, as amended at 79 FR 24211, Apr. 29, 2014]

32.202 General.

32.202–1 Policy.

(a) *Use of financing in contracts.* It is the responsibility of the contractor to provide all resources needed for performance of the contract. Thus, for purchases of commercial items, financing of the contract is normally the contractor's responsibility. However, in some markets the provision of financing by the buyer is a commercial practice. In these circumstances, the contracting officer may include appropriate financing terms in contracts for commercial purchases when doing so will be in the best interest of the Government.

(b) *Authorization.* Commercial interim payments and commercial advance payments may be made under the following circumstances—

(1) The contract item financed is a commercial supply or service;

(2) The contract price exceeds the simplified acquisition threshold;

(3) The contracting officer determines that it is appropriate or customary in the commercial marketplace to make financing payments for the item;

(4) Authorizing this form of contract financing is in the best interest of the Government (see paragraph (e) of this subsection);

(5) Adequate security is obtained (see 32.202–4);

(6) Prior to any performance of work under the contract, the aggregate of commercial advance payments shall not exceed 15 percent of the contract price;

(7) The contract is awarded on the basis of competitive procedures or, if only one offer is solicited, adequate consideration is obtained (based on the time value of the additional financing to be provided) if the financing is expected to be substantially more advantageous to the offeror than the offeror's normal method of customer financing; and

(8) The contracting officer obtains concurrence from the payment office concerning liquidation provisions when required by 32.206(e).

(c) *Difference from non-commercial financing.* Government financing of commercial purchases under this subpart is expected to be different from that used for non-commercial purchases under subpart 32.1 and its related subparts. While the contracting officer may adapt techniques and procedures from the non-commercial subparts for use in implementing commercial contract financing arrangements, the contracting officer must have a full understanding of effects of the differing contract environments and of what is needed to protect the interests of the Government in commercial contract financing.

(d) *Unusual contract financing.* Any contract financing arrangement not in accord with the requirements of agency regulations or this part is unusual contract financing and requires advance approval in accordance with agency procedures. If not otherwise specified, such unusual contract financing shall be approved by the head of the contracting activity.

(e) *Best interest of the Government.* The statutes cited in 32.201 do not allow contract financing by the Government unless it is in the best interest of the United States. Agencies may establish standards to determine whether contract financing is in the best interest of the Government. These standards

may be for certain types of procurements, certain types of items, or certain dollar levels of procurements.

[60 FR 49711, Sept. 26, 1995, as amended at 61 FR 39190, July 26, 1996]

32.202–2 Types of payments for commercial item purchases.

These definitions incorporate the requirements of the statutory commercial financing authority and the implementation of the Prompt Payment Act.

Commercial advance payment, as used in this subsection, means a payment made before any performance of work under the contract. The aggregate of these payments shall not exceed 15 percent of the contract price. These payments are contract financing payments for prompt payment purposes (*i.e.*, not subject to the interest penalty provisions of the Prompt Payment Act in accordance with subpart 32.9). These payments are not subject to subpart 32.4, Advance Payments for Non-Commercial Items.

Commercial interim payment (See 32.001.)

Delivery payment (See 32.001).

[60 FR 49711, Sept. 26, 1995, as amended at 66 FR 2132, Jan. 10, 2001]

32.202–3 Conducting market research about financing terms.

Contract financing may be a subject included in the market research conducted in accordance with part 10. If market research for contract financing is conducted, the contracting officer should consider—

(a) The extent to which other buyers provide contract financing for purchases in that market;

(b) The overall level of financing normally provided;

(c) The amount or percentages of any payments equivalent to commercial advance payments (see 32.202–2);

(d) The basis for any payments equivalent to commercial interim payments (see 32.001), as well as the frequency, and amounts or percentages; and

(e) Methods of liquidation of contract financing payments and any special or unusual payment terms applicable to delivery payments (see 32.001).

[60 FR 49711, Sept. 26, 1995, as amended at 66 FR 2132, Jan. 10, 2001]

32.202–4 Security for Government financing.

(a) *Policy*. (1) 10 U.S.C. 2307(f) and 41 U.S.C. 4505 require the Government to obtain adequate security for Government financing. The contracting officer shall specify in the solicitation the type of security the Government will accept. If the Government is willing to accept more than one form of security, the offeror shall be required to specify the form of security it will provide. If acceptable to the contracting officer, the resulting contract shall specify the security (see 32.206(b)(1)(iv)).

(2) Subject to agency regulations, the contracting officer may determine the offeror's financial condition to be adequate security, provided the offeror agrees to provide additional security should that financial condition become inadequate as security (see paragraph (c) of the clause at 52.232–29, Terms for Financing of Purchases of Commercial Items). Assessment of the contractor's financial condition shall consider both net worth and liquidity. If the contracting officer finds the offeror's financial condition is not adequate security, the contracting officer shall require other adequate security. Paragraphs (b), (c), and (d) of this subsection list other (but not all) forms of security that the contracting officer may find acceptable.

(3) The value of the security must be at least equal to the maximum unliquidated amount of contract financing payments to be made to the contractor. The value of security may be adjusted periodically during contract performance, as long as it is always equal to or greater than the amount of unliquidated financing.

(b) *Paramount lien*. (1) The statutes cited in 32.201 provide that if the Government's security is in the form of a lien, such lien is paramount to all other liens and is effective immediately upon the first payment, without filing, notice, or other action by the United States.

(2) When the Government's security is in the form of a lien, the contract shall specify what the lien is upon, e.g., the work in process, the contractor's plant, or the contractor's inventory. Contracting officers may be flexible in the choice of assets. The contract must

also give the Government a right to verify the existence and value of the assets.

(3) Provision of Government financing shall be conditioned upon a contractor certification that the assets subject to the lien are free from any prior encumbrances. Prior liens may result from such things as capital equipment loans, installment purchases, working capital loans, various lines of credit, and revolving credit arrangements.

(c) *Other assets as security.* Contracting officers may consider the guidance at 28.203–2, 28.203–3, and 28.204 in determining which types of assets may be acceptable as security. For the purpose of applying the guidance in part 28 to this subsection, the term ''surety'' and/or ''individual surety'' should be interpreted to mean ''offeror'' and/or ''contractor.''

(d) *Other forms of security.* Other acceptable forms of security include—

(1) An irrevocable letter of credit from a federally insured financial institution;

(2) A bond from a surety, acceptable in accordance with part 28 (note that the bond must guarantee repayment of the unliquidated contract financing);

(3) A guarantee of repayment from a person or corporation of demonstrated liquid net worth, connected by significant ownership to the contractor; or

(4) Title to identified contractor assets of adequate worth.

(e) *Management of risk and security.* In establishing contract financing terms, the contracting officer must be aware of certain risks. For example, very high amounts of financing early in the contract (front-end loading) may unduly increase the risk to the Government. The security and the amounts and timing of financing payments must be analyzed as a whole to determine whether the arrangement will be in the best interest of the Government.

[60 FR 49711, Sept. 26, 1995, as amended at 79 FR 24211, Apr. 29, 2014]

32.203 Determining contract financing terms.

When the criteria in 32.202–1(b) are met, the contracting officer may either specify the financing terms in the solicitation (see 32.204) or permit each offeror to propose its own customary financing terms (see 32.205). When the contracting officer has sufficient information on financing terms that are customary in the commercial marketplace for the item, those terms may be specified in the solicitation.

32.204 Procedures for contracting officer-specified commercial contract financing.

The financing terms shall be included in the solicitation. Contract financing shall not be a factor in the evaluation of resulting proposals, and proposals of alternative financing terms shall not be accepted (but see 14.208 and 15.206 concerning amendments of solicitations). However, an offer stating that the contracting officer-specified contract financing terms will not be used by the offeror does not alter the evaluation of the offer, nor does it render the offer nonresponsive or otherwise unacceptable. In the event of award to an offeror who declined the proposed contract financing, the contract financing provisions shall not be included in the resulting contract. Contract financing shall not be a basis for adjusting offerors' proposed prices, because the effect of contract financing is reflected in each offeror's proposed prices.

[60 FR 49711, Sept. 26, 1995, as amended at 62 FR 51271, Sept. 30, 1997]

32.205 Procedures for offeror-proposed commercial contract financing.

(a) Under this procedure, each offeror may propose financing terms. The contracting officer must then determine which offer is in the best interests of the United States.

(b) *Solicitations.* The contracting officer must include in the solicitation the provision at 52.232–31, Invitation to Propose Financing Terms. The contracting officer must also—

(1) Specify the delivery payment (invoice) dates that will be used in the evaluation of financing proposals; and

(2) Specify the interest rate to be used in the evaluation of financing proposals (see paragraph (c)(4) of this section).

(c) *Evaluation of proposals.* (1) When contract financing terms vary among

offerors, the contracting officer must adjust each proposed price for evaluation purposes to reflect the cost of providing the proposed financing in order to determine the total cost to the Government of that particular combination of price and financing.

(2) Contract financing results in the Government making payments earlier than it otherwise would. In order to determine the cost to the Government of making payments earlier, the contracting officer must compute the imputed cost of those financing payments and add it to the proposed price to determine the evaluated price for each offeror.

(3) The imputed cost of a single financing payment is the amount of the payment multiplied by the annual interest rate, multiplied by the number of years, or fraction thereof, between the date of the financing payment and the date the amount would have been paid as a delivery payment. The imputed cost of financing is the sum of the imputed costs of each of the financing payments.

(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. Where the period of proposed financing does not match the periods in the OMB Circular, the interest rate for the period closest to the finance period shall be used. Appendix C is updated yearly, and is available from the Office of Economic Policy in the Office of Management and Budget (OMB).

[60 FR 49711, Sept. 26, 1995, as amended at 65 FR 16279, Mar. 27, 2000]

32.206 Solicitation provisions and contract clauses.

(a) The contract shall contain the paragraph entitled ''Payment'' of the clause at 52.212–4, Contract Terms and Conditions—Commercial Items. If the contract will provide for contract financing, the contracting officer shall construct a solicitation provision and contract clause. This solicitation provision shall be constructed in accordance with 32.204 or 32.205. If the procedure at 32.205 is used, the solicitation provision at 52.232–31, Invitation to Propose Financing Terms, shall be included. The contract clause shall be constructed in accordance with the requirements of this subpart and any agency regulations.

(b) Each contract financing clause shall include:

(1) A description of the—

(i) Computation of the financing payment amounts (see paragraph (c) of this section);

(ii) Specific conditions of contractor entitlement to those financing payments (see paragraph (c) of this section);

(iii) Liquidation of those financing payments by delivery payments (see paragraph (e) of this section);

(iv) Security the contractor will provide for financing payments and any terms or conditions specifically applicable thereto (see 32.202–4); and

(v) Frequency, form, and any additional content of the contractor's request for financing payment (in addition to the requirements of the clause at 52.232–29, Terms for Financing of Purchases of Commercial Items; and

(2) Unless agency regulations authorize alterations, the unaltered text of the clause at 52.232–29, Terms for Financing of Purchases of Commercial Items.

(c) *Computation of amounts, and contractor entitlement provisions.* (1) Contracts shall provide that delivery payments shall be made only for completed supplies and services accepted by the Government in accordance with the terms of the contract. Contracts may provide for commercial advance and commercial interim payments based upon a wide variety of bases, including (but not limited to) achievement or occurrence of specified events, the passage of time, or specified times prior to the delivery date(s). The basis for payment must be objectively determinable. The clause written by the contracting officer shall specify, to the extent access is necessary, the information and/or facilities to which the Government shall have access for the purpose of verifying the contractor's

entitlement to payment of contract financing.

(2) If the contract is awarded using the offeror-proposed procedure at 32.205, the clause constructed by the contracting officer under paragraph (b)(1) of this section shall contain the following:

(i) A statement that the offeror's proposed listing of earliest times and greatest amounts of projected financing payments submitted in accordance with paragraph (d)(2) of the provision at 52.232–31, Invitation to Propose Financing Terms, is incorporated into the contract, and

(ii) A statement that financing payments shall be made in the lesser amount and on the later of the date due in accordance with the financing terms of the contract, or in the amount and on the date projected in the listing of earliest times and greatest amounts incorporated in the contract.

(3) If the security accepted by the contracting officer is the contractor's financial condition, the contracting officer shall incorporate in the clause constructed under paragraph (b)(1) of this section the following—

(i) A statement that the contractor's financial condition has been accepted as adequate security for commercial financing payments; and

(ii) A statement that the contracting officer may exercise the Government's rights to require other security under paragraph (c), Security for Government Financing, of the clause at 52.232–29, Terms for Financing of Purchases of Commercial Items, in the event the contractor's financial condition changes and is found not to be adequate security.

(d) *Instructions for multiple appropriations.* If contract financing is to be computed for the contract as a whole, and if there is more than one appropriation account (or subaccount) funding payments under the contract, the contracting officer shall include, in the contract, instructions for distribution of financing payments to the respective funds accounts. Distribution instructions and contract liquidation instructions must be mutually consistent.

(e) *Liquidation.* Liquidation of contract financing payments shall be on the same basis as the computation of contract financing payments; that is, financing payments computed on a whole contract basis shall be liquidated on a whole contract basis; and a payment computed on a line item basis shall be liquidated against that line item. If liquidation is on a whole contract basis, the contracting officer shall use a uniform liquidation percentage as the liquidation method, unless the contracting officer obtains the concurrence of the cognizant payment office that the proposed liquidation provisions can be executed by that office, or unless agency regulations provide alternative liquidation methods.

(f) *Prompt payment for commercial purchase payments.* The provisions of subpart 32.9, Prompt Payment, apply to contract financing and invoice payments for commercial purchases in the same manner they apply to non-commercial purchases. The contracting officer is responsible for including in the contract all the information necessary to implement prompt payment. In particular, contracting officers must be careful to clearly differentiate in the contract between contract financing and invoice payments and between items having different prompt payment times.

(g) *Installment payment financing for commercial items.* Contracting officers may insert the clause at 52.232–30, Installment Payments for Commercial Items, in solicitations and contracts in lieu of constructing a specific clause in accordance with paragraphs (b) through (e) of this section, if the contract action qualifies under the criteria at 32.202–1(b) and installment payments for the item are either customary or are authorized in accordance with agency procedures.

(1) *Description.* Installment payment financing is payment by the Government to a contractor of a fixed number of equal interim financing payments prior to delivery and acceptance of a contract item. The installment payment arrangement is designed to reduce administrative costs. However, if a contract will have a large number of deliveries, the administrative costs may increase to the point where installment payments are not in the best interests of the Government.

(2) *Authorized types of installment payment financing and rates.* Installment payments may be made using the clause at 52.232–30, Installment Payments for Commercial Items, either at the 70 percent financing rate cited in the clause or at a lower rate in accordance with agency procedures.

(3) *Calculating the amount of installment financing payments.* The contracting officer shall identify in the contract schedule those items for which installment payment financing is authorized. Monthly installment payment amounts are to be calculated by the contractor pursuant to the instructions in the contract clause only for items authorized to receive installment payment financing.

(4) *Liquidating installment payments.* If installment payments have been made for an item, the amount paid to the contractor upon acceptance of the item by the Government shall be reduced by the amount of installment payments made for the item. The contractor's request for final payment for each item is required to show this calculation.

32.207 Administration and payment of commercial financing payments.

(a) *Responsibility.* The contracting officer responsible for administration of the contract shall be responsible for review and approval of contract financing requests.

(b) *Approval of financing requests.* Unless otherwise provided in agency regulations, or by agreement with the appropriate payment official—

(1) The contracting officer shall be responsible for receiving, approving, and transmitting all contract financing requests to the appropriate payment office; and

(2) Each approval shall specify the amount to be paid, necessary contractual information, and the account(s) (see 32.206(d)) to be charged for the payment.

(c) *Management of security.* After contract award, the contracting officer responsible for approving requests for financing payments shall be responsible for determining that the security continues to be adequate. If the contractor's financial condition is the Government's security, this contracting officer is also responsible for monitoring the contractor's financial condition.

Subpart 32.3—Loan Guarantees for Defense Production

32.300 Scope of subpart.

This subpart prescribes policies and procedures for designated agencies' guarantees of loans made by private financial institutions to borrowers performing contracts related to national defense (see 30.102).

32.301 Definitions.

As used in this subpart—

Borrower means a contractor, subcontractor (at any tier), or other supplier who receives a guaranteed loan.

Federal Reserve Board means the Board of Governors of the Federal Reserve System.

Guaranteed loan or *V loan* means a loan, revolving credit fund, or other financial arrangement made pursuant to Regulation V of the Federal Reserve Board, under which the guaranteeing agency is obligated, on demand of the lender, to purchase a stated percentage of the loan and to share any losses in the amount of the guaranteed percentage.

Guaranteeing agency means any agency that the President has authorized to guarantee loans, through Federal Reserve Banks, for expediting national defense production.

[48 FR 42328, Sept. 19, 1983, as amended at 66 FR 2132, Jan. 10, 2001]

32.302 Authority.

Congress has authorized Federal Reserve Banks to act, on behalf of guaranteeing agencies, as fiscal agents of the United States in the making of loan guarantees for defense production (Section 301, Defense Production Act of 1950 (50 U.S.C. App. 2091)). By Executive Order 10480, August 14, 1953 (3 CFR 1949–53), as amended, the President has designated the following agencies as guaranteeing agencies:

(a) Department of Defense.
(b) Department of Energy.
(c) Department of Commerce.
(d) Department of the Interior.
(e) Department of Agriculture.
(f) General Services Administration.

(g) National Aeronautics and Space Administration.

32.303 General.

(a) Section 301 of the Defense Production Act authorizes loan guarantees for contract performance or other operations related to national defense, subject to amounts annually authorized by Congress on the maximum obligation of any guaranteeing agency under any loan, discount, advance, or commitment in connection therewith, entered into under section 301. (See 50 U.S.C. App. 2091 for statutory limitations and exceptions concerning the authorization of loan guarantee amounts and the use of loan guarantees for the prevention of insolvency or bankruptcy.)

(b) The guarantee shall be for less than 100 percent of the loan unless the agency determines that—

(1) The circumstances are exceptional;

(2) The operations of the contractor are vital to the national defense; and

(3) No other suitable means of financing are available.

(c) Loan guarantees are not issued to other agencies of the Government.

(d) Guaranteed loans are essentially the same as conventional loans made by private financial institutions, except that the guaranteeing agency is obligated, on demand of the lender, to purchase a stated percentage of the loan and to share any losses in the amount of the guaranteed percentage. It is the responsibility of the private financial institution to disburse and collect funds and to administer the loan. Under Regulation V of the Federal Reserve Board (12 CFR 245), any private financing institution may submit an application to the Federal Reserve Bank of its district for guarantee of a loan or credit.

(e) Federal Reserve Banks will make the loan guarantee agreements on behalf of the guaranteeing agencies.

(f) Under Section 302(c) of Executive Order 10480, August 14, 1953 (3 CFR 1949–53), as amended, all actions and operations of Federal Reserve Banks, as fiscal agents, are subject to the supervision of the Federal Reserve Board. The Federal Reserve Board is authorized to prescribe the following, after consultation with the heads of guaranteeing agencies:

(1) Regulations governing the actions and operations of fiscal agents.

(2) Rates of interest, guarantee and commitment fees, and other charges that may be made for loans, discounts, advances, or commitments guaranteed by the guaranteeing agencies through the Federal Reserve Banks. These prescriptions may be in the form of specific rates or limits, or in other forms.

(3) Uniform forms and procedures to be used in connection with the guarantees.

(g) The guaranteeing agency is responsible for certifying eligibility for the guarantee and fixing the maximum dollar amount and maturity date of the guaranteed loan to meet the contractor's requirement for financing performance of the defense production contract on hand at the time the guarantee application is submitted.

32.304 Procedures.

32.304–1 Application for guarantee.

(a) A contractor, subcontractor, or supplier that needs operating funds to perform a contract related to national defense may apply to a financing institution for a loan. If the financing institution is willing to extend credit, but considers a Government guarantee necessary, the institution may apply to the Federal Reserve Bank of its district for the guarantee. Application forms and guidance are available at all Federal Reserve Banks.

(b) The Federal Reserve Bank will promptly send a copy of the application, including a list of the relevant defense contracts held by the contractor, to the Federal Reserve Board. The Board will transmit the application and the list of contracts to the interested guaranteeing agency, so that the agency can determine the eligibility of the contractor.

(c) To expedite the process, the Federal Reserve Bank may, pursuant to instructions of a guaranteeing agency, submit lists of the defense contracts to the interested contracting officers.

(d) While eligibility is being determined, the Federal Reserve Bank will make any necessary credit investigations to supplement the information

furnished by the applicant financing institution in order to—

(1) Expedite necessary defense financing; and

(2) Protect the Government against monetary loss.

(e) The Federal Reserve Bank will send its report and recommendation to the Federal Reserve Board. The Board will transmit them to the interested guaranteeing agency.

32.304–2 Certificate of eligibility.

(a) The contracting officer shall prepare the certificate of eligibility for a contract that the contracting officer deems to be of material consequence, when—

(1) The contract financing office requests it;

(2) Another interested agency requests it; or

(3) The application for a loan guarantee relates to a contract or subcontract within the cognizance of the contracting officer.

(b) The agency shall evaluate the relevant data, including the certificate of eligibility, the accompanying data, and any other relevant information on the contractor's financial status and performance, to determine whether authorization of a loan guarantee would be in the Government's interest.

(c) If the contractor has several major national defense contracts, it is normally not necessary to evaluate the eligibility of relatively minor contracts. The determination of eligibility should be processed, without delay, based on the preponderance of the amount of the contracts.

(d) The certificate of eligibility shall include the following determinations:

(1) The supplies or services to be acquired are essential to the national defense.

(2) The contractor has the facilities and the technical and management ability required for contract performance.

(3) There is no practicable alternate source for the acquisition without prejudice to the national defense. (This statement shall not be included if the contractor is a small business concern.)

(e) The contracting officer shall consider the following factors in determining if a practicable alternate source exists:

(1) Prejudice to the national defense, because reletting of a contract with another source would conflict with a major policy on defense acquisition; e.g., policies relating to the mobilization base.

(2) The urgency of contract performance schedules.

(3) The technical ability and facilities of other potential sources.

(4) The extent to which other sources would need contract financing to perform.

(5) The willingness of other sources to enter into contracts.

(6) The time and expense involved in repurchasing for contracts or parts of contracts. This may include potential claims under a termination for convenience or delays incident to default at a later date.

(7) The comparative prices available from other sources.

(8) The disruption of established subcontracting arrangements.

(9) Other pertinent factors.

(f) The contracting officer shall attach sufficient data to the certificate of eligibility to support the determinations made. Available pertinent information shall be included on—

(1) The contractor's past performance;

(2) The relationship of the contractor's operations to performance schedules; and

(3) Other factors listed in paragraph (e) above, if relevant to the case under consideration.

(g) If the contracting officer determines that a certificate of eligibility is not justified, the facts and reasons supporting that conclusion shall be documented and furnished to the agency contract finance office.

(h) The guaranteeing agency shall review the proposed guarantee terms and conditions. If they are considered appropriate, the guaranteeing agency shall complete a standard form of authorization as prescribed by the Federal Reserve Board. The agency shall transmit the authorization through the Federal Reserve Board to the Federal Reserve Bank. The Bank is authorized to execute and deliver to the financing

institution a standard form of guarantee agreement, with the terms and conditions approved for the particular case. The financing institution will then make the loan.

(i) Substantially the same procedure may be followed for the application of an offeror who is actively negotiating or bidding for a defense contract, except that the guarantee shall not be authorized until the contract has been executed.

(j) The contracting officer shall report to the agency contract finance office any information about the contractor that would have a potentially adverse impact on a pending guarantee application. The contracting officer is not required, however, to initiate any special investigation for this purpose.

(k) With regard to existing contracts, the agency shall not consider the percentage of guarantee requested by the financing institution in determining the contractor's eligibility.

32.304–3 Asset formula.

(a) Under guaranteed loans made primarily for working capital purposes, the agency shall normally limit the guarantee, by use of an asset formula, to an amount that does not exceed a specified percentage (90 percent or less) of the contractor's investment (e.g., payrolls and inventories) in defense production contracts. The asset formula may include all items under defense contracts for which the contractor would be entitled to payment on performance or termination. The formula shall exclude—

(1) Amounts for which the contractor has not done any work or made any expenditure;

(2) Amounts that would become due as the result of later performance under the contracts; and

(3) Cash collateral or bank deposit balances.

(b) Progress payments are deducted from the asset formula.

(c) The agency may relax the asset formula to an appropriate extent for the time actually necessary for contract performance, if the contractor's working capital and credit are inadequate.

32.304–4 Guarantee amount and maturity.

The agency may change the guarantee amount or maturity date, within the limitations at 32.304–3, as follows:

(a) If the contractor enters into additional defense production contracts after the application for, but before authorization of, a guarantee, the agency may adjust the loan guarantee amount or maturity date to meet any significant increase in financing need.

(b) If the contractor enters into defense production contracts during the term of the guaranteed loan, the parties may adjust the existing guarantee agreement to provide for financing the new contracts. Pertinent information and the Federal Reserve Bank reports will be submitted to the guaranteeing agency under the procedures for the original guarantee application, described in 32.304–1. Normally, a new certificate of eligibility is required.

32.304–5 Assignment of claims under contracts.

(a) The agency shall generally require a contractor that is provided a guaranteed loan to execute an assignment of claims under defense production contracts (including any contracts entered into during the term of the guaranteed loan that are eligible for financing under the loan); however, the agency need not require assignment if any of the following conditions are present:

(1) The contractor's financial condition is so strong that the protection to the Government provided by an assignment of claims is unnecessary.

(2) In connection with the assignment of claims under a major contract, the increased protection of the loan that would be provided by the assignments under additional, relatively smaller contracts is not considered necessary by the agency.

(3) The assignment of claims would create an administrative burden disproportionate to the protection required; e.g., if the contractor has a large number of contracts with individually small dollar amounts.

(b) The contractor shall also execute an assignment of claims if requested to do so by the guarantor or the financing institution.

(c) A subcontract or purchase order issued to a subcontractor shall not be considered eligible for financing under guaranteed loans when the issuer of the subcontract or purchase order reserves (1) the privilege of making payments directly to the assignor or to the assignor and assignee jointly, after notice of the assignment, or (2) the right to reduce or set off assigned proceeds under defense production contracts by reason of claims against the borrower arising after notice of assignment and independently of defense production contracts under which the borrower is the seller.

32.304–6 Other collateral security.

The following are examples of other forms of security that, although seldom invoked under guaranteed loans, may be required when considered necessary for protection of the Government interest:

(a) Mortgages on fixed assets.

(b) Liens against inventories.

(c) Endorsements.

(d) Guarantees.

(e) Subordinations or standbys of other indebtedness.

32.304–7 Contract surety bonds and loan guarantees.

(a) Contract surety bonds are incompatible with the Government's interests under guaranteed loans, unless the interests of the surety are subordinated to the guaranteed loan.

(b) If a substantial share of the contractor's defense contracts are covered by surety bonds, or the amount of the bond is substantial in relation to the contractor's net worth, the agency shall not authorize the guarantee of a loan on a bonded contract unless the surety enters into an agreement with the financing institution to subordinate the surety's rights and claims in favor of the guaranteed loan.

(c) The agency approval of a guarantee for a loan involving relatively substantial subcontracts covered by surety bonds shall also depend on the establishment of a reasonable allocation agreement between the sureties and the financing institution. The agreement should give the financing institution the benefit, with regard to payments to be made on the contract, of the portion of its loans fairly attributable to expenditures made under the bonded subcontracts before notice of default.

32.304–8 Other borrowing.

(a) Because of the limitations under guaranteed loans, some contractors seek to supplement the loan by other borrowing (outside the guarantee) from the financing institution or other sources. It has been recognized in practice that, while prohibition of borrowings outside the guaranteed loan is preferable when practicable in a given V-loan case, such other borrowings should be permitted when necessary.

(b) If the agency consents to the contractor obtaining other borrowing during the guaranteed loan period, the agency shall apply the following restrictions:

(1) A reasonable limit on the amount of other borrowing.

(2) If guaranteed and unguaranteed loans are made by the same financing institution, a requirement that any collateral security requested by the institution under the unguaranteed loan is also to be secondary collateral for the guaranteed loan.

(3) A requirement that the contractor provide appropriate documentation to the guaranteeing agency, at intervals not longer than 30 days, to disclose outstanding unguaranteed borrowings.

[48 FR 42328, Sept. 19, 1983, as amended at 62 FR 237, Jan. 2, 1997]

32.305 Loan guarantees for terminated contracts.

(a) The purpose of guaranteed loans; i.e., to provide for financing based on the borrower's recoverable investment in defense production contracts, may also apply to contracts that have been terminated (partially or totally) for the convenience of the Government. Guaranteed loans also may be made before such termination if it is known that termination of particular contracts for the convenience of the Government is about to occur. These loans are expected to provide necessary financing pending termination settlements and payments. They may also finance continuing performance of defense production contracts that are eligible for guaranteed loans.

(b) The procedure for such guarantees is substantially the same as that outlined in 32.304, except that certificates of eligibility are not required for (1) contracts that have been totally terminated or (2) the terminated portion of contracts that have been partially terminated. The agency shall take precautions necessary to avoid Government losses and to ensure the loans will be self-liquidating from the proceeds of defense production contracts.

(c) Loan guarantees for contract termination financing shall not be provided before specific contract terminations are certain.

32.306 Loan guarantees for subcontracts.

If the request for a loan guarantee concerns a subcontractor that is financially weak in comparison with its contractor, the Government's interests may be fostered by the contractor making progress payments to the subcontractor. If so, the agency shall try to arrange for the contractor to provide the progress payments. As a result, the need for the loan guarantee may be reduced or eliminated and the contractor would bear part or all of the risk of loss arising from the selection of the subcontractor.

Subpart 32.4—Advance Payments for Non-Commercial Items

32.400 Scope of subpart.

This subpart provides policies and procedures for advance payments on prime contracts and subcontracts. It does not include policies and procedures for advance payments for the types of transactions listed in 32.404. This subpart does not apply to commercial advance payments, which are subject to subpart 32.2.

[48 FR 42328, Sept. 19, 1983, as amended at 60 FR 49714, Sept. 26, 1995]

32.401 Statutory authority.

The agency may authorize advance payments in negotiated and sealed bid contracts if the action is appropriate under

(a) 41 U.S.C. chapter 45;

(b) 10 U.S.C. 2307; or

(c) Pub. L. 85–804 (50 U.S.C. 1431–1435) and Executive Order 10789, November 14, 1958 (3 CFR 1958 Supp. pp. 72–74) (see Subpart 50.1 for other applications of this statute).

[48 FR 42328, Sept. 19, 1983, as amended at 50 FR 1744, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 72 FR 63030, Nov. 7, 2007; 79 FR 24211, Apr. 29, 2014]

32.402 General.

(a) A limitation on authority to grant advance payments under Pub. L. 85–804 (50 U.S.C. 1431–1435) is described at 50.102–3(b)(4).

(b) Advance payments may be provided on any type of contract; however, the agency shall authorize advance payments sparingly. Except for the contracts described in 32.403(a) and (b), advance payment is the least preferred method of contract financing (see 32.106) and generally they should not be authorized if other types of financing are reasonably available to the contractor in adequate amounts. Loans and credit at excessive interest rates or other exorbitant charges, or loans from other Government agencies, are not considered reasonably available financing.

(c) If statutory requirements and standards for advance payment determinations are met, the contracting officer shall generally recommend that the agency authorize advance payments.

(1) The statutory requirements are that—

(i) The contractor gives adequate security;

(ii) The advance payments will not exceed the unpaid contract price (see 32.410(b), subparagraph (a)(2)); and

(iii) The agency head or designee determines, based on written findings, that the advance payment—

(A) Is in the public interest (under 32.401(a) or (b)); or

(B) Facilitates the national defense (under 32.401(c)).

(2) The standards for advance payment determinations are that—

(i) The advance payments will not exceed the contractor's interim cash needs based on—

(A) Analysis of the cash flow required for contract performance;

(B) Consideration of the reimbursement or other payment cycle; and

(C) To the extent possible, employment of the contractor's own working capital;

(ii) The advance payments are necessary to supplement other funds or credit available to a contractor;

(iii) The recipient is otherwise qualified as a responsible contractor;

(iv) The Government will benefit from performance prospects or there are other practical advantages; and

(v) The case fits one or more of the categories described in 32.403.

(d) If necessary, the agency may authorize advance payments in addition to progress or partial payments on the same contract (see 32.501–1(c)).

(e) Each agency that provides advance payments shall—

(1) Place the responsibility for making findings and determinations, and for approval of contract terms concerning advance payments (see 32.410), at an organizational level high enough to ensure uniform application of this subpart (see the limitation at 50.102–1(b) which also applies to advance payments authorized under Pub. L. 85–804 (50 U.S.C. 1431–1435)); and

(2) Establish procedures for coordination, before advance payment authorization, with the activity that provides contract financing support.

(f) If the contract provides for advance payments under Pub. L. 85–804, the contracting officer shall ensure conformance with the requirements of 50.103–7.

[48 FR 42328, Sept. 19, 1983, as amended at 59 FR 67047, Dec. 28, 1994; 72 FR 63030, Nov. 7, 2007]

32.403 Applicability.

Advance payments may be considered useful and appropriate for the following:

(a) Contracts for experimental, research, or development work with nonprofit educational or research institutions.

(b) Contracts solely for the management and operation of Government-owned plants.

(c) Contracts for acquisition, at cost, of property for Government ownership.

(d) Contracts of such a highly classified nature that the agency considers it undesirable for national security to permit assignment of claims under the contract.

(e) Contracts entered into with financially weak contractors whose technical ability is considered essential to the agency. In these cases, the agency shall closely monitor the contractor's performance and financial controls to reduce the Government's financial risk.

(f) Contracts for which a loan by a private financial institution is not practicable, whether or not a loan guarantee under this part is issued; for example, if—

(1) Financing institutions will not assume a reasonable portion of the risk under a guaranteed loan;

(2) Loans with reasonable interest rates or finance charges are not available to the contractor; or

(3) Contracts involve operations so remote from a financial institution that the institution could not be expected to suitably administer a guaranteed loan.

(g) Contracts with small business concerns, under which circumstances that make advance payments appropriate often occur (but see 32.104(b)).

(h) Contracts under which exceptional circumstances make advance payments the most advantageous contract financing method for both the Government and the contractor.

[48 FR 42328, Sept. 19, 1983, as amended at 72 FR 27384, May 15, 2007]

32.404 Exclusions.

(a) This subpart does not apply to advance payments authorized by law for—

(1) Rent;

(2) Tuition;

(3) Insurance premiums;

(4) Expenses of investigations in foreign countries;

(5) Extension or connection of public utilities for Government buildings or installations;

(6) Subscriptions to publications;

(7) Purchases of supplies or services in foreign countries, if—

(i) The purchase price does not exceed $15,000 (or equivalent amount of the applicable foreign currency); and

(ii) The advance payment is required by the laws or government regulations of the foreign country concerned;

(8) Enforcement of the customs or narcotics laws; or

(9) Other types of transactions excluded by agency procedures under statutory authority.

(b) Agencies may issue their own instructions to deal with advance payment items in paragraph (a) above authorized under statutes relevant to their agencies.

[48 FR 42328, Sept. 19, 1983, as amended at 75 FR 53134, Aug. 30, 2010]

32.405 Applying Pub. L. 85–804 to advance payments under sealed bid contracts.

(a) Actions that designated agencies may take to facilitate the national defense without regard to other provisions of law relating to contracts, as explained in 50.101–1(a), also include making advance payments. These advance payments may be made at or after award of sealed bid contracts as well as negotiated contracts.

(b) Bidders may request advance payments before or after award, even if the invitation for bids does not contain an advance payment provision. However, the contracting officer shall reject any bid requiring that advance payments be provided as a basis for acceptance.

(c) When advance payments are requested, the agency may—

(1) Enter into the contract and provide for advance payments conforming to this part 32;

(2) Enter into the contract without providing for advance payments if the contractor does not actually need advance payments; or

(3) Deny award of the contract if the request for advance payments has been disapproved under 32.409–2 and funds adequate for performance are not otherwise available to the offeror.

[48 FR 42328, Sept. 19, 1983, as amended at 50 FR 1744, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 72 FR 63030, Nov. 7, 2007]

32.406 Letters of credit.

(a) The Department of the Treasury (Treasury) prescribes regulations and instructions covering the use of letters of credit for advance payments under contracts. See Treasury Department Circular 1075 (31 CFR part 205), and the implementing instructions in the Treasury Financial Manual, available in offices providing financial advice and assistance.

(b) If agencies provide advance payments to contractors, use of the following methods is required unless the agency has obtained a waiver from the Treasury Department:

(1) By letter of credit if the contracting agency expects to have a continuing relationship with the contractor for a year or more, with advances totaling at least $120,000 a year.

(2) By direct Treasury check if the circumstances do not meet the criteria in subparagraph (1) above.

(c) If the agency has entered into multiple contracts (or a combination of contract(s) and assistance agreement(s)) involving eligibility of a contractor for more than one letter of credit, the agency shall follow arrangements made under Treasury procedures for (1) consolidating funding to the same contractor under one letter of credit or (2) replacing multiple letters of credit with a single letter of credit.

(d) The letter of credit enables the contractor to withdraw Government funds in amounts needed to cover its own disbursements of cash for contract performance. Whenever feasible, the agency shall, under the direction and approval of the Department of the Treasury, use a letter of credit method that requires the contractor not to withdraw the Government funds until the contractor's checks have been (1) forwarded to the payees (delay of drawdown technique), or (2) presented to the contractor's bank for payment (checks paid technique) (see 31 CFR 205.3 and 205.4(d)).

(e) The Treasury regulations provide for terminating the advance financing arrangement if the contractor is unwilling or unable to minimize the elapsed time between receipt of the advance and disbursement of the funds. In such cases, if reversion to normal payment methods is not feasible, the Treasury regulation provides for use of a working capital method of advance; i.e., for limiting advances to (1) only the estimated disbursements for a

given initial period and (2) subsequently, for only actual cash disbursements (31 CFR 205.3(k) and 205.7).

[48 FR 42328, Sept. 19, 1983, as amended at 52 FR 19805, May 27, 1987]

32.407 Interest.

(a) Except as provided in paragraph (d) below, the contracting officer shall charge interest on the daily unliquidated balance of all advance payments at the higher of—

(1) The published prime rate of the financial institution (depository) in which the special account (see 32.409–3) is established; or

(2) The rate established by the Secretary of the Treasury under 50 U.S.C. App. 1215(b)(2).

(b) The interest rate for advance payments shall be adjusted for changes in the prime rate of the depository and the semiannual determination by the Secretary of the Treasury under 50 U.S.C. App. 1215(b)(2). The contracting officer shall obtain data from the depository on changes in the interest rate during the month. Interest shall be computed at the end of each month on the daily unliquidated balance of advance payments at the applicable daily interest rate.

(c) Interest shall be required on contracts that are for acquisition, at cost, of property for Government ownership, if the contracts are awarded in combination with, or in contemplation of, supply contracts or subcontracts.

(d) The agency head or designee may authorize advance payments without interest under the following types of contracts, if in the Government's interest:

(1) Contracts for experimental, research, or development work (including studies, surveys, and demonstrations in socio-economic areas) with nonprofit education or research institutions.

(2) Contracts solely for the management and operation of Government-owned plants.

(3) Cost-reimbursement contracts with governments, including State or local governments, or their instrumentalities.

(4) Other classes of contracts, or unusual cases, for which the exclusion of interest on advances is specifically authorized by agency procedures.

(e) If a contract provides for interest-free advance payments, the contracting officer may require the contractor to charge interest on advances or downpayments to subcontractors and credit the Government for the proceeds from the interest charges. Interest rates shall be determined as described in paragraphs (a) and (b) above. The contracting officer need not require the contractor to charge interest on an advance to a subcontractor that is an institution of the kind described in paragraph (d)(1).

(f) The contracting officer shall not allow interest charges, required by this 32.407, as reimbursable costs under cost-reimbursement contracts, whether the interest charge was incurred by the prime contractor or a subcontractor.

[48 FR 42328, Sept. 19, 1983, as amended at 66 FR 2138, Jan. 10, 2001; 72 FR 27384, May 15, 2007]

32.408 Application for advance payments.

(a) A contractor may apply for advance payments before or after the award of a contract.

(b) The contractor shall submit any advance payment request in writing to the contracting officer and provide the following information:

(1) A reference to the contract if the request concerns an existing contract, or a reference to the solicitation if the request concerns a proposed contract.

(2) A cash flow forecast showing estimated disbursements and receipts for the period of contract performance. If the application pertains to a type of contract described in 32.403(a) or (b), the contractor shall limit the forecast to the contract to be financed by advance payments.

(3) The proposed total amount of advance payments.

(4) The name and address of the financial institution at which the contractor expects to establish a special account as depository for the advance payments. If advance payments in the form of a letter of credit are anticipated, the contractor shall identify the specific account at the financial institution to be used. This subparagraph (4) is not applicable if an alternate method is used under agency procedures.

(5) A description of the contractor's efforts to obtain unguaranteed private financing or a V-loan (see 32.301) under eligible contracts. This requirement is not applicable to the contract types described in 32.403(a) or (b).

(6) Other information appropriate to an understanding of (i) the contractor's financial condition and need, (ii) the contractor's ability to perform the contract without loss to the Government, and (iii) financial safeguards needed to protect the Government's interest. Ordinarily, if the contract is a type described in 32.403(a) or (b), the contractor may limit the response to this subparagraph (6) to information on the contractor's reliability, technical ability, and accounting system and controls.

[48 FR 42328, Sept. 19, 1983, as amended at 66 FR 2138, Jan. 10, 2001]

32.409 Contracting officer action.

After analysis of the contractor's application and any appropriate investigation, the contracting officer shall recommend approval or disapproval and transmit the request and recommendation to the approving authority designated under 32.402(e).

32.409–1 Recommendation for approval.

If recommending approval, the contracting officer shall transmit the following, under agency procedures, to the approving authority:

(a) Contract data, including—

(1) Identification and date of the award;

(2) Citation of the appropriation;

(3) Type and dollar amount of the contract;

(4) Items to be supplied, schedule of deliveries or performance, and status of any deliveries or performance;

(5) The contract fee or profit contemplated; and

(6) A copy of the contract, if available.

(b) The contractor's request and supporting information.

(c) A report on the contractor's past performance, responsibility, technical ability, and plant capacity.

(d) Comments on (1) the contractor's need for advance payments and (2) potential Government benefits from the contract performance.

(e) Proposed advance payment contract terms, including proposed security requirements.

(f) The findings, determination, and authorization (see 32.410).

(g) The recommendation for approval of the advance payment request.

(h) Justification of any proposal for waiver of interest charges (see 32.407).

32.409–2 Recommendation for disapproval.

If recommending disapproval, the contracting officer shall, under agency procedures, transmit—

(a) The items prescribed in 32.409–1(a), (b), and (c); and

(b) The recommendation for disapproval and the reasons.

32.409–3 Security, supervision, and covenants.

(a) If advance payments are approved, the contracting officer shall enter into an agreement with the contractor covering special accounts and suitable covenants protecting the Government's interest (see 32.411). This requirement generally applies under all statutory authorities, but modified requirements applicable to certain specific cases are prescribed in paragraphs (e) through (g) below.

(b) The agency shall (1) ensure that the amount of advance payments does not exceed the contractor's financial needs, and (2) closely supervise the contractor's withdrawal of funds from special accounts in which the advance payments are deposited.

(c) In the terms of the agreement, the contracting officer should provide for a paramount lien in favor of the Government. This lien may supplement or replace other security requirements. The lien should cover—

(1) Supplies being acquired;

(2) Any credit balance in the special account in which advance payments are deposited; and

(3) All property that the contractor acquires for performing the contract, except to the extent to which the Government otherwise has valid title to the property.

(d) Security requirements vary to fit the circumstances of different cases.

Minimum security requirements are covered by the clauses prescribed in the contract. The contracting officer may supplement these as necessary in each case for protection of the Government's interest. Examples of additional security terms are—

(1) Personal or corporate endorsements or guarantees;

(2) Pledges of collateral;

(3) Subordination or standby of other indebtedness;

(4) Controls or limitations on profit distributions, salaries, bonuses or commissions, rentals and royalties, capital expenditures, creation of liens, retirement of stock or debt, and creation of additional obligations; and

(5) Advance payment bonds (rarely required).

(e) In an advance payment agreement with an instrumentality of the Government, a State, a local government, or an agency or instrumentality of a State or local government, the contracting officer may omit the requirement for deposit of the advances in a special account, if the official approving the advance determines that other adequate security exists to protect the Government's interest.

(f) The requirements of this 32.409–3 do not apply when using letters of credit if an agency's procedures provide for—

(1) The use under a cost-reimbursement contract of Federal funds deposited in the contractor's account at a financial institution (without the contractor acquiring title to the funds); and

(2) The security of such deposit of public moneys in accordance with governing regulations of the Treasury Department.

(g) If a separate special account is not required; e.g., advance payment by a letter of credit, an agency may require a special account for an individual case, or classes of cases, if the circumstances warrant.

[48 FR 42328, Sept. 19, 1983, as amended at 66 FR 2138, Jan. 10, 2001]

32.410 Findings, determination, and authorization.

(a) Each determination concerning advance payments shall be supported by written findings (see 32.402(c)(1)(iii)).

(b) The following is an example of the format and text of findings, determination, and authorization with alternative words, phrases, and paragraphs to be selected to conform to the circumstances involved:

FINDINGS, DETERMINATION, AND AUTHORIZATION FOR ADVANCE PAYMENTS

FINDINGS

(a) The undersigned hereby finds that:

(1) The _____ [*insert the name of the contracting activity*] and _____ [*insert the name of the contractor*] (have entered) (propose to enter) into (negotiated) (sealed bid) Contract No. ____, dated _____

[*Summarize the specific facts and significant circumstances concerning the contract and the contractor, that, together with the other findings, will clearly support the determination below.*]

(2) Advance payments (in an amount not to exceed $_____ at any time outstanding) (in an aggregate amount not exceeding $_____, less the aggregate amounts repaid, or withdrawn by the Government) are required by the Contractor to perform under the contract. The amount does not exceed the unpaid contract price or the estimated interim cash needs arising during the reimbursement cycle.

(3) The advance payments are necessary for prompt, efficient contract performance that will benefit the Government.

(4) The proposed advance payment clause provides for security for the protection of the Government. The clause requires that all payments will be desposited in a special account at the Contractor's financial institution and that the Government will have a paramount lien on (i) the credit balance in the special account, (ii) any supplies contracted for, and (iii) any material or other property acquired for performance of the contract. [*Insert the following, if applicable* (The Contractor's financial management system provides for effective control over and accountability for all Federal funds under governing regulations of the Treasury Department.) (An advance payment bond is required.)] This security is considered adequate.

(5) Advance payments are the only adequate means of financing available to the Contractor, and the amount designated in (2) above is based, to the extent possible, on the use of the Contractor's own working capital in performing the contract.

[*Insert paragraph (6), (7), or (8), as applicable*].

(6) The Contractor is a nonprofit (educational) (and) (research) institution, and

the contract is for (experimental) (,) (research and development) work.

(7) The contract is solely for the management and operation of a Government-owned plant.

(8) The following unusual facts and circumstances favor making advance payments to the Contractor without interest:

[*List the pertinent facts and circumstances.*]

DETERMINATION

(b) Based on the findings in (a) above, the undersigned determined that the making of the proposed advance payments, (with interest at the rate of ____ [*Insert the interest rate computed in accordance with 32.407*] percent on the daily unliquidated balance of the advance payments,) (without interest, except as provided by the proposed advance payment clause,) (is in the public interest) (will facilitate the national defense).

AUTHORIZATION

(c) The advance payments, of which (the amount at any time outstanding) (the aggregate amount, less the aggregate amounts repaid, or withdrawn by the Government), shall not exceed $____, are hereby authorized under (41 U.S.C. chapter 45, Contract Financing) (10 U.S.C. 2307) (the Extraordinary Contracting Authority of Government Agencies in Connection with National Defense Functions (50 U.S.C. 1431–1435) and Executive Order No. 10789 of November 14, 1958 (3 CFR 1958 Supp. pp. 72–74)) [*or, if other, cite appropriate authority*] on (terms substantially as contained in the proposed advance payment clause, a copy (an outline) of which is annexed to this authorization) (the following terms:) [*Insert the appropriate terms.*]

(All prior authorizations for advance payments under Contract No. _____ are superseded.)

_____

(*Signature*)

_____

(*Name typed*)

_____

(*Title of authorized official*)

[*Each Findings, Determination, and Authorization shall be individually prepared to fit the particular circumstances at hand. Subparagraphs (a)(1), (2), (3) and (4) and paragraphs (b) and (c) shall be used in each case. If the contract is (a) for experimental, developmental, or research work and with a nonprofit educational or research institution, or (b) only for management and operation of a Government-owned plant, subparagraph (a)(5) should not be included. If the advance payment is to be made without interest to the contractor, include subparagraph (a)(6), (7), or (8). If any advance payments have previously been authorized for the contract, include the final sentence of paragraph (c). The alternate parenthetical wording or other modifications may be used as appropriate. The paragraphs actually used shall be renumbered sequentially*].

[48 FR 42328, Sept. 19, 1983, as amended at 50 FR 1744, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 66 FR 2138, Jan. 10, 2001; 79 FR 24211, Apr. 29, 2014]

32.411 Agreement for special account at a financial institution.

The contracting officer must use substantially the following form of agreement for a special account for advance payments:

Agreement for Special Account

This agreement is entered into this ____ day of _____, 20___, between the United States of America (the Government), represented by the Contracting Officer executing this agreement, _____ [*Insert the name of the Contractor*], a _____ [*Insert the name of the State of incorporation*] corporation (the Contractor), and _____, a financial institution operating under the laws of _____, located at _____ (the financial institution).

Recitals

(a) Under date of _____, 20___, the Government and the Contractor entered into Contract No. ____, or a related supplemental agreement, providing for advance payments to the Contractor. A copy of the advance payment terms was furnished to the financial institution.

(b) The contract or supplemental agreement requires that amounts advanced to the Contractor be deposited separate from the Contractor's general or other funds, in a Special Account at a member bank of the Federal Reserve System, any ''insured'' bank within the meaning of the Act creating the Federal Deposit Insurance Corporation (12 U.S.C. 1811), or a credit union insured by the National Credit Union Administration. The parties agree to deposit the amounts with the financial institution, which meets the requirement.

(c) This Special Account is designated ''_____ [*Insert the Contractor's name*], _____ [*Insert the name of the Government agency*] Special Account.''

Covenants

In consideration of the foregoing, and for other good and valuable considerations, the parties agree to the following conditions:

(a) The Government shall have a lien on the credit balance in the account to secure the repayment of all advance payments made to the Contractor. The lien is paramount to any lien or claim of the financial institution regarding the account.

(b) The financial institution is bound by the terms of the contract relating to the deposit and withdrawal of funds in the Special Account, but is not responsible for the application of funds withdrawn from the account. The financial institution shall act on written directions from the Contracting Officer, the administering office, or a duly authorized representative of either. The financial institution is not liable to any party to this agreement for any action that complies with the written directions. Any written directions received by the financial institution through the Contracting Officer on _____ [*Insert the name of the agency*] stationery and purporting to be signed by, or by the direction of _____ or duly authorized representative, shall be, as far as the rights, duties, and liabilities of the financial institution are concerned, considered as being properly issued and filed with the financial institution by the _____ [*Insert the name of the agency*].

(c) The Government, or its authorized representatives, shall have access to the books and records maintained by the financial institution regarding the Special Account at all reasonable times and for all reasonable purposes, including (but not limited to), the inspection or copying of the books and records and any and all pertinent memoranda, checks, correspondence, or documents. The financial institution shall preserve the books and records for a period of 6 years after the closing of this Special Account.

(d) In the event of the service of any writ of attachment, levy of execution, or commencement of garnishment proceedings regarding the Special Account, the financial institution will promptly notify _____ [*Insert the name of the administering office*].

(e) While this Special Account exists, the financial institution shall inform the Government each month of the financial institution's published prime interest rate and changes to the rate during the month. The financial institution shall give this information to the Contracting Officer on the last business day of the month. [*This covenant will not be included in the Special Account Agreements covering interest-free advance payments.*]

Each of the parties to this agreement has executed the agreement on _____, 20____.

_____

[*Signatures and Official Titles*]

[66 FR 2138, Jan. 10, 2001]

32.412 Contract clause.

(a) The contracting officer shall insert the clause at 52.232–12, Advance Payments, in solicitations and contracts under which the Government will provide advance payments, except as provided in 32.412(b).

(b) If the agency desires to waive the countersignature requirement because of the contractor's financial strength, good performance record, and favorable experience concerning cost disallowances, the contracting officer shall use the clause with its *Alternate I*.

(c) If a cost-reimbursement contract is contemplated, the contracting officer shall use the clause with its *Alternate II*.

(d) If the agency considers a more rapid liquidation appropriate, the contracting officer shall use the clause with its *Alternate III*.

(e) If the agency provides advance payments under the contract at no interest to the prime contractor, the contracting officer shall use the clause with its *Alternate IV*.

(f) If the requirement for a special account is eliminated in accordance with 32.409–3 (e) or (g), the contracting officer shall insert in the solicitation or contract the clause set forth in *Alternate V* of 52.232–12, Advance Payments, instead of the basic clause.

[48 FR 42328, Sept. 19, 1983, as amended at 55 FR 25530, June 21, 1990; 66 FR 2138, Jan. 10, 2001]

Subpart 32.5—Progress Payments Based on Costs

32.500 Scope of subpart.

This subpart prescribes policies, procedures, forms, solicitation provisions, and contract clauses for providing contract financing through progress payments based on costs. This subpart does not apply to—

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

(b) Contracts for construction or for shipbuilding or ship conversion, alteration, or repair, when the contracts provide for progress payments based on a percentage or stage of completion.

[48 FR 42328, Sept. 19, 1983, as amended at 65 FR 16279, Mar. 27, 2000]

32.501 General.

Progress payments may be customary or unusual. Customary progress payments are those made under the general guidance in this subpart, using the customary progress payment rate, the cost base, and frequency of payment established in the Progress Payments clause, and either the ordinary liquidation method or the alternate method as provided in subsections 32.503–8 and 32.503–9. Any other progress payments are considered unusual, and may be used only in exceptional cases when authorized in accordance with subsection 32.501–2.

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. 4504(b), 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.

[65 FR 16279, Mar. 27, 2000, as amended at 79 FR 24211, Apr. 29, 2014]

32.501–2 Unusual progress payments.

(a) The contracting officer may provide unusual progress payments only if—

(1) The contract necessitates predelivery expenditures that are large in relation to contract price and in relation to the contractor's working capital and credit;

(2) The contractor fully documents an actual need to supplement any private financing available, including guaranteed loans; and

(3) The contractor's request is approved by the head of the contracting activity or a designee. In addition, see 32.502–2.

(b) The excess of the unusual progress payment rate approved over the customary progress payment rate should be the lowest amount possible under the circumstances.

(c) Progress payments will not be considered unusual merely because they are on letter contracts or the definitive contracts that supersede letter contracts.

32.501–3 Contract price.

(a) For the purpose of making progress payments and determining the limitation on progress payments, the contract price shall be as follows:

(1) Under firm-fixed price contracts, the contract price is the current amount fixed by the contract plus the not-to-exceed amount for any unpriced modifications.

(2) If the contract is redeterminable or subject to economic price adjustment, the contract price is the initial price until modified.

(3) Under a fixed-price incentive contract, the contract price is the target price plus the not-to-exceed amount of unpriced modifications. However, if the contractor's properly incurred costs exceed the target price, the contracting officer may provisionally increase the price up to the ceiling or maximum price.

(4) Under a letter contract, the contract price is the maximum amount obligated by the contract as modified.

(5) Under an unpriced order issued against a basic ordering agreement, the contract price is the maximum amount obligated by the order, as modified.

(6) Any portion of the contract specifically providing for reimbursement of costs only shall be excluded from the contract price.

(b) The contracting officer shall not make progress payments or increase

the contract price beyond the funds obligated under the contract, as amended.

[48 FR 42328, Sept. 19, 1983, as amended at 74 FR 28431, June 15, 2009]

32.501–4 [Reserved]

32.501–5 Other protective terms.

If the contracting officer considers it necessary for protection of the Government's interest, protective terms such as the following may be used in addition to the Progress Payments clause of the contract:

(a) Personal or corporate guarantees.

(b) Subordinations or standbys of indebtedness.

(c) Special bank accounts.

(d) Protective covenants of the kinds in paragraph (p) of the clause at 52.232–12, Advance Payments.

(e) A provision, included in the solicitation and resultant contract when first article testing is required (see subpart 9.3), limiting progress payments on first article work by a stated amount or percentage.

[48 FR 42328, Sept. 19, 1983, as amended at 55 FR 52794, Dec. 21, 1990]

32.502 Preaward matters.

This section covers matters that generally are relevant only before contract award. This does not preclude taking actions discussed here after award, if appropriate; e.g., postaward addition of a Progress Payments clause for consideration.

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.

[65 FR 16280, Mar. 27, 2000]

32.502–2 Contract finance office clearance.

The contracting officer shall obtain the approval of the contract finance office or other offices designated under agency procedures before taking any of the following actions:

(a) Providing a progress payment rate higher than the customary rate (see 32.501–1).

(b) Deviating from the progress payments terms prescribed in this part.

(c) Providing progress payments to a contractor—

(1) Whose financial condition is in doubt;

(2) Who has had an advance payment request or loan guarantee denied for financial reasons (or approved but withdrawn or lapsed) within the previous 12 months; or

(3) Who is named in the consolidated list of contractors indebted to the United States (known commonly as the *Hold-up List*).

32.502–3 Solicitation provisions.

(a) The contracting officer shall insert the provision at 52.232–13, Notice of Progress Payments, in invitations for bids and requests for proposals that include a Progress Payments clause.

(b)(1) Under the authority of the statutes cited in 32.101, an invitation for bids may restrict the availability of progress payments to small business concerns only.

(2) The contracting officer shall insert the provision at 52.232–14, Notice of Availability of Progress Payments Exclusively for Small Business Concerns, in invitations for bids if it is anticipated that (1) both small business concerns and others may submit bids in response to the same invitation and (2) only the small business bidders would need progress payments.

(c) The contracting officer shall insert the provision at 52.232–15, Progress Payments Not Included, in invitations for bids if the solicitation will not contain one of the provisions prescribed in paragraphs (a) and (b) above.

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)(6), 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)(6), 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.

[65 FR 16280, Mar. 27, 2000, as amended at 65 FR 24325, Apr. 25, 2000]

32.503 Postaward matters.

This section covers matters that are generally relevant only after award of a contract. This does not preclude taking actions discussed here before award, if appropriate; e.g., preaward review of accounting systems and controls.

32.503–1 [Reserved]

32.503–2 Supervision of progress payments.

(a) The extent of progress payments supervision, by prepayment review or periodic review, should vary inversely with the contractor's experience, performance record, reliability, quality of management, and financial strength, and with the adequacy of the contractor's accounting system and controls. Supervision shall be of a kind and degree sufficient to provide timely knowledge of the need for, and timely opportunity for, any actions necessary to protect Government interests.

(b) The administering office must keep itself informed of the contractor's overall operations and financial condition, since difficulties encountered and losses suffered in operations outside the particular progress payment contract may affect adversely the performance of that contract and the liquidation of the progress payments.

(c) For contracts with contractors (1) whose financial condition is doubtful or not strong in relation to progress payments outstanding or to be outstanding, (2) with management of doubtful capacity, (3) whose accounting controls are found by experience to be weak, or (4) experiencing substantial difficulties in performance, full information on progress under the contract involved (including the status of subcontracts) and on the contractor's other operations and overall financial condition should be obtained and analyzed frequently, with a view to protecting the Government's interests better and taking such action as may be proper to make contract performance more certain.

(d) So far as practicable, all cost problems, particularly those involving indirect costs, that are likely to create disagreements in future administration of the contract should be identified and resolved at the inception of the contract (see 31.109).

32.503–3 Initiation of progress payments and review of accounting system.

(a) For contractors that the administrative contracting officer (ACO) has found by previous experience or recent audit review (within the last 12 months) to be (1) reliable, competent, and capable of satisfactory performance, (2) possessed of an adequate accounting system and controls, and (3) in sound financial condition, progress payments in amounts requested by the contractor should be approved as a matter of course.

(b) For all other contractors, the ACO shall not approve progress payments before determining (1) that (i) the contractor will be capable of liquidating any progress payments or (ii) the Government is otherwise protected against loss by additional protective provisions, and (2) that the contractor's accounting system and controls are adequate for proper administration of progress payments. The services of the responsible audit agency or office should be used to the greatest extent practicable. However, if the auditor so advises, a complete audit may not be necessary.

[48 FR 42328, Sept. 19, 1983, as amended at 63 FR 9061, Feb. 23, 1998]

32.503–4 Approval of progress payment requests.

(a) When the reliability of the contractor and the adequacy of the contractor's accounting system and controls have been established (see 32.503–3 above) the ACO may, in approving any particular progress payment request (including initial requests on new contracts), rely upon that accounting system and upon the contractor's certification, without requiring audit or review of the request before payment.

(b) The ACO should not routinely ask for audits of progress payment requests. However, when there is reason to (1) question the reliability or accuracy of the contractor's certification or (2) believe that the contract will involve a loss, the ACO should ask for a review or audit of the request before payment is approved or the request is otherwise disposed of.

(c) When there is reason to doubt the amount of a progress payment request, only the doubtful amount should be withheld, subject to later adjustment after review or audit; any clearly proper and due amounts should be paid without awaiting resolution of the differences.

32.503–5 Administration of progress payments.

(a) While the ACO may, in approving progress payment requests under 32.503–3 above, rely on the contractor's accounting system and certification without prepayment review, postpayment reviews (including audits when considered necessary) shall be made periodically, or when considered desirable by the ACO to determine the validity of progress payments already made and expected to be made.

(b) These postpayment reviews or audits shall, as a minimum, include a determination of whether or not—

(1) The unliquidated progress payments are fairly supported by the value of the work accomplished on the undelivered portion of the contract;

(2) The applicable limitation on progress payments in the Progress Payments clause has been exceeded;

(3)(i) The unpaid balance of the contract price will be adequate to cover the anticipated cost of completion, or

(ii) The contractor has adequate resources to complete the contract; and

(4) There is reason to doubt the adequacy and reliability of the contractor's accounting system and controls and certification.

(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. When the contract will be administered by an agency other than the awarding agency, the contracting officer shall coordinate with the contract administration office if the awarding agency wants the administration of progress payments to be on a basis other than order-by-order.

[48 FR 42328, Sept. 19, 1983, as amended at 65 FR 16280, Mar. 27, 2000; 68 FR 13208, Mar. 18, 2003]

32.503–6 Suspension or reduction of payments.

(a) *General.* The Progress Payments clause provides a Government right to reduce or suspend progress payments, or to increase the liquidation rate, under specified conditions. These conditions and actions are discussed in paragraphs (b) through (g) below.

(1) The contracting officer shall take these actions only in accordance with the contract terms and never precipitately or arbitrarily. These actions should be taken only after—

(i) Notifying the contractor of the intended action and providing an opportunity for discussion;

(ii) Evaluating the effect of the action on the contractor's operations, based on the contractor's financial condition, projected cash requirements, and the existing or available credit arrangements; and

(iii) Considering the general equities of the particular situation.

(2) The contracting officer shall take immediate unilateral action only if warranted by circumstances such as overpayments or unsatisfactory contract performance.

(3) In all cases, the contracting officer shall—

(i) Act fairly and reasonably;

(ii) Base decisions on substantial evidence; and

(iii) Document the contract file. Findings made under paragraph (c) of the Progress Payments clause shall be in writing.

(b) *Contractor noncompliance.* (1) The contractor must comply with all material requirements of the contract. This includes the requirement to maintain an efficient and reliable accounting system and controls, adequate for the proper administration of progress payments. If the system or controls are deemed inadequate, progress payments shall be suspended (or the portion of progress payments associated with the unacceptable portion of the contractor's accounting system shall be suspended) until the necessary changes have been made.

(2) If the contractor fails to comply with the contract without fault or negligence, the contracting officer will not take action permitted by paragraph (c)(1) of the Progress Payments clause, other than to correct overpayments and collect amounts due from the contractor.

(c) *Unsatisfactory financial condition.* (1) If the contracting officer finds that contract performance (including full liquidation of progress payments) is endangered by the contractor's financial condition, or by a failure to make progress, the contracting officer shall require the contractor to make additional operating or financial arrangements adequate for completing the contract without loss to the Government.

(2) If the contracting officer concludes that further progress payments would increase the probable loss to the Government, the contracting officer shall suspend progress payments and all other payments until the unliquidated balance of progress payments is eliminated.

(d) *Excessive inventory.* If the inventory allocated to the contract exceeds reasonable requirements (including a reasonable accumulation of inventory for continuity of operations), the contracting officer should, in addition to requiring the transfer of excessive inventory from the contract, take one or more of the following actions, as necessary, to avoid or correct overpayment:

(1) Eliminate the costs of the excessive inventory from the costs eligible for progress payments, with appropriate reduction in progress payments outstanding.

(2) Apply additional deductions to billings for deliveries (increase liquidation).

(e) *Delinquency in payment of costs of performance.* (1) If the contractor is delinquent in paying the costs of contract performance in the ordinary course of business, the contracting officer shall evaluate whether the delinquency is caused by an unsatisfactory financial condition and, if so, shall apply the guidance in paragraph (c) above. If the contractor's financial condition is satisfactory, the contracting officer shall not deny progress payments if the contractor agrees to—

(i) Cure the payment delinquencies;

(ii) Avoid further delinquencies; and

(iii) Make additional arrangements adequate for completing the contract without loss to the Government.

(2) If the contractor has, in good faith, disputed amounts claimed by subcontractors, suppliers, or others, the contracting officer shall not consider the payments delinquent until the amounts due are established by the parties through litigation or arbitration. However, the amounts shall be excluded from costs eligible for progress payments so long as they are disputed.

(3) Determinations of delinquency in making contributions under employee pension, profit sharing, or stock ownership plans, and exclusion of costs for such contributions from progress payment requests, shall be in accordance with paragraph (a)(3) of the clause at 52.232–16, Progress Payments, without regard to the provisions of 32.503–6.

(f) *Fair value of undelivered work.* Progress payments must be commensurate with the fair value of work accomplished in accordance with contract requirements. 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 provided at paragraph (g) of this subsection constitutes this adjustment.

(g) *Loss contracts.* (1) If the sum of the total costs incurred under a contract plus the estimated costs to complete the performance are likely to exceed the contract price, the contracting officer shall compute a loss ratio factor and adjust future progress payments to exclude the element of loss. The loss ratio factor is computed as follows:

(i) Revise the current contract price used in progress payment computations (the current ceiling price under fixed-price incentive contracts) to include the not-to-exceed amount for any pending change orders and unpriced orders.

(ii) Divide the revised contract price by the sum of the total costs incurred to date plus the estimated additional costs of completing the contract performance.

(2) If the contracting officer believes a loss is probable, future progress payment requests shall be modified as follows:

(i) The contract price shall be the revised amount computed under subparagraph (1)(i) above.

(ii) The total costs eligible for progress payments shall be the product of (A) the sum of paid costs eligible for progress payments times (B) the loss ratio factor computed under subparagraph (1)(ii) above.

(iii) The costs applicable to items delivered, invoiced, and accepted shall not include costs in excess of the contract price of the items.

(3) The contracting officer may use audit assistance, technical services, management reports, and other sources of pertinent data to evaluate progress payment requests. If the contracting officer concludes that the contractor's figures in the contractor's progress payment request are not correct, the contracting officer shall—

(i) In the manner prescribed in paragraph (4) below, prepare a supplementary analysis to be attached to the contractor's request;

(ii) Advise the contractor in writing of the differences; and

(iii) Adjust all further progress payments in accordance with paragraph (1) above, using the contracting officer's figures, until the difference is resolved.

(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.

[48 FR 42328, Sept. 19, 1983, as amended at 52 FR 30077, Aug. 12, 1987; 54 FR 5056, Jan. 31, 1989; 54 FR 48989, Nov. 28, 1989; 64 FR 72451, Dec. 27, 1999; 65 FR 16280, Mar. 27, 2000; 74 FR 28431, June 15, 2009]

32.503–7 [Reserved]

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.

[65 FR 16280, Mar. 27, 2000]

32.503–9 Liquidation rates—alternate method.

(a) The liquidation rate determined under 32.503–8 shall apply throughout the period of contract performance unless the contracting officer adjusts the liquidation rate under the alternate method in this 32.503–9. The objective of the alternate liquidation rate method is to permit the contractor to retain the earned profit element of the contract prices for completed items in the liquidation process. The contracting officer may reduce the liquidation rate if—

(1) The contractor requests a reduction in the rate;

(2) The rate has not been reduced in the preceding 12 months;

(3) The contract delivery schedule extends at least 18 months from the contract award date;

(4) Data on actual costs are available (i) for the products delivered, or (ii) if no deliveries have been made, for a performance period of at least 12 months;

(5) The reduced liquidation rate would result in the Government recouping under each invoice the full extent of the progress payments applicable to the costs allocable to that invoice;

(6) The contractor would not be paid for more than the costs of items delivered and accepted (less allocable progress payments) and the earned profit on those items;

(7) The unliquidated progress payments would not exceed the limit prescribed in paragraph (a)(5) of the Progress Payments clause;

(8) The parties agree on an appropriate rate; and

(9) The contractor agrees to certify annually, or more often if requested by the contracting officer, that the alternate rate continues to meet the conditions of subsections 5, 6, and 7 above. The certificate must be accompanied by adequate supporting information.

(b) The contracting officer shall change the liquidation rate in the following circumstances:

(1) The rate shall be increased for both previous and subsequent transactions, if the contractor experiences a lower profit rate than the rate anticipated at the time the liquidation rate was established. Accordingly, the contracting officer shall adjust the progress payments associated with contract items already delivered, as well as subsequent progress payments.

(2) The rate shall be increased or decreased in keeping with the successive changes to the contract price or target profit when—

(i) The target profit is changed under a fixed-price incentive contract with successive targets; or

(ii) A redetermined price involves a change in the profit element under a contract with prospective price redetermination at stated intervals.

(c) Whenever the liquidation rate is changed, the contracting officer shall

issue a contract modification to specify the new rate in the Progress Payments clause. Adequate consideration for these contract modifications is provided by the consideration included in the initial contract. The parties shall promptly make the payment or liquidation required in the circumstances.

[48 FR 42328, Sept. 19, 1983, as amended at 74 FR 40468, Aug. 11, 2009]

32.503–10 Establishing alternate liquidation rates.

(a) The contracting officer must ensure that the liquidation rate is—

(1) High enough to result in Government recoupment of the applicable progress payments on each billing; and

(2) Supported by documentation included in the administration office contract file.

(b) The minimum liquidation rate is the expected progress payments divided by the contract price. Each of these factors is discussed below:

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

(2) For purposes of computing the liquidation rate, the contracting officer may adjust the estimated cost and the contract price to include the estimated value of any work authorized but not yet priced and any projected economic adjustments; however, the contracting officer's adjustment must not exceed the Government's estimate of the price of all authorized work or the funds obligated for the contract.

(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:

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

(4) Minimum liquidation rates will generally be expressed to tenths of a percent. Decimals between tenths will be rounded up to the next highest tenth (not necessarily the nearest tenth), since rounding down would produce a rate below the minimum rate calculated.

[48 FR 42328, Sept. 19, 1983, as amended 52 FR 30077, Aug. 12, 1987; 65 FR 16281, Mar. 27, 2000]

32.503–11 Adjustments for price reduction.

(a) If a retroactive downward price reduction occurs under a redeterminable contract that provides for progress payments, the contracting officer shall—

(1) Determine the refund due and obtain repayment from the contractor for the excess of payments made for delivered items over amounts due as recomputed at the reduced prices; and

(2) Increase the unliquidated progress payments amount for overdeductions made from the contractor's billings for items delivered.

(b) The contracting officer shall also increase the unliquidated progress payments amount if the contractor makes an interim or voluntary price reduction under a redeterminable or incentive contract.

32.503–12 Maximum unliquidated amount.

(a) The contracting officer shall ensure that any excess of the unliquidated progress payments over the contractual limitation in paragraph (a) of the Progress Payments clause in the contract is promptly corrected through one or more of the following actions:

(1) Increasing the liquidation rate.

(2) Reducing the progress payment rate.

(3) Suspending progress payments.

(b) The excess described in paragraph (a) above is most likely to arise under the following circumstances:

(1) The costs of performance exceed the contract price.

(2) The alternate method of liquidation (see 32.503–9) is used and the actual costs of performance exceed the cost

estimates used to establish the liquidation rate.

(3) The rate of progress or the quality of contract performance is unsatisfactory.

(4) The rate of rejections, waste, or spoilage is excessive.

(c) As required, the services of the responsible audit agency or office should be fully utilized, along with the services of qualified cost analysis and engineering personnel.

[48 FR 42328, Sept. 19, 1983, as amended at 63 FR 9061, Feb. 23, 1998]

32.503–13 [Reserved]

32.503–14 Protection of Government title.

(a) Since the Progress Payments clause gives the Government title to all of the materials, work-in-process, finished goods, and other items of property described in paragraph (d) of the Progress Payments clause, under the contract under which progress payments have been made, the ACO must ensure that the Government title to these inventories is not compromised by other encumbrances. Ordinarily, the ACO, in the absence of reason to believe otherwise, may rely upon the contractor's certification contained in the progress payment request.

(b) If the ACO becomes aware of any arrangement or condition that would impair the Government's title to the property affected by progress payment, the ACO shall require additional protective provisions (see 32.501–5) to establish and protect the Government's title.

(c) The existence of any such encumbrance is a violation of the contractor's obligations under the contract, and the ACO may, if necessary, suspend or reduce progress payments under the terms of the Progress Payments clause covering failure to comply with any material requirement of the contract. In addition, if the contractor fails to disclose an existing encumbrance in the progress payments certification, the ACO should consult with legal counsel concerning possible violation of 31 U.S.C. 3729, the False Claims Act.

[48 FR 42328, Sept. 19, 1983, as amended at 51 FR 2665, Jan. 17, 1986]

32.503–15 Application of Government title terms.

(a) Property to which the Government obtains title by operation of the Progress Payments clause solely is not, as a consequence, Government-furnished property.

(b) Although property title is vested in the Government under the Progress Payments clause, the acquisition, handling, and disposition of certain types of property are governed by—

(1) The clause at 52.245–1, Government Property; and

(2) The termination clauses at 52.249, for termination inventory.

(c) The contractor may sell or otherwise dispose of current production scrap in the ordinary course of business on its own volition, even if title has vested in the Government under the Progress Payments clause. The contracting officer shall require the contractor to credit the costs of the contract performance with the proceeds of the scrap disposition.

(d) When the title to materials or other inventories is vested in the Government under the Progress Payments clause, the contractor may transfer the inventory items from the contract for its own use or other disposition only if, and on terms, approved by the contracting officer. The contractor shall (1) eliminate the costs allocable to the transferred property from the costs of contract performance, and (2) repay or credit to the Government an amount equal to the unliquidated progress payments, allocable to the transferred property.

(e) If excess property remains after the contract performance is complete and all contractor obligations under the contract are satisfied, including full liquidation of progress payments, the excess property is outside the scope of the Progress Payments clause. Therefore, the contractor holds title to it.

[48 FR 42328, Sept. 19, 1983, as amended at 72 FR 27384, May 15, 2007]

32.503–16 Risk of loss.

(a) Under the Progress Payments clause, and except for normal spoilage, the contractor bears the risk of loss for Government property under the clause,

even though title is vested in the Government, unless the Government has expressly assumed this risk. The clauses prescribed in this regulation related to progress payments, default, and terminations do not constitute a Government assumption of this risk.

(b) If a loss occurs in connection with property for which the contractor bears the risk, the contractor is obligated to repay to the Government the amount of unliquidated progress payments based on costs allocable to the property.

(c) The contractor is not obligated to pay for the loss of property for which the Government has assumed the risk of loss. However, a serious loss may impede the satisfactory progress of contract performance, so that the contracting officer may need to act under paragraph (c)(5) of the Progress Payments clause.

[48 FR 42328, Sept. 19, 1983, as amended at 75 FR 38680, July 2, 2010; 77 FR 12941, Mar. 2, 2012]

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 determined due and that the contractor will pay—

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

(2) Ordinarily within 30 days of the submission of the contractor's 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.

[65 FR 16281, Mar. 27, 2000, as amended at 67 FR 70521, Nov. 22, 2002]

Subpart 32.6—Contract Debts

SOURCE: 73 FR 54002, Sept. 17, 2008, unless otherwise noted.

32.600 Scope of subpart.

This subpart prescribes policies and procedures for identifying, collecting, and deferring collection of contract debts (including interest, if applicable). Sections 32.607, 32.608, and 32.610 of this subpart do not apply to claims against common carriers for transportation overcharges and freight and cargo losses (31 U.S.C. 3726).

32.601 General.

(a) Contract debts are amounts that—

(1) Have been paid to a contractor to which the contractor is not currently entitled under the terms and conditions of the contract; or

(2) Are otherwise due from the contractor under the terms and conditions of the contract.

(b) Contract debts include, but are not limited to, the following:

(1) Billing and price reductions resulting from contract terms for price redetermination or for determination of prices under incentive type contracts.

(2) Price or cost reductions for defective certified cost or pricing data.

(3) Financing payments determined to be in excess of the contract limitations at 52.232–16(a)(7), Progress Payments, or 52.232–32(d)(2), Performance—Based Payments, or any contract clause for commercial item financing.

(4) Increases to financing payment liquidation rates.

(5) Overpayments disclosed by quarterly statements required under price redetermination or incentive contracts.

(6) Price adjustments resulting from Cost Accounting Standards (CAS) noncompliances or changes in cost accounting practice.

(7) Reinspection costs for nonconforming supplies or services.

(8) Duplicate or erroneous payments.

(9) Damages or excess costs related to defaults in performance.

(10) Breach of contract obligations concerning progress payments, performance-based payments, advance payments, commercial item financing, or Government-furnished property.

(11) Government expense of correcting defects.

(12) Overpayments related to errors in quantity or billing or deficiencies in quality.

(13) Delinquency in contractor payments due under agreements or arrangements for deferral or postponement of collections.

(14) Reimbursement of amounts due under 33.102(b)(3) and 33.104(h)(8).

[73 FR 54002, Sept. 17, 2008, as amended at 75 FR 53149, Aug. 30, 2010]

32.602 Responsibilities.

(a) The contracting officer has primary responsibility for identifying and demanding payment of contract debts except those resulting from errors

made by the payment office. The contracting officer shall not collect contract debts or otherwise agree to liquidate contract debts (*e.g.*, offset the amount of the debt against existing unpaid bills due the contractor, or allow contractors to retain contract debts to cover amounts that may become payable in future periods).

(b) The payment office has primary responsibility for—

(1) Collecting contract debts identified by contracting officers;

(2) Identifying and collecting duplicate and erroneous payments; and

(3) Authorizing the liquidation of contract debts in accordance with agency procedures.

32.603 Debt determination.

(a) If the contracting officer has any indication that a contractor owes money to the Government under a contract, the contracting officer shall determine promptly whether an actual debt is due and the amount. Any unnecessary delay may contribute to—

(1) Loss of timely availability of the funds to the program for which the funds were initially provided;

(2) Increased difficulty in collecting the debt; or

(3) Actual monetary loss to the Government.

(b) The amount of indebtedness determined by the contracting officer shall be an amount that—

(1) Is based on the merits of the case; and

(2) Is consistent with the contract terms.

32.604 Demand for payment.

(a) Except as provided in paragraph (c) of this section, the contracting officer shall take the following actions:

(1) Issue the demand for payment as soon as the contracting officer has determined that an actual debt is due the Government and the amount.

(2) Issue the demand for payment even if—

(i) The debt is or will be the subject of a bilateral modification;

(ii) The contractor is otherwise obligated to pay the money under the existing contract terms; or

(iii) The contractor has agreed to repay the debt.

(3) Issue the demand for payment as a part of the final decision, if a final decision is required by 32.605(a).

(b) The demand for payment shall include the following:

(1) A description of the debt, including the debt amount.

(2) A distribution of the principal amount of the debt by line(s) of accounting subject to the following:

(i) If the debt affects multiple lines of accounting, the contracting officer shall, to the maximum extent practicable, identify all affected lines of accounting. If it is not practicable to identify all affected lines of accounting, the contracting officer may select representative lines of accounting in accordance with paragraph (b)(2)(ii) of this section.

(ii) In selecting representative lines of accounting, the contracting officer shall—

(A) Consider the affected departments or agencies, years of appropriations, and the predominant types of appropriations; and

(B) Not distribute to any line of accounting an amount of the principal in excess of the total obligation for the line of accounting; and

(iii) Include the lines of accounting even if the associated funds are expired or cancelled. While cancelled funds will be deposited in a miscellaneous receipt account of the Treasury if collected, the funds are tracked under the closed year appropriation(s) to comply with the Anti-Deficiency Act.

(iv) If the debt affects multiple contracts and the lines of accounting are not readily available, the contracting officer shall—

(A) Issue the demand for payment without the distribution of the principal amount to the affected lines of accounting;

(B) Include a statement in the demand for payment advising when the distribution will be provided; and

(C) Provide the distribution by the date identified in the demand for payment.

(3) The basis for and amount of any accrued interest or penalty.

(4)(i) For debts resulting from specific contract terms (*e.g.*, debts resulting from incentive clause provisions, Quarterly Limitation on Payments

Statement, Cost Accounting Standards, price reduction for defective pricing), a notification stating that payment should be made promptly, and that interest is due in accordance with the terms of the contract. Interest shall be computed from the date specified in the applicable contract clause until repayment by the contractor. The interest rate shall be the rate specified in the applicable contract clause. In the case of a debt arising from a price reduction for defective pricing, or as specifically set forth in a Cost Accounting Standards (CAS) clause in the contract, interest is computed from the date of overpayment by the Government until repayment by the contractor at the underpayment rate established by the Secretary of the Treasury, for the periods affected, under 26 U.S.C. 6621(a)(2).

(ii) For all other contract debts, a notification stating that any amounts not paid within 30 days from the date of the demand for payment will bear interest. Interest shall be computed from the date of the demand for payment until repayment by the contractor. The interest rate shall be the interest rate established by the Secretary of the Treasury, as provided in 41 U.S.C. 7109, which is applicable to the period in which the amount becomes due, and then at the rate applicable for each six-month period as established by the Secretary until the amount is paid.

(5) A statement advising the contractor—

(i) To contact the contracting officer if the contractor believes the debt is invalid or the amount is incorrect; and

(ii) If the contractor agrees, to remit a check payable to the agency's payment office annotated with the contract number along with a copy of the demand for payment to the payment office identified in the contract or as otherwise specified in the demand letter in accordance with agency procedures.

(6) Notification that the payment office may initiate procedures, in accordance with the applicable statutory and regulatory requirements, to offset the debt against any payments otherwise due the contractor.

(7) Notification that the debt may be subject to administrative charges in accordance with the requirements of 31 U.S.C. 3717(e) and the Debt Collection Improvement Act of 1996.

(8) Notification that the contractor may submit a request for installment payments or deferment of collection if immediate payment is not practicable or if the amount is disputed.

(c) Except as provided in paragraph (d) of this section, the contracting officer should not issue a demand for payment if the contracting officer only becomes aware of the debt when the contractor—

(1) Provides a lump sum payment or submits a credit invoice. (A credit invoice is a contractor's request to liquidate the debt against existing unpaid bills due the contractor); or

(2) Notifies the contracting officer that the payment office overpaid on an invoice payment. When the contractor provides the notification, the contracting officer shall notify the payment office of the overpayment.

(d) If a demand for payment was not issued as provided for in paragraph (c) of this section, the contracting officer shall issue a demand for payment no sooner than 30 days after the contracting officer becomes aware of the debt unless—

(1) The contractor has liquidated the debt;

(2) The contractor has requested an installment payment agreement; or

(3) The payment office has issued a demand for payment.

(e) The contracting officer shall—

(1) Furnish a copy of the demand for payment to the contractor by certified mail, return receipt requested, or by any other method that provides evidence of receipt; and

(2) Forward a copy of the demand to the payment office.

[73 FR 54002, Sept. 17, 2008, as amended at 79 FR 24211, Apr. 29, 2014]

32.605 Final decisions.

(a) The contracting officer shall issue a final decision as required by 33.211 if—

(1) The contracting officer and the contractor are unable to reach agreement on the existence or amount of a debt in a timely manner;

(2) The contractor fails to liquidate a debt previously demanded by the contracting officer within the timeline specified in the demand for payment unless the amounts were not repaid because the contractor has requested an installment payment agreement; or

(3) The contractor requests a deferment of collection on a debt previously demanded by the contracting officer (see 32.607–2).

(b) If a demand for payment was previously issued for the debt, the demand for payment included in the final decision shall identify the same due date as the original demand for payment.

(c) The contracting officer shall—

(1) Furnish the decision to the contractor by certified mail, return receipt requested, or by any other method that provides evidence of receipt; and

(2) Forward a copy to the payment office identified in the contract.

32.606 Debt collection.

(a) If the contractor has not liquidated the debt within 30 days of the date due or requested installment payments or deferment of collection, the payment office shall initiate withholding of principal, interest, penalties, and administrative charges. In the event the contract is assigned under the Assignment of Claims Act of 1940 (31 U.S.C. 3727 and 41 U.S.C. 6305), the rights of the assignee will be scrupulously respected and withholding of payments shall be consistent with those rights. For additional information on assignment of claims, see Subpart 32.8.

(b) As provided for in the Debt Collection Improvement Act of 1996 (31 U.S.C. 3711(g)(1)), payment offices are required to transfer any debt that is delinquent more than 180 days to the Department of Treasury for collection.

(c) The contracting officer shall periodically follow up with the payment office to determine whether the debt has been collected and credited to the correct appropriation(s).

[73 FR 54002, Sept. 17, 2008, as amended at 79 FR 24211, Apr. 29, 2014]

32.607 Installment payments and deferment of collection.

(a) The contracting officer shall not approve or deny a contractor's request for installment payments or deferment of collections. The office designated in agency procedures is responsible for approving or denying requests for installment payments or deferment of collections.

(b) If a contractor has not appealed the debt or filed an action under the Disputes clause of the contract and the contractor has submitted a proposal for debt deferment or installment payments—

(1) The office designated in agency procedures may arrange for deferment/installment payments if the contractor is unable to pay at once in full or the contractor's operations under national defense contracts would be seriously impaired. The arrangement shall include appropriate covenants and securities and should be limited to the shortest practicable maturity; and

(2) The deferment/installment agreement shall include a specific schedule or plan for payment. It should permit the Government to make periodic financial reviews of the contractor and to require payments earlier than required by the agreement if the Government considers the contractor's ability to pay improved. It should also provide for required stated or measurable payments on the occurrence of specific events or contingencies that improve the contractor's ability to pay.

(c) If not already applicable under the contract terms, interest on contract debt shall be made an element of any agreement entered into for installment payments or deferment of collection.

32.607–1 Installment payments.

If a contractor requests an installment payment agreement, the contracting officer shall notify the contractor to send a written request for installment payments to the office designated in agency procedures.

32.607–2 Deferment of collection.

(a) All requests for deferment of collection must be submitted in writing to the contracting officer.

(1) If the contractor has appealed the debt under the procedures of the Disputes clause of the contract, the information with the request for deferment may be limited to an explanation of the contractor's financial condition.

(2) Actions filed by contractors under the Disputes Clause shall not suspend or delay collection.

(3) If there is no appeal pending or action filed under the Disputes clause of the contract, the following information about the contractor should be submitted with the request:

(i) Financial condition.

(ii) Contract backlog.

(iii) Projected cash receipts and requirements.

(iv) The feasibility of immediate payment of the debt.

(v) The probable effect on operations of immediate payment in full.

(b) Upon receipt of the contractor's written request, the contracting officer shall promptly provide a notification to the payment office and advise the payment office that the contractor's request is under consideration.

(c)(1) The contracting officer should consider any information necessary to develop a recommendation on the deferment request.

(2) The contracting officer shall forward the following to the office designated in agency procedures for a decision:

(i) A copy of the contractor's request for a deferment of collection.

(ii) A written recommendation on the request and the basis for the recommendation including the advisability of deferment to avoid possible overcollections.

(iii) A statement as to whether the contractor has an appeal pending or action filed under the Disputes clause of the contract and the docket number if the appeal has been filed.

(iv) A copy of the contracting officer's final decision (see 32.605).

(d) The office designated in agency procedures may authorize a deferment pending the resolution of appeal to avoid possible overcollections. The agency is required to use unexpired funds to pay interest on overcollections.

(e) Deferments pending disposition of appeal may be granted to small business concerns and financially weak contractors, balancing the need for Government security against loss and undue hardship on the contractor.

(f) The deferment agreement shall not provide that a claim of the Government will not become due and payable pending mutual agreement on the amount of the claim or, in the case of a dispute, until the decision is reached.

(g) At a minimum, the deferment agreement shall contain the following:

(1) A description of the debt.

(2) The date of first demand for payment.

(3) Notice of an interest charge, in conformity with 32.608 and the FAR clause at 52.232–17, Interest; or, in the case of a debt arising from a defective pricing or a CAS noncompliance overpayment, interest, as prescribed by the applicable Price Reduction for Defective Certified Cost or Pricing Data or CAS clause (see 32.607(c)).

(4) Identification of the office to which the contractor is to send debt payments.

(5) A requirement for the contractor to submit financial information requested by the Government and for reasonable access to the contractor's records and property by Government representatives.

(6) Provision for the Government to terminate the deferment agreement and accelerate the maturity of the debt if the contractor defaults or if bankruptcy or insolvency proceedings are instituted by or against the contractor.

(7) Protective requirements that are considered by the Government to be prudent and feasible in the specific circumstances. The coverage of protective terms at 32.409 and 32.501–5 may be used as a guide.

(h) If a contractor appeal of the debt determination is pending, the deferment agreement shall also include a requirement that the contractor shall—

(1) Diligently prosecute the appeal; and

(2) Pay the debt in full when the appeal is decided, or when the parties reach agreement on the debt amount.

(i) The deferment agreement may provide for the right to make early payments without prejudice, for refund

of overpayments, and for crediting of interest.

[73 FR 54002, Sept. 17, 2008, as amended at 75 FR 53149, Aug. 30, 2010]

32.608 Interest.

32.608–1 Interest charges.

Unless specified otherwise in the clause at 52.232–17, Interest, interest charges shall apply to any contract debt unpaid after 30 days from the issuance of a demand unless—

(a) The contract is a kind excluded under 32.611; or

(b) The contract or debt has been exempted from interest charges under agency procedures.

32.608–2 Interest credits.

(a) An equitable interest credit shall be applied under the following circumstances:

(1) When the amount of debt initially determined is subsequently reduced; *e.g.*, through a successful appeal.

(2) When any amount collected by the Government is in excess of the amount found to be due on appeal under the Disputes Clause of the contract.

(3) When the collection procedures followed in a given case result in an overcollection of the debt due.

(4) When the responsible official determines that the Government has unduly delayed payments to the contractor on the same contract at some time during the period to which the interest charge applied, provided an interest penalty was not paid for such late payment.

(b) Any appropriate interest credits shall be computed under the following procedures:

(1) Interest at the rate under 52.232–17 shall be charged on the reduced debt from the date of collection by the Government until the date the monies are remitted to the contractor.

(2) Interest may not be reduced for any time between the due date under the demand and the period covered by a deferment of collection, unless the contract includes an interest clause; *e.g.*, the clause prescribed in 32.611.

(3) Interest shall not be credited in an amount that, when added to other amounts refunded or released to the contractor, exceeds the total amount that has been collected, or withheld for the purpose of collecting the debt. This limitation shall be further reduced by the amount of any limitation applicable under paragraph (b)(2) of this subsection.

32.609 Delays in receipt of notices or demands.

If interest is accrued based on the date of the demand letter and delivery of the demand letter is delayed by the Government (*e.g.*, undue delay after dating at the originating office or delays in the mail), the date of the debt and accrual of interest shall be extended to a time that is fair and reasonable under the particular circumstances.

32.610 Compromising debts.

For debts under $100,000, excluding interest, the designated agency official may compromise the debt pursuant to the Federal Claims Collection Standards (31 CFR part 902) and agency regulations. Unless specifically authorized by agency procedures, contracting officers cannot compromise debts.

32.611 Contract clause.

(a) The contracting officer shall insert the clause at 52.232—17, Interest, in solicitations and contracts unless it is contemplated that the contract will be in one or more of the following categories:

(1) Contracts at or below the simplified acquisition threshold.

(2) Contracts with Government agencies.

(3) Contracts with a State or local government or instrumentality.

(4) Contracts with a foreign government or instrumentality.

(5) Contracts without any provision for profit or fee with a nonprofit organization.

(6) Contracts described in Subpart 5.5, Paid Advertisements.

(7) Any other exceptions authorized under agency procedures.

(b) The contracting officer may insert the FAR clause at 52.232–17, Interest, in solicitations and contracts when it is contemplated that the contract will be in any of the categories specified in 32.611(a).

Subpart 32.7—Contract Funding

32.700 Scope of subpart.

This subpart (a) describes basic requirements for contract funding and (b) prescribes procedures for using limitation of cost or limitation of funds clauses. Detailed acquisition funding requirements are contained in agency fiscal regulations.

32.701 [Reserved]

32.702 Policy.

No officer or employee of the Government may create or authorize an obligation in excess of the funds available, or in advance of appropriations (Anti-Deficiency Act, 31 U.S.C. 1341), unless otherwise authorized by law. Before executing any contract, the contracting officer shall (a) obtain written assurance from responsible fiscal authority that adequate funds are available or (b) expressly condition the contract upon availability of funds in accordance with 32.703–2.

[48 FR 42328, Sept. 19, 1983, as amended at 51 FR 2665, Jan. 17, 1986]

32.703 Contract funding requirements.

32.703–1 General.

(a) If the contract is fully funded, funds are obligated to cover the price or target price of a fixed-price contract or the estimated cost and any fee of a cost-reimbursement contract.

(b) If the contract is incrementally funded, funds are obligated to cover the amount allotted and any corresponding increment of fee.

32.703–2 Contracts conditioned upon availability of funds.

(a) *Fiscal year contracts.* The contracting officer may initiate a contract action properly chargeable to funds of the new fiscal year before these funds are available, *provided* that the contract includes the clause at 52.232–18, Availability of Funds (see 32.706–1(a)). This authority may be used only for operation and maintenance and continuing services (e.g., rentals, utilities, and supply items not financed by stock funds) (1) necessary for normal operations and (2) for which Congress previously had consistently appropriated funds, unless specific statutory authority exists permitting applicability to other requirements.

(b) *Indefinite-quantity or requirements contracts.* A one-year indefinite-quantity or requirements contract for services that is funded by annual appropriations may extend beyond the fiscal year in which it begins; *provided*, that (1) any specified minimum quantities are certain to be ordered in the initial fiscal year (see 37.106) and (2) the contract includes the clause at 52.232–19, Availability of Funds for the Next Fiscal Year (see 32.706–1(b)).

(c) *Acceptance of supplies or services.* The Government shall not accept supplies or services under a contract conditioned upon the availability of funds until the contracting officer has given the contractor notice, to be confirmed in writing, that funds are available.

[48 FR 42328, Sept. 19, 1983, as amended at 67 FR 13054, Mar. 20, 2002; 78 FR 37688, June 21, 2013]

32.703–3 Contracts crossing fiscal years.

(a) A contract that is funded by annual appropriations may not cross fiscal years, except in accordance with statutory authorization (e.g., 41 U.S.C. 6302, 31 U.S.C. 1308, 42 U.S.C. 2459a, 42 U.S.C. 3515, and paragraph (b) of this subsection), or when the contract calls for an end product that cannot feasibly be subdivided for separate performance in each fiscal year (e.g., contracts for expert or consultant services).

(b) The head of an executive agency, except NASA, may enter into a contract, exercise an option, or place an order under a contract for severable services for a period that begins in one fiscal year and ends in the next fiscal year if the period of the contract awarded, option exercised, or order placed does not exceed one year (10 U.S.C. 2410a and 41 U.S.C. 3902). Funds made available for a fiscal year may be obligated for the total amount of an action entered into under this authority.

[63 FR 58601, Oct. 30, 1998, as amended at 79 FR 24212, Apr. 29, 2014]

32.704 Limitation of cost or funds.

(a)(1) When a contract contains the clause at 52.232–20, Limitation of Cost;

or 52.232–22, Limitation of Funds, the contracting officer, upon learning that the contractor is approaching the estimated cost of the contract or the limit of the funds allotted, shall promptly obtain funding and programming information pertinent to the contract's continuation and notify the contractor in writing that—

(i) Additional funds have been allotted, or the estimated cost has been increased, in a specified amount;

(ii) The contract is not to be further funded and that the contractor should submit a proposal for an adjustment of fee, if any, based on the percentage of work completed in relation to the total work called for under the contract;

(iii) The contract is to be terminated; or

(iv)(A) The Government is considering whether to allot additional funds or increase the estimated cost, (B) the contractor is entitled by the contract terms to stop work when the funding or cost limit is reached, and (C) any work beyond the funding or cost limit will be at the contractor's risk.

(2) Upon learning that a partially funded contract containing any of the clauses referenced in subparagraph (1) above will receive no further funds, the contracting officer shall promptly give the contractor written notice of the decision not to provide funds.

(b) Under a cost-reimbursement contract, the contracting officer may issue a change order, a direction to replace or repair defective items or work, or a termination notice without immediately increasing the funds available. Since a contractor is not obligated to incur costs in excess of the estimated cost in the contract, the contracting officer shall ensure availability of funds for directed actions. The contracting officer may direct that any increase in the estimated cost or amount allotted to a contract be used for the sole purpose of funding termination or other specified expenses.

(c) Government personnel encouraging a contractor to continue work in the absence of funds will incur a violation of Revised Statutes Section 3679 (31 U.S.C. 1341) that may subject the violator to civil or criminal penalties.

[48 FR 42328, Sept. 19, 1983, as amended at 51 FR 2665, Jan. 17, 1986; 72 FR 27384, May 15, 2007]

32.705 Unenforceability of unauthorized obligations.

Many supplies or services are acquired subject to supplier license agreements. These are particularly common in information technology acquisitions, but they may apply to any supply or service. For example, computer software and services delivered through the internet (web services) are often subject to license agreements, referred to as End User License Agreements (EULA), Terms of Service (TOS), or other similar legal instruments or agreements. Many of these agreements contain indemnification clauses that are inconsistent with Federal law and unenforceable, but which could create a violation of the Anti-Deficiency Act (31 U.S.C. 1341) if agreed to by the Government.

[78 FR 37688, June 21, 2013]

32.706 Contract clauses.

[48 FR 42328, Sept. 19, 1983. Redesignated at 78 FR 37688, June 21, 2013]

32.706–1 Clauses for contracting in advance of funds.

(a) Insert the clause at 52.232–18, Availability of Funds, in solicitations and contracts if the contract will be chargeable to funds of the new fiscal year and the contract action will be initiated before the funds are available.

(b) The contracting officer shall insert the clause at 52.232–19, Availability of Funds for the Next Fiscal Year, in solicitations and contracts if a one-year indefinite-quantity or requirements contract for services is contemplated and the contract—

(1) Is funded by annual appropriations; and

(2) Is to extend beyond the initial fiscal year (see 32.703–2(b)).

[48 FR 42328, Sept. 19, 1983, as amended at 63 FR 58602, Oct. 30, 1998; 67 FR 13054, Mar. 20, 2002. Redesignated at 78 FR 37688, June 21, 2013]

32.706–2 Clauses for limitation of cost or funds.

(a) The contracting officer shall insert the clause at 52.232–20, Limitation of Cost, in solicitations and contracts if a fully funded cost-reimbursement contract is contemplated, whether or not the contract provides for payment of a fee.

(b) The contracting officer shall insert the clause at 52.232–22, Limitation of Funds, in solicitations and contracts if an incrementally funded cost-reimbursement contract is contemplated.

[48 FR 42328, Sept. 19, 1983, as amended at 72 FR 27385, May 15, 2007. Redesignated at 78 FR 37688, June 21, 2013]

32.706–3 Clause for unenforceability of unauthorized obligations.

The contracting officer shall insert the clause at 52.232–39, Unenforceability of Unauthorized Obligations in all solicitations and contracts.

[78 FR 37689, June 21, 2013]

Subpart 32.8—Assignment of Claims

32.800 Scope of subpart.

This subpart prescribes policies and procedures for the assignment of claims under the Assignment of Claims Act of 1940, as amended, (31 U.S.C. 3727, 41 U.S.C. 6305) (hereafter referred to as *the Act*).

[48 FR 42328, Sept. 19, 1983, as amended at 51 FR 2665, Jan. 17, 1986; 79 FR 24212, Apr. 29, 2014]

32.801 Definitions.

Designated agency, as used in this subpart, means any department or agency of the executive branch of the United States Government (see 32.803(d)).

No-setoff commitment, as used in this subpart, means a contractual undertaking that, to the extent permitted by the Act, payments by the designated agency to the assignee under an assignment of claims will not be reduced to liquidate the indebtedness of the contractor to the Government.

[48 FR 42328, Sept. 19, 1983, as amended at 60 FR 49730, Sept. 26, 1995; 66 FR 2132, Jan. 10, 2001]

32.802 Conditions.

Under the Assignment of Claims Act, a contractor may assign moneys due or to become due under a contract if all the following conditions are met:

(a) The contract specifies payments aggregating $1,000 or more.

(b) The assignment is made to a bank, trust company, or other financing institution, including any Federal lending agency.

(c) The contract does not prohibit the assignment.

(d) Unless otherwise expressly permitted in the contract, the assignment—

(1) Covers all unpaid amounts payable under the contract;

(2) Is made only to one party, except that any assignment may be made to one party as agent or trustee for two or more parties participating in the financing of the contract; and

(3) Is not subject to further assignment.

(e) The assignee sends a written notice of assignment together with a true copy of the assignment instrument to the—

(1) Contracting officer or the agency head;

(2) Surety on any bond applicable to the contract; and

(3) Disbursing officer designated in the contract to make payment.

32.803 Policies.

(a) Any assignment of claims that has been made under the Act to any type of financing institution listed in 32.802(b) may thereafter be further assigned and reassigned to any such institution if the conditions in 32.802(d) and (e) continue to be met.

(b) A contract may prohibit the assignment of claims if the agency determines the prohibition to be in the Government's interest.

(c) Under a requirements or indefinite quantity type contract that authorizes ordering and payment by multiple Government activities, amounts due for individual orders for $1,000 or more may be assigned.

(d) Any contract of a designated agency (see FAR 32.801), except a contract under which full payment has been made, may include a no-setoff

commitment only when a determination of need is made by the head of the agency, in accordance with the Presidential delegation of authority dated October 3, 1995, and after such determination has been published in the FEDERAL REGISTER. The Presidential delegation makes such determinations of need subject to further guidance issued by the Office of Federal Procurement Policy. The following guidance has been provided: Use of the no-setoff provision may be appropriate to facilitate the national defense; in the event of a national emergency or natural disaster; or when the use of the no-setoff provision may facilitate private financing of contract performance. However, in the event an offeror is significantly indebted to the United States, the contracting officer should consider whether the inclusion of the no-setoff commitment in a particular contract is in the best interests of the United States. In such an event, the contracting officer should consult with the Government officer(s) responsible for collecting the debt(s).

(e) When an assigned contract does not include a no-setoff commitment, the Government may apply against payments to the assignee any liability of the contractor to the Government arising independently of the assigned contract if the liability existed at the time notice of the assignment was received even though that liability had not yet matured so as to be due and payable.

[48 FR 42328, Sept. 19, 1983, as amended at 60 FR 49730, Sept. 26, 1995; 61 FR 18921, Apr. 29, 1996]

32.804 Extent of assignee's protection.

(a) No payments made by the Government to the assignee under any contract assigned in accordance with the Act may be recovered on account of any liability of the contractor to the Government. This immunity of the assignee is effective whether the contractor's liability arises from or independently of the assigned contract.

(b) Except as provided in paragraph (c) below, the inclusion of a no-setoff commitment in an assigned contract entitles the assignee to receive contract payments free of reduction or setoff for—

(1) Any liability of the contractor to the Government arising independently of the contract; and

(2) Any of the following liabilities of the contractor to the Government arising from the assigned contract:

(i) Renegotiation under any statute or contract clause.

(ii) Fines.

(iii) Penalties, exclusive of amounts that may be collected or witheld from the contractor under, or for failure to comply with, the terms of the contract.

(iv) Taxes or social security contributions.

(v) Withholding or nonwithholding of taxes or social security contributions.

(c) In some circumstances, a setoff may be appropriate even though the assigned contract includes a no-setoff commitment, e.g.—

(1) When the assignee has neither made a loan under the assignment nor made a commitment to do so; or

(2) To the extent that the amount due on the contract exceeds the amount of any loans made or expected to be made under a firm commitment for financing.

32.805 Procedure.

(a) *Assignments.* (1) Assignments by corporations shall be—

(i) Executed by an authorized representative;

(ii) Attested by the secretary or the assistant secretary of the corporation; and

(iii) Impressed with the corporate seal or accompanied by a true copy of the resolution of the corporation's board of directors authorizing the signing representative to execute the assignment.

(2) Assignments by a partnership may be signed by one partner, if the assignment is accompanied by adequate evidence that the signer is a general partner of the partnership and is authorized to execute assignments on behalf of the partnership.

(3) Assignments by an individual shall be signed by that individual and the signature acknowledged before a notary public or other person authorized to administer oaths.

(b) *Filing.* The assignee shall forward to each party specified in 32.802(e) an original and three copies of the notice

of assignment, together with one true copy of the instrument of assignment. The true copy shall be a certified duplicate or photostat copy of the original assignment.

(c) *Format for notice of assignment.* The following is a suggested format for use by an assignee in providing the notice of assignment required by 32.802(e).

NOTICE OF ASSIGNMENT

TO: _____ [*address to one of the parties specified in 32.802(e)*].

This has reference to Contract No. _____ dated _____, entered into between _____ [*contractor's name and address*] and _____ [*government agency, name of office, and address*], for _____ [*describe nature of the contract*].

Moneys due or to become due under the contract described above have been assigned to the undersigned under the provisions of the Assignment of Claims Act of 1940, as amended, (31 U.S.C. 3727, 41 U.S.C. 6305).

A true copy of the instrument of assignment executed by the Contractor on _____ [*date*], is attached to the original notice.

Payments due or to become due under this contract should be made to the undersigned assignee.

Please return to the undersigned the three enclosed copies of this notice with appropriate notations showing the date and hour of receipt, and signed by the person acknowledging receipt on behalf of the addressee.

Very truly yours,

_____

[*name of assignee*]

By _____

[*signature of signing officer*

Title _____

[*title of signing officer*]

_____

_____

[*address of assignee*]

ACKNOWLEDGEMENT

Receipt is acknowledged of the above notice and of a copy of the instrument of assignment. They were received at ____ (a.m.) (p.m.) on _____, 20____.

_____

[*signature*]

_____

[*title*]

_____

On behalf of

_____

[*name of addressee of this notice*]

(d) *Examination by the Government.* In examining and processing notices of assignment and before acknowleging their receipt, contracting officers should assure that the following conditions and any additional conditions specified in agency regulations, have been met:

(1) The contract has been properly approved and executed.

(2) The contract is one under which claims may be assigned.

(3) The assignment covers only money due or to become due under the contract.

(4) The assignee is registered separately in the System for Award Management unless one of the exceptions in 4.1102 applies.

(e) *Release of assignment.* (1) A release of an assignment is required whenever—

(i) There has been a further assignment or reassignment under the Act; or

(ii) The contractor wishes to reestablish its right to receive further payments after the contractor's obligations to the assignee have been satisfied and a balance remains due under the contract.

(2) The assignee, under a further assignment or reassignment, in order to establish a right to receive payment from the Government, must file with the addressees listed in 32.802(e) a—

(i) Written notice of release of the contractor by the assigning financing institution;

(ii) Copy of the release instrument;

(iii) Written notice of the further assignment or reassignment; and

(iv) Copy of the further assignment or reassignment instrument.

(3) If the assignee releases the contractor from an assignment of claims under a contract, the contractor, in order to establish a right to receive payment of the balance due under the contract, must file a written notice of release together with a true copy of the release of assignment instrument with the addressees noted in 32.802(e).

(4) The addressee of a notice of release of assignment or the official acting on behalf of that addressee shall acknowledge receipt of the notice.

[48 FR 42328, Sept. 19, 1983, as amended at 51 FR 2665, Jan. 17, 1986; 52 FR 9039, Mar. 20, 1987; 62 FR 237, Jan. 2, 1997; 64 FR 10533, Mar. 4, 1999; 65 FR 24325, Apr. 25, 2000; 68 FR 56673, Oct. 1, 2003; 78 FR 37679, June 21, 2013; 79 FR 24212, Apr. 29, 2014]

32.806 Contract clauses.

(a)(1) The contracting officer shall insert the clause at 52.232–23, Assignment of Claims, in solicitations and contracts expected to exceed the micro-purchase threshold, unless the contract will prohibit the assignment of claims (see 32.803(b)). The use of the clause is not required for purchase orders. However, the clause may be used in purchase orders expected to exceed the micro-purchase threshold, that are accepted in writing by the contractor, if such use is consistent with agency policies and regulations.

(2) If a no-setoff commitment has been authorized (see FAR 32.803(d)), the contracting officer shall use the clause with its *Alternate I*.

(b) The contracting officer shall insert the clause at 52.232–24, Prohibition of Assignment of Claims, in solicitations and contracts for which a determination has been made under agency regulations that the prohibition of assignment of claims is in the Government's interest.

[48 FR 42328, Sept. 19, 1983, as amended at 51 FR 2665, Jan. 17, 1986; 60 FR 49730, Sept. 26, 1995; 61 FR 18921, Apr. 29, 1996]

Subpart 32.9—Prompt Payment

SOURCE: 66 FR 65355, Dec. 18, 2001, unless otherwise noted.

32.900 Scope of subpart.

This subpart prescribes policies, procedures, and clauses for implementing Office of Management and Budget (OMB) prompt payment regulations at 5 CFR part 1315.

32.901 Applicability.

(a) This subpart applies to invoice payments on all contracts, except contracts with payment terms and late payment penalties established by other governmental authority (*e.g.*, tariffs).

(b) This subpart does not apply to contract financing payments (see definition at 32.001).

32.902 Definitions.

As used in this subpart—

Discount for prompt payment means an invoice payment reduction offered by the contractor for payment prior to the due date.

Mixed invoice means an invoice that contains items with different payment due dates.

Payment date means the date on which a check for payment is dated or, for an electronic funds transfer (EFT), the settlement date.

Settlement date, as it applies to electronic funds transfer, means the date on which an electronic funds transfer payment is credited to the contractor's financial institution.

32.903 Responsibilities.

(a) Agency heads—

(1) Must establish the policies and procedures necessary to implement this subpart;

(2) May prescribe additional standards for establishing invoice payment due dates (see 32.904) necessary to support agency programs and foster prompt payment to contractors;

(3) May adopt different payment procedures in order to accommodate unique circumstances, provided that such procedures are consistent with the policies in this subpart;

(4) Must inform contractors of points of contact within their cognizant payment offices to enable contractors to obtain status of invoices; and

(5) May authorize the use of the accelerated payment methods specified at 5 CFR 1315.5.

(b) When drafting solicitations and contracts, contracting officers must identify for each line item number, subline item number, or exhibit line item number—

(1) The applicable Prompt Payment clauses that apply to each item when the solicitation or contract contains items that will be subject to different payment terms; and

(2) The applicable Prompt Payment food category (*e.g.*, which item numbers are meat or meat food products, which are perishable agricultural commodities), when the solicitation or contract contains multiple payment terms for various classes of foods and edible products.

[66 FR 65355, Dec. 18, 2001, as amended at 82 FR 4714, Jan. 13, 2017]

32.904 Determining payment due dates.

(a) *General.* Agency procedures must ensure that, when specifying due dates, contracting officers give full consideration to the time reasonably required by Government officials to fulfill their administrative responsibilities under the contract.

(b) *Payment due dates.* Except as prescribed in paragraphs (c) through (f) of this section, or as authorized in 32.908(a)(2) or (c)(2), the due date for making an invoice payment is as follows:

(1) The later of the following two events:

(i) The 30th day after the designated billing office receives a proper invoice from the contractor (except as provided in paragraph (b)(3) of this section).

(ii) The 30th day after Government acceptance of supplies delivered or services performed.

(A) For a final invoice, when the payment amount is subject to contract settlement actions, acceptance is deemed to occur on the effective date of the contract settlement.

(B) For the sole purpose of computing an interest penalty that might be due the contractor—

(*1*) Government acceptance is deemed to occur constructively on the 7th day after the contractor delivers supplies or performs services in accordance with the terms and conditions of the contract, unless there is a disagreement over quantity, quality, or contractor compliance with a contract requirement;

(*2*) If actual acceptance occurs within the constructive acceptance period, the Government must base the determination of an interest penalty on the actual date of acceptance;

(*3*) The constructive acceptance requirement does not compel Government officials to accept supplies or services, perform contract administration functions, or make payment prior to fulfilling their responsibilities; and

(*4*) Except for a contract for the purchase of a commercial item, including a brand-name commercial item for authorized resale (*e.g.*, commissary items), the contracting officer may specify a longer period for constructive acceptance in the solicitation and resulting contract, if required to afford the Government a reasonable opportunity to inspect and test the supplies furnished or to evaluate the services performed. The contracting officer must document in the contract file the justification for extending the constructive acceptance period beyond 7 days. Extended acceptance periods must not be a routine agency practice and must be used only when necessary to permit proper Government inspection and testing of the supplies delivered or services performed.

(2) If the contract does not require submission of an invoice for payment (*e.g.*, periodic lease payments), the contracting officer must specify the due date in the contract.

(3) If the designated billing office fails to annotate the invoice with the actual date of receipt at the time of receipt, the invoice payment due date is the 30th day after the date of the contractor's invoice, provided the designated billing office receives a proper invoice and there is no disagreement over quantity, quality, or contractor compliance with contract requirements.

(c) *Architect-engineer contracts.* (1) The due date for making payments on contracts that contain the clause at 52.232–10, Payments Under Fixed-Price Architect-Engineer Contracts, is as follows:

(i) The due date for work or services completed by the contractor is the later of the following two events:

(A) The 30th day after the designated billing office receives a proper invoice from the contractor.

(B) The 30th day after Government acceptance of the work or services completed by the contractor.

(*1*) For a final invoice, when the payment amount is subject to contract settlement actions (e.g., release of

claims), acceptance is deemed to occur on the effective date of the settlement.

(*2*) For the sole purpose of computing an interest penalty that might be due the contractor, Government acceptance is deemed to occur constructively on the 7th day after the contractor completes the work or services in accordance with the terms and conditions of the contract (see also paragraph (c)(2) of this section). If actual acceptance occurs within the constructive acceptance period, the Government must base the determination of an interest penalty on the actual date of acceptance.

(ii) The due date for progress payments is the 30th day after Government approval of contractor estimates of work or services accomplished. For the sole purpose of computing an interest penalty that might be due the contractor—

(A) Government approval is deemed to occur constructively on the 7th day after the designated billing office receives the contractor estimates (see also paragraph (c)(2) of this section).

(B) If actual approval occurs within the constructive approval period, the Government must base the determination of an interest penalty on the actual date of approval.

(iii) If the designated billing office fails to annotate the invoice or payment request with the actual date of receipt at the time of receipt, the payment due date is the 30th day after the date of the contractor's invoice or payment request, provided the designated billing office receives a proper invoice or payment request and there is no disagreement over quantity, quality, or contractor compliance with contract requirements.

(2) The constructive acceptance and constructive approval requirements described in paragraphs (c)(1)(i) and (ii) of this section are conditioned upon receipt of a proper payment request and no disagreement over quantity, quality, contractor compliance with contract requirements, or the requested progress payment amount. These requirements do not compel Government officials to accept work or services, approve contractor estimates, perform contract administration functions, or make payment prior to fulfilling their responsibilities. The contracting officer may specify a longer period for constructive acceptance or constructive approval, if required to afford the Government a reasonable opportunity to inspect and test the supplies furnished or to evaluate the services performed. The contracting officer must document in the contract file the justification for extending the constructive acceptance or approval period beyond 7 days.

(d) *Construction contracts.* (1) The due date for making payments on construction contracts is as follows:

(i) The due date for making progress payments based on contracting officer approval of the estimated amount and value of work or services performed, including payments for reaching milestones in any project, is 14 days after the designated billing office receives a proper payment request.

(A) If the designated billing office fails to annotate the payment request with the actual date of receipt at the time of receipt, the payment due date is the 14th day after the date of the contractor's payment request, provided the designated billing office receives a proper payment request and there is no disagreement over quantity, quality, or contractor compliance with contract requirements.

(B) The contracting officer may specify a longer period in the solicitation and resulting contract if required to afford the Government a reasonable opportunity to adequately inspect the work and to determine the adequacy of the contractor's performance under the contract. The contracting officer must document in the contract file the justification for extending the due date beyond 14 days.

(C) The contracting officer must not approve progress payment requests unless the certification and substantiation of amounts requested are provided as required by the clause at 52.232–5, Payments Under Fixed-Price Construction Contracts.

(ii) The due date for payment of any amounts retained by the contracting officer in accordance with the clause at 52.232–5, Payments Under Fixed-Price Construction Contracts, will be as

specified in the contract or, if not specified, 30 days after approval by the contracting officer for release to the contractor. The contracting officer must base the release of retained amounts on the contracting officer's determination that satisfactory progress has been made.

(iii) The due date for final payments based on completion and acceptance of all work (including any retained amounts), and payments for partial deliveries that have been accepted by the Government (*e.g.*, each separate building, public work, or other division of the contract for which the price is stated separately in the contract) is as follows:

(A) The later of the following two events:

(*1*) The 30th day after the designated billing office receives a proper invoice from the contractor.

(*2*) The 30th day after Government acceptance of the work or services completed by the contractor. For a final invoice, when the payment amount is subject to contract settlement actions (*e.g.*, release of contractor claims), acceptance is deemed to occur on the effective date of the contract settlement.

(B) If the designated billing office fails to annotate the invoice with the actual date of receipt at the time of receipt, the invoice payment due date is the 30th day after the date of the contractor's invoice, provided the designated billing office receives a proper invoice and there is no disagreement over quantity, quality, or contractor compliance with contract requirements.

(2) For the sole purpose of computing an interest penalty that might be due the contractor for payments described in paragraph (d)(1)(iii) of this section—

(i) Government acceptance or approval is deemed to occur constructively on the 7th day after the contractor completes the work or services in accordance with the terms and conditions of the contract, unless there is a disagreement over quantity, quality, contractor compliance with a contract requirement, or the requested amount;

(ii) If actual acceptance occurs within the constructive acceptance period, the Government must base the determination of an interest penalty on the actual date of acceptance;

(iii) The constructive acceptance requirement does not compel Government officials to accept work or services, approve contractor estimates, perform contract administration functions, or make payment prior to fulfilling their responsibilities; and

(iv) The contracting officer may specify a longer period for constructive acceptance or constructive approval in the solicitation and resulting contract, if required to afford the Government a reasonable opportunity to adequately inspect the work and to determine the adequacy of the contractor's performance under the contract. The contracting officer must document in the contract file the justification for extending the constructive acceptance or approval beyond 7 days.

(3) Construction contracts contain special provisions concerning contractor payments to subcontractors, along with special contractor certification requirements. The Office of Management and Budget has determined that these certifications must not be construed as final acceptance of the subcontractor's performance. The certification in 52.232–5(c) implements this determination; however, certificates are still acceptable if the contractor deletes paragraph (c)(4) of 52.232–5 from the certificate.

(4)(i) Paragraph (d) of the clause at 52.232–5, Payments under Fixed-Price Construction Contracts, and paragraph (e)(6) of the clause at 52.232–27, Prompt Payment for Construction Contracts, provide for the contractor to pay interest on unearned amounts in certain circumstances. The Government must recover this interest from subsequent payments to the contractor. Therefore, contracting officers normally must make no demand for payment. Contracting officers must—

(A) Compute the amount in accordance with the clause;

(B) Provide the contractor with a final decision; and

(C) Notify the payment office of the amount to be withheld.

(ii) The payment office is responsible for making the deduction of interest. Amounts collected in accordance with

these provisions revert to the United States Treasury.

(e) *Cost-reimbursement contracts for services.* For purposes of computing late payment interest penalties that may apply, the due date for making interim payments on cost-reimbursement contracts for services is 30 days after the date of receipt of a proper invoice.

(f) *Food and specified items.*

If the items delivered are:	Payment must be made as close as possible to, but not later than:
(1) *Meat or meat food products.* As defined in section 2(a)(3) of the Packers and Stockyard Act of 1921 (7 U.S.C. 182(3)), and as further defined in Public Law 98–181, including any edible fresh or frozen poultry meat, any perishable poultry meat food product, fresh eggs, and any perishable egg product.	7th day after product delivery.
(2) *Fresh or frozen fish.* As defined in section 204(3) of the Fish and Seafood Promotion Act of 1986 (16 U.S.C. 4003(3)).	7th day after product delivery.
(3) *Perishable agricultural commodities.* As defined in section 1(4) of the Perishable Agricultural Commodities Act of 1930 (7 U.S.C. 499a(4)).	10th day after product delivery, unless another date is specified in the contract.
(4) *Dairy products.* As defined in section 111(e) of the Dairy Production Stabilization Act of 1983 (7 U.S.C. 4502(e)), edible fats or oils, and food products prepared from edible fats or oils. Liquid milk, cheese, certain processed cheese products, butter, yogurt, ice cream, mayonnaise, salad dressings, and other similar products fall within this classification. Nothing in the Act limits this classification to refrigerated products. If questions arise regarding the proper classification of a specific product, the contracting officer must follow prevailing industry practices in specifying a contract payment due date. The burden of proof that a classification of a specific product is, in fact, prevailing industry practice is upon the contractor making the representation.	10th day after a proper invoice has been received.

(g) *Multiple payment due dates.* Contracting officers may encourage, but not require, contractors to submit separate invoices for products with different payment due dates under the same contract or order. When an invoice contains items with different payment due dates (*i.e.*, a mixed invoice), the payment office will, subject to agency policy—

(1) Pay the entire invoice on the earliest due date; or

(2) Split invoice payments, making payments by the applicable due dates.

32.905 Payment documentation and process.

(a) *General.* Payment will be based on receipt of a proper invoice and satisfactory contract performance.

(b) *Content of invoices.* (1) A proper invoice must include the following items (except for interim payments on cost reimbursement contracts for services):

(i) Name and address of the contractor.

(ii) Invoice date and invoice number. (Contractors should date invoices as close as possible to the date of mailing or transmission.)

(iii) Contract number or other authorization for supplies delivered or services performed (including order number and line item number).

(iv) Description, quantity, unit of measure, unit price, and extended price of supplies delivered or services performed.

(v) Shipping and payment terms (*e.g.*, shipment number and date of shipment, discount for prompt payment terms). Bill of lading number and weight of shipment will be shown for shipments on Government bills of lading.

(vi) Name and address of contractor official to whom payment is to be sent (must be the same as that in the contract or in a proper notice of assignment).

(vii) Name (where practicable), title, phone number, and mailing address of person to notify in the event of a defective invoice.

(viii) Taxpayer Identification Number (TIN). The contractor must include its TIN on the invoice only if required by agency procedures. (See 4.9 TIN requirements.)

(ix) Electronic funds transfer (EFT) banking information.

(A) The contractor must include EFT banking information on the invoice only if required by agency procedures.

(B) If EFT banking information is not required to be on the invoice, in

order for the invoice to be a proper invoice, the contractor must have submitted correct EFT banking information in accordance with the applicable solicitation provision (*e.g.*, 52.232–38, Submission of Electronic Funds Transfer Information with Offer), contract clause (*e.g.*, 52.232–33, Payment by Electronic Funds Transfer—System for Award Management, or 52.232–34, Payment by Electronic Funds Transfer—Other Than System for Award Management), or applicable agency procedures.

(C) EFT banking information is not required if the Government waived the requirement to pay by EFT.

(x) Any other information or documentation required by the contract (*e.g.*, evidence of shipment).

(2) An interim payment request under a cost-reimbursement contract for services constitutes a proper invoice for purposes of this subsection if it includes all of the information required by the contract.

(3) If the invoice does not comply with these requirements, the designated billing office must return it within 7 days after receipt (3 days on contracts for meat, meat food products, or fish; 5 days on contracts for perishable agricultural commodities, dairy products, edible fats or oils, and food products prepared from edible fats or oils), with the reasons why it is not a proper invoice. If such notice is not timely, then the designated billing office must adjust the due date for the purpose of determining an interest penalty, if any.

(c) *Authorization to pay*. All invoice payments, with the exception of interim payments on cost-reimbursement contracts for services, must be supported by a receiving report or other Government documentation authorizing payment (*e.g.*, Government certified voucher). The agency receiving official should forward the receiving report or other Government documentation to the designated payment office by the 5th working day after Government acceptance or approval, unless other arrangements have been made. This period of time does not extend the due dates prescribed in this section. Acceptance should be completed as expeditiously as possible. The receiving report or other Government documentation authorizing payment must, as a minimum, include the following:

(1) Contract number or other authorization for supplies delivered or services performed.

(2) Description of supplies delivered or services performed.

(3) Quantities of supplies received and accepted or services performed, if applicable.

(4) Date supplies delivered or services performed.

(5) Date that the designated Government official—

(i) Accepted the supplies or services; or

(ii) Approved the progress payment request, if the request is being made under the clause at 52.232–5, Payments Under Fixed-Price Construction Contracts, or the clause at 52.232–10, Payments Under Fixed-Price Architect-Engineer Contracts.

(6) Signature, printed name, title, mailing address, and telephone number of the designated Government official responsible for acceptance or approval functions.

(d) *Billing office*. The designated billing office must immediately annotate each invoice with the actual date it receives the invoice.

(e) *Payment office*. The designated payment office will annotate each invoice and receiving report with the actual date it receives the invoice.

[66 FR 65355, Dec. 18, 2001, as amended at 78 FR 37679, June 21, 2013; 82 FR 4714, Jan. 13, 2017]

32.906 Making payments.

(a) *General*. The Government will not make invoice payments earlier than 7 days prior to the due dates specified in the contract unless the agency head determines—

(1) To make earlier payment on a case-by-case basis; or

(2) That the use of accelerated payment methods are necessary (see 32.903(a)(5)).

(b) *Payment office*. The designated payment office—

(1) Will mail checks on the same day they are dated;

(2) For payments made by EFT, will specify a date on or before the established due date for settlement of the payment at a Federal Reserve Bank;

(3) When the due date falls on a Saturday, Sunday, or legal holiday when Government offices are closed, may make payment on the following working day without incurring a late payment interest penalty.

(4) When it is determined that the designated billing office erroneously rejected a proper invoice and upon resubmission of the invoice, will enter in the payment system the original date the invoice was received by the designated billing office for the purpose of calculating the correct payment due date and any interest penalties that may be due.

(c) *Partial deliveries.* (1) Contracting officers must, where the nature of the work permits, write contract statements of work and pricing arrangements that allow contractors to deliver and receive invoice payments for discrete portions of the work as soon as completed and found acceptable by the Government (see 32.102(d)).

(2) Unless specifically prohibited by the contract, the clause at 52.232–1, Payments, provides that the contractor is entitled to payment for accepted partial deliveries of supplies or partial performance of services that comply with all applicable contract requirements and for which prices can be calculated from the contract terms.

(d) *Contractor identifier.* Each payment or remittance advice will use the contractor invoice number in addition to any Government or contract information in describing any payment made.

(e) *Discounts.* When a discount for prompt payment is taken, the designated payment office will make payment to the contractor as close as possible to, but not later than, the end of the discount period. The discount period is specified by the contractor and is calculated from the date of the contractor's proper invoice. If the contractor has not placed a date on the invoice, the due date is calculated from the date the designated billing office receives a proper invoice, provided the agency annotates such invoice with the date of receipt at the time of receipt. When the discount date falls on a Saturday, Sunday, or legal holiday when Government offices are closed, the designated payment office may make payment on the following working day and take a discount. Payment terms are specified in the clause at 52.232–8, Discounts for Prompt Payment.

32.907 Interest penalties.

(a) *Late payment.* The designated payment office will pay an interest penalty automatically, without request from the contractor, when all of the following conditions, if applicable, have been met:

(1) The designated billing office received a proper invoice.

(2) The Government processed a receiving report or other Government documentation authorizing payment, and there was no disagreement over quantity, quality, or contractor compliance with any contract requirement.

(3) In the case of a final invoice, the payment amount is not subject to further contract settlement actions between the Government and the contractor.

(4) The designated payment office paid the contractor after the due date.

(5) In the case of interim payments on cost-reimbursement contracts for services, when payment is made more than 30 days after the designated billing office receives a proper invoice.

(b) *Improperly taken discount.* The designated payment office will pay an interest penalty automatically, without request from the contractor, if the Government takes a discount for prompt payment improperly. The interest penalty is calculated on the amount of discount taken for the period beginning with the first day after the end of the discount period through the date when the contractor is paid.

(c) *Failure to pay interest.* (1) The designated payment office will pay a penalty amount, in addition to the interest penalty amount, only if—

(i) The Government owes an interest penalty of $1 or more;

(ii) The designated payment office does not pay the interest penalty within 10 days after the date the invoice amount is paid; and

(iii) The contractor makes a written demand to the designated payment office for additional penalty payment in accordance with paragraph (c)(2) of this section, postmarked not later than 40 days after the date the invoice amount is paid.

(2)(i) Contractors must support written demands for additional penalty payments with the following data. The Government must not request additional data. Contractors must—

(A) Specifically assert that late payment interest is due under a specific invoice, and request payment of all overdue late payment interest penalty and such additional penalty as may be required;

(B) Attach a copy of the invoice on which the unpaid late payment interest is due; and

(C) State that payment of the principal has been received, including the date of receipt.

(ii) If there is no postmark or the postmark is illegible—

(A) The designated payment office that receives the demand will annotate it with the date of receipt, provided the demand is received on or before the 40th day after payment was made; or

(B) If the designated payment office fails to make the required annotation, the Government will determine the demand's validity based on the date the contractor has placed on the demand; provided such date is no later than the 40th day after payment was made.

(d) *Disagreements.* (1) The payment office will not pay interest penalties if payment delays are due to disagreement between the Government and contractor concerning—

(i) The payment amount;

(ii) Contract compliance; or

(iii) Amounts temporarily withheld or retained in accordance with the terms of the contract.

(2) The Government and the contractor must resolve claims involving disputes, and any interest that may be payable in accordance with the Disputes clause.

(e) *Computation of interest penalties.* The Government will compute interest penalties in accordance with OMB prompt payment regulations at 5 CFR part 1315. These regulations are available via the Internet at *http://www.fms.treas.gov/prompt/.*

(f) *Unavailability of funds.* The temporary unavailability of funds to make a timely payment does not relieve an agency from the obligation to pay interest penalties.

32.908 Contract clauses.

(a) Insert the clause at 52.232–26, Prompt Payment for Fixed-Price Architect-Engineer Contracts, in solicitations and contracts that contain the clause at 52.232–10, Payments Under Fixed-Price Architect-Engineer Contracts.

(1) As authorized in 32.904(c)(2), the contracting officer may modify the date in paragraph (a)(4)(i) of the clause to specify a period longer than 7 days for constructive acceptance or constructive approval, if required to afford the Government a practicable opportunity to inspect and test the supplies furnished or evaluate the services performed.

(2) As provided in 32.903, agency policies and procedures may authorize amendment of paragraphs (a)(1)(i) and (ii) of the clause to insert a period shorter than 30 days (but not less than 7 days) for making contract invoice payments.

(b) Insert the clause at 52.232–27, Prompt Payment for Construction Contracts, in all solicitations and contracts for construction (see part 36).

(1) As authorized in 32.904(d)(1)(i)(B), the contracting officer may modify the date in paragraph (a)(1)(i)(A) of the clause to specify a period longer than 14 days if required to afford the Government a reasonable opportunity to adequately inspect the work and to determine the adequacy of the Contractor's performance under the contract.

(2) As authorized in 32.904(d)(2)(iv), the contracting officer may modify the date in paragraph (a)(4)(i) of the clause to specify a period longer than 7 days for constructive acceptance or constructive approval if required to afford the Government a reasonable opportunity to inspect and test the supplies furnished or evaluate the services performed.

(c) Insert the clause at 52.232–25, Prompt Payment, in all other solicitations and contracts, except when the

clause at 52.212–4, Contract Terms and Conditions—Commercial Items, applies, or when payment terms and late payment penalties are established by other governmental authority (*e.g.*, tariffs).

(1) As authorized in 32.904(b)(1)(ii)(B)(*4*), the contracting officer may modify the date in paragraph (a)(5)(i) of the clause to specify a period longer than 7 days for constructive acceptance, if required to afford the Government a reasonable opportunity to inspect and test the supplies furnished or to evaluate the services performed, except in the case of a contract for the purchase of a commercial item, including a brand-name commercial item for authorized resale (*e.g.*, commissary items).

(2) As provided in 32.903, agency policies and procedures may authorize amendment of paragraphs (a)(1)(i) and (ii) of the clause to insert a period shorter than 30 days (but not less than 7 days) for making contract invoice payments.

(3) If the contract is a cost-reimbursement contract for services, use the clause with its *Alternate I*.

32.909 Contractor inquiries.

(a) Direct questions involving—

(1) Delinquent payments to the designated billing office or designated payment office; and

(2) Disagreements in payment amount or timing to the contracting officer for resolution. The contracting officer must coordinate within appropriate contracting channels and seek the advice of other offices as necessary to resolve disagreements.

(b) Small business concerns may contact the agency's local small business specialist or representative from the Office of Small and Disadvantaged Business Utilization to obtain additional assistance related to payment issues, late payment interest penalties, and information on the Prompt Payment Act.

Subpart 32.10—Performance-Based Payments

SOURCE: 60 FR 49715, Sept. 26, 1995, unless otherwise noted.

32.1000 Scope of subpart.

This subpart provides policy and procedures for performance-based payments under noncommercial purchases pursuant to Subpart 32.1.

[72 FR 73220, Dec. 26, 2007]

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.

(d) Performance-based payments are contract financing payments and, therefore, are not subject to the interest-penalty provisions of prompt payment (see Subpart 32.9). These payments shall be made in accordance with agency policy.

(e) Performance-based payments shall not be used for—

(1) Payments under cost-reimbursement line items;

(2) Contracts for architect-engineer services or construction, or for shipbuilding or ship conversion, alteration, or repair, when the contracts provide for progress payments based upon a percentage or stage of completion; or

(3) Contracts awarded through sealed bid procedures.

[72 FR 73220, Dec. 26, 2007]

32.1002 Bases for performance-based payments.

Performance-based payments may be made on any of the following bases:

(a) Performance measured by objective, quantifiable methods.

(b) Accomplishment of defined events.

(c) Other quantifiable measures of results.

[72 FR 73220, Dec. 26, 2007]

32.1003 Criteria for use.

The contracting officer may use performance-based payments for individual orders and contracts provided—

(a) The contracting officer and offeror agree on the performance-based payment terms;

(b) The contract, individual order, or line item is a fixed-price type;

(c) For indefinite delivery contracts, the individual order does not provide for progress payments; and

(d) For other than indefinite delivery contracts, the contract does not provide for progress payments.

[72 FR 73220, Dec. 26, 2007]

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 line item for 10 airplanes, with a unit price of $1,000,000 each, has 10 deliverable items-the separate planes. A 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 shall be an integral and necessary part of contract performance and shall 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, the passage of time, or other such occurrences do not represent meaningful efforts or actions and shall not be identified as 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 shall include the following in the contract:

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

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

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

(iv) Because performance-based payments are contract financing, events or criteria shall 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 shall be part of the performance necessary for that deliverable item and shall be identified to a specific line item or subline item.

(b) *Establishing performance-based finance payment amounts.* (1) The contracting officer shall 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 shall adjust the performance-based payment schedule appropriately.

(2) Total performance-based payments shall—

(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 shall 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 shall 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 shall 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 shall provide instructions to the Government payment office for distribution of financing payments to the respective funds accounts. Distribution instructions shall be consistent with the contract's liquidation provisions.

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

(i) What, if any, terms shall 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 state that the evaluation of the offeror's proposed prices will include an adjustment 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 shall—

(i) Review the proposed terms to ensure they comply with this section; and

(ii) Use the adjustment method at 32.205(c) if the price is to be adjusted

for evaluation purposes in accordance with paragraph (e)(1)(ii) of this section.

[72 FR 73220, Dec. 26, 2007, as amended at 82 FR 4714, Jan. 13, 2017]

32.1005 Solicitation provision and contract clause.

(a) Insert the clause at 52.232–32, Performance-Based Payments, 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)).

[72 FR 73222, Dec. 26, 2007]

32.1006 [Reserved]

32.1007 Administration and payment of performance-based payments.

(a) *Responsibility*. The contracting officer responsible for administering performance-based payments (*see* 42.302(a)(13)) for the contract shall review and approve all performance-based payments for that contract.

(b) *Approval of financing requests*. Unless otherwise provided in agency regulations, or by agreement with the appropriate payment official—

(1) The contracting officer shall be responsible for receiving, approving, and transmitting all performance-based payment requests to the appropriate payment office; and

(2) Each approval shall specify the amount to be paid, necessary contractual information, and the appropriation account(s) (see 32.1004(c)) to be charged for the payment.

(c) *Reviews*. The contracting officer is responsible for determining what reviews are required for protection of the Government's interests. The contracting officer should consider the contractor's experience, performance record, reliability, financial strength, and the adequacy of controls established by the contractor for the administration of performance-based payments. Based upon the risk to the Government, post-payment reviews and verifications should normally be arranged as considered appropriate by the contracting officer. If considered necessary by the contracting officer, pre-payment reviews may be required.

(d) *Incomplete performance*. The contracting officer shall not approve a performance-based payment until the specified event or performance criterion has been successfully accomplished in accordance with the contract. If an event is cumulative, the contracting officer shall not approve the performance-based payment unless all identified preceding events or criteria are accomplished.

(e) *Government-caused delay*. Entitlement to a performance-based payment is solely on the basis of successful performance of the specified events or performance criteria. However, if there is a Government-caused delay, the contracting officer may renegotiate the performance-based payment schedule to facilitate contractor billings for any successfully accomplished portions of the delayed event or criterion.

[72 FR 73222, Dec. 26, 2007, as amended at 76 FR 14547, Mar. 16, 2011]

32.1008 Suspension or reduction of performance-based payments.

The contracting officer shall apply the policy and procedures in paragraphs (a), (b), (c), and (e) of 32.503–6, Suspension or reduction of payments, whenever exercising the Government's rights to suspend or reduce performance-based payments in accordance with paragraph (e) of the clause at 52.232–32, Performance-Based Payments.

32.1009 Title.

(a) Since the clause at 52.232–32, Performance-Based Payments, gives the Government title to the property described in paragraph (f) of the clause, the contracting officer shall ensure that the Government title is not compromised by other encumbrances. Ordinarily, the contracting officer, in the absence of reason to believe otherwise,

may rely upon the contractor's certification contained in the payment request.

(b) If the contracting officer becomes aware of any arrangement or condition that would impair the Government's title to the property affected by the Performance-Based Payments clause, the contracting officer shall require additional protective provisions.

(c) The existence of any such encumbrance is a violation of the contractor's obligations under the contract, and the contracting officer may, if necessary, suspend or reduce payments under the terms of the Performance-Based Payments clause covering failure to comply with a material requirement of the contract. In addition, if the contractor fails to disclose an existing encumbrance in the certification, the contracting officer should consult with legal counsel concerning possible violation of 31 U.S.C. 3729, the False Claims Act.

[64 FR 10540, Mar. 4, 1999, as amended at 72 FR 73222, Dec. 26, 2007]

32.1010 Risk of loss.

(a) Under the clause at 52.232–32, Performance-Based Payments, and except for normal spoilage, the contractor bears the risk of loss for Government property, even though title is vested in the Government, unless the Government has expressly assumed this risk. The clauses prescribed in this regulation related to performance-based payments, default, and terminations do not constitute a Government assumption of risk.

(b) If a loss occurs in connection with property for which the contractor bears the risk, and the property is needed for performance, the contractor is obligated to repay the Government the performance-based payments related to the property.

(c) The contractor is not obligated to pay for the loss of property for which the Government has assumed the risk of loss. However, a serious loss may impede the satisfactory progress of contract performance, so that the contracting officer may need to act under paragraph (e)(2) of the Performance-Based Payments clause. In addition, while the contractor is not required to repay previous performance-based payments in the event of a loss for which the Government has assumed the risk, such a loss may prevent the contractor from making the certification required by the Performance-Based Payments clause.

[64 FR 10540, Mar. 4, 1999, as amended at 75 FR 38680, July 2, 2010; 77 FR 12941, Mar. 2, 2012]

Subpart 32.11—Electronic Funds Transfer

SOURCE: 64 FR 10540, Mar. 4, 1999, unless otherwise noted.

32.1100 Scope of subpart.

This subpart provides policy and procedures for contract financing and delivery payments to contractors by electronic funds transfer (EFT).

32.1101 Statutory requirements.

31 U.S.C. 3332 requires, subject to implementing regulations of the Secretary of the Treasury at 31 CFR part 208, that EFT be used to make all contract payments.

32.1102 Definitions.

As used in this subpart—

Electron Funds Transfer information (EFT) means information necessary for making a payment by EFT through specified EFT mechanisms.

Governmentwide commercial purchase card means a card that is similar in nature to a commercial credit card that is used to make financing and delivery payments for supplies and services. The purchase card is an EFT method and it may be used as a means to meet the requirement to pay by EFT, to the extent that purchase card limits do not preclude such payments.

Payment information means the payment advice provided by the Government to the contractor that identifies what the payment is for, any computations or adjustments made by the Government, and any information required by the Prompt Payment Act.

[64 FR 10540, Mar. 4, 1999, as amended at 66 FR 2132, Jan. 10, 2001]

32.1103 Applicability.

The Government shall provide all contract payments through EFT except if—

(a) The office making payment under a contract that requires payment by EFT, loses the ability to release payment by EFT. To the extent authorized by 31 CFR part 208, the payment office shall make necessary payments pursuant to paragraph (a)(2) of the clause at either 52.232–33 or 52.232–34 until such time as it can make EFT payments;

(b) The payment is to be received by or on behalf of the contractor outside the United States and Puerto Rico (but see 32.1106(b));

(c) A contract is paid in other than United States currency (but see 32.1106(b));

(d) Payment by EFT under a classified contract could compromise the safeguarding of classified information or national security, or arrangements for appropriate EFT payments would be impractical due to security considerations;

(e) A contract is awarded by a deployed contracting officer in the course of military operations, including, but not limited to, contingency operations as defined in 2.101, or a contract is awarded by any contracting officer in the conduct of emergency operations, such as responses to natural disasters or national or civil emergencies, if—

(1) EFT is not known to be possible; or

(2) EFT payment would not support the objectives of the operation;

(f) The agency does not expect to make more than one payment to the same recipient within a one-year period;

(g) An agency's need for supplies and services is of such unusual and compelling urgency that the Government would be seriously injured unless payment is made by a method other than EFT;

(h) There is only one source for supplies and services and the Government would be seriously injured unless payment is made by a method other than EFT; or

(i) Otherwise authorized by Department of the Treasury Regulations at 31 CFR part 208.

[64 FR 10540, Mar. 4, 1999, as amended at 67 FR 6114, Feb. 8, 2002; 68 FR 13203, Mar. 18, 2003; 68 FR 56673, Oct. 1, 2003]

32.1104 Protection of EFT information.

The Government shall protect against improper disclosure of contractors' EFT information.

32.1105 Assignment of claims.

The use of EFT payment methods is not a substitute for a properly executed assignment of claims in accordance with Subpart 32.8. EFT information that shows the ultimate recipient of the transfer to be other than the contractor, in the absence of a proper assignment of claims, is considered to be incorrect EFT information within the meaning of the ''Suspension of Payment'' paragraphs of the EFT clauses at 52.232–33 and 52.232–34.

32.1106 EFT mechanisms.

(a) *Domestic EFT mechanisms.* The EFT clauses at 52.232–33 and 52.232–34 are designed for use with the domestic United States banking system, using United States currency, and only the specified mechanisms (U.S. Automated Clearing House, and Fedwire Transfer System) of EFT. However, the head of an agency may authorize the use of any other EFT mechanism for domestic EFT with the concurrence of the office or agency responsible for making payments.

(b) *Nondomestic EFT mechanisms and other than United States currency.* The Government shall provide payment by other than EFT for payments received by or on behalf of the contractor outside the United States and Puerto Rico or for contracts paid in other than United States currency. However, the head of an agency may authorize appropriate use of EFT with the concurrence of the office or agency responsible for making payments if—

(1) The political, financial, and communications infrastructure in a foreign country supports payment by EFT; or

(2) Payments of other than United States currency may be made safely.

32.1107 Payment information.

The payment or disbursing office shall forward to the contractor available payment information that is suitable for transmission as of the date of release of the EFT instruction to the Federal Reserve System.

32.1108 Payment by Governmentwide commercial purchase card.

A Governmentwide commercial purchase card charge authorizes the third party (e.g., financial institution) that issued the purchase card to make immediate payment to the contractor. The Government reimburses the third party at a later date for the third party's payment to the contractor.

(a) The clause at 52.232–36, Payment by Third Party, governs when a contractor submits a charge against the purchase card for contract payment. The clause provides that the contractor shall make such payment requests by a charge to a Government account with the third party at the time the payment clause(s) of the contract authorizes the contractor to submit a request for payment, and for the amount due in accordance with the terms of the contract. To the extent that such a payment would otherwise be approved, the charge against the purchase card should not be disputed when the charge is reported to the Government by the third party. To the extent that such payment would otherwise not have been approved, an authorized individual (see 1.603–3) shall take action to remove the charge, such as by disputing the charge with the third party or by requesting that the contractor credit the charge back to the Government under the contract.

(b)(1) Written contracts to be paid by purchase card should include the clause at 52.232–36, Payment by Third Party, as prescribed by 32.1110(d). However, payment by a purchase card also may be made under a contract that does not contain the clause to the extent the contractor agrees to accept that method of payment.

(2)(i) When it is contemplated that the Governmentwide commercial purchase card will be used as the method of payment, and the contract or order is above the micro-purchase threshold, contracting officers are required to verify by looking in the System for Award Management (SAM) whether the contractor has any delinquent debt subject to collection under the Treasury Offset Program (TOP) at contract award and order placement. Information on TOP is available at *http://fms.treas.gov/debt/index.html*.

(ii) The contracting officer shall not authorize the Governmentwide commercial purchase card as a method of payment during any period the SAM indicates that the contractor has delinquent debt subject to collection under the TOP. In such cases, payments under the contract shall be made in accordance with the clause at 52.232–33, Payment by Electronic Funds Transfer—System for Award Management, or 52.232–34, Payment by Electronic Funds Transfer—Other Than System for Award Management, as appropriate (see FAR 32.1110(d)).

(iii) Contracting officers shall not use the presence of the SAM debt flag indicator to exclude a contractor from receipt of the contract award or issuance or placement of an order.

(iv) The contracting officer may take steps to authorize payment by Governmentwide commercial purchase card when a contractor alerts the contracting officer that the SAM debt flag indicator has been changed to no longer show a delinquent debt.

(c) The clause at 52.232–36, Payment by Third Party, requires that the contract—

(1) Identify the third party and the particular purchase card to be used; and

(2) Not include the purchase card account number. The purchase card account number should be provided separately to the contractor.

[64 FR 10540, Mar. 4, 1999, as amended at 74 FR 65604, Dec. 10, 2009; 78 FR 37679, June 21, 2013; 83 FR 48698, Sept. 26, 2018]

32.1109 EFT information submitted by offerors.

If offerors are required to submit EFT information prior to award, the successful offeror is not responsible for resubmitting this information after award of the contract except to make changes, or to place the information on invoices if required by agency procedures. Therefore, contracting officers

shall forward EFT information provided by the successful offeror to the appropriate office.

32.1110 Solicitation provision and contract clauses.

(a) The contracting officer shall insert the clause at—

(1) 52.232–33, Payment by Electronic Funds Transfer—System for Award Management, in solicitations and contracts that include the provision at 52.204–7, System for Award Management, or an agency clause that requires a contractor to be registered in SAM and maintain registration until final payment, unless—

(i) Payment will be made through a third party arrangement (*see* 13.301 and paragraph (d) of this section); or

(ii) An exception listed in 32.1103(a) through (i) applies.

(2)(i) 52.232–34, Payment by Electronic Funds Transfer—Other than System for Award Management, in solicitations and contracts that require EFT as the method for payment but do not include the provision at 52.204–7, System for Award Management, or a similar agency clause that requires the contractor to be registered in SAM.

(ii)(A) If permitted by agency procedures, the contracting officer may insert in paragraph (b)(1) of the clause, a particular time after award, such as a fixed number of days, or event such as the submission of the first request for payment.

(B) If no agency procedures are prescribed, the time period inserted in paragraph (b)(1) of the clause shall be ''no later than 15 days prior to submission of the first request for payment.''

(b) If the head of the agency has authorized, in accordance with 32.1106, to use a nondomestic EFT mechanism, the contracting officer shall insert in solicitations and contracts a clause substantially the same as 52.232–33 or 52.232–34 that clearly addresses the nondomestic EFT mechanism.

(c) If EFT information is to be submitted to other than the payment office in accordance with agency procedures, the contracting officer shall insert in solicitations and contracts the clause at 52.232–35, Designation of Office for Government Receipt of Electronic Funds Transfer Information, or a clause substantially the same as 52.232–35 that clearly informs the contractor where to send the EFT information.

(d) If payment under a written contract will be made by a charge to a Government account with a third party such as a Governmentwide commercial purchase card, then the contracting officer shall insert the clause at 52.232–36, Payment by Third Party, in solicitations and contracts. Payment by a purchase card may also be made under a contract that does not contain the clause at 52.232–36, to the extent the contractor agrees to accept that method of payment. When the clause at 52.232–36 is included in a solicitation or contract, the contracting officer shall also insert the clause at 52.232–33, Payment by Electronic Funds Transfer—System for Award Management, or 52.232–34, Payment by Electronic Funds Transfer—Other Than System for Award Management, as appropriate.

(e) If the contract or agreement provides for the use of delivery orders, and provides that the ordering office designate the method of payment for individual orders, the contracting officer shall insert, in the solicitation and contract or agreement, the clause at 52.232–37, Multiple Payment Arrangements, and, to the extent they are applicable, the clauses at—

(1) 52.232–33, Payment by Electronic Funds Transfer—System for Award Management;

(2) 52.232–34, Payment by Electronic Funds Transfer—Other than System for Award Management; and

(3) 52.232–36, Payment by Third Party.

(f) If more than one disbursing office will make payment under a contract or agreement, the contracting officer, or ordering office (if the contract provides for choices between EFT clauses on individual orders or classes of orders), shall include or identify the EFT clause appropriate for each office and shall identify the applicability by disbursing office and line item.

(g) If the solicitation contains the clause at 52.232–34, Payment by Electronic Funds Transfer—Other than System for Award Management, and an offeror is required to submit EFT information prior to award—

(1) The contracting officer shall insert in the solicitation the provision at 52.232–38, Submission of Electronic Funds Transfer Information with Offer, or a provision substantially the same; and

(2) For sealed bid solicitations, the contracting officer shall amend 52.232–38 to ensure that a bidder's EFT information—

(i) Is not a part of the bid to be opened at the public opening; and

(ii) May not be released to members of the general public who request a copy of the bid.

[64 FR 10540, Mar. 4, 1999, as amended at 68 FR 56673, Oct. 1, 2003; 68 FR 61866, Oct. 30, 2003; 74 FR 65605, Dec. 10, 2009; 77 FR 69718, Nov. 20, 2012; 78 FR 37680, June 21, 2013; 82 FR 4714, Jan. 13, 2017; 83 FR 48698, Sept. 26, 2018]

PART 33—PROTESTS, DISPUTES, AND APPEALS

Sec.

AUTHORITY: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

33.000 Scope of part.

This part prescribes policies and procedures for filing protests and for processing contract disputes and appeals.

[50 FR 2270, Jan. 15, 1985]

33.001 General.

There are other Federal court-related protest authorities and dispute-appeal authorities that are not covered by this part of the FAR, e.g., 28 U.S.C. 1491 for Court of Federal Claims jurisdiction. Contracting officers should contact their designated legal advisor for additional information whenever they become aware of any litigation related to their contracts.

[77 FR 56743, Sept. 13, 2012]

Subpart 33.1—Protests

33.101 Definitions.

As used in this subpart—

Day means a calendar day, unless otherwise specified. In the computation of any period—

(1) The day of the act, event, or default from which the designated period of time begins to run is not included; and

(2) The last day after the act, event, or default is included unless—

(i) The last day is a Saturday, Sunday, or Federal holiday; or

(ii) In the case of a filing of a paper at any appropriate administrative forum, the last day is a day on which weather or other conditions cause the closing of the forum for all or part of the day, in which event the next day on which the appropriate administrative forum is open is included.

Filed means the complete receipt of any document by an agency before its close of business. Documents received after close of business are considered filed as of the next day. Unless otherwise stated, the agency close of business is presumed to be 4:30 p.m., local time.

Interested Party for the purpose of filing a protest means an actual or prospective offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract.

Protest means a written objection by an interested party to any of the following:

(1) A solicitation or other request by an agency for offers for a contract for the procurement of property or services.

(2) The cancellation of the solicitation or other request.

(3) An award or proposed award of the contract.

(4) A termination or cancellation of an award of the contract, if the written objection contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract.

Protest venue means protests filed with the agency, the Government Accountability Office, or the U.S. Court of Federal Claims. U.S. District Courts do not have any bid protest jurisdiction.

[50 FR 2270, Jan. 15, 1985, as amended at 53 FR 43391, Oct. 26, 1988; 54 FR 19827, May 8, 1989; 60 FR 48225, Sept. 18, 1995; 62 FR 64933, Dec. 9, 1997; 66 FR 2132, Jan. 10, 2001; 77 FR 56743, Sept. 13, 2012]

33.102 General.

(a) Without regard to the protest venue, contracting officers shall consider all protests and seek legal advice, whether protests are submitted before or after award and whether filed directly with the agency, the Government Accountability Office (GAO), or the U.S. Court of Federal Claims. (*See* 19.302 for protests of small business status, 19.305 for protests of disadvantaged business status, 19.306 for protests of HUBZone small business status, and 19.307 for protests of service-disabled veteran-owned small business status, and 19.308 for protests of the status of an economically disadvantaged women-owned small business concern or of a women-owned small business concern eligible under the Women-Owned Small Business Program.)

(b) If, in connection with a protest, the head of an agency determines that a solicitation, proposed award, or award does not comply with the requirements of law or regulation, the head of the agency may—

(1) Take any action that could have been recommended by the Comptroller General had the protest been filed with the Government Accountability Office;

(2) Pay appropriate costs as stated in 33.104(h);

(3) Require the awardee to reimburse the Government's costs, as provided in this paragraph, where a postaward protest is sustained as the result of an awardee's intentional or negligent misstatement, misrepresentation, or miscertification. In addition to any other remedy available, and pursuant to the requirements of Subpart 32.6, the Government may collect this debt by offsetting the amount against any payment due the awardee under any contract between the awardee and the Government.

(i) When a protest is sustained by GAO under circumstances that may allow the Government to seek reimbursement for protest costs, the contracting officer will determine whether the protest was sustained based on the awardee's negligent or intentional misrepresentation. If the protest was sustained on several issues, protest costs shall be apportioned according to the costs attributable to the awardee's actions.

(ii) The contracting officer shall review the amount of the debt, degree of the awardee's fault, and costs of collection, to determine whether a demand for reimbursement ought to be made. If it is in the best interests of the Government to seek reimbursement, the contracting officer shall notify the contractor in writing of the nature and amount of the debt, and the intention to collect by offset if necessary. Prior to issuing a final decision, the contracting officer shall afford the contractor an opportunity to inspect and copy agency records pertaining to the debt to the extent permitted by statute and regulation, and to request review of the matter by the head of the contracting activity.

(iii) When appropriate, the contracting officer shall also refer the matter to the agency debarment official for consideration under Subpart 9.4.

(c) In accordance with 31 U.S.C. 1558, with respect to any protest filed with the GAO, if the funds available to the agency for a contract at the time a

protest is filed in connection with a solicitation for, proposed award of, or award of such a contract would otherwise expire, such funds shall remain available for obligation for 100 days after the date on which the final ruling is made on the protest. A ruling is considered final on the date on which the time allowed for filing an appeal or request for reconsideration has expired, or the date on which a decision is rendered on such appeal or request, whichever is later.

(d) *Protest likely after award.* The contracting officer may stay performance of a contract within the time period contained in 33.104(c)(1) if the contracting officer makes a written determination that—

(1) A protest is likely to be filed; and

(2) Delay of performance is, under the circumstances, in the best interests of the United States.

(e) An interested party wishing to protest is encouraged to seek resolution within the agency (see 33.103) before filing a protest with the GAO, but may protest to the GAO in accordance with GAO regulations (4 CFR part 21).

(f) No person may file a protest at GAO for a procurement integrity violation unless that person reported to the contracting officer the information constituting evidence of the violation within 14 days after the person first discovered the possible violation (41 U.S.C. 2106).

[50 FR 2270, Jan. 15, 1985]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting §33.102, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at *www.govinfo.gov*.

33.103 Protests to the agency.

(a) *Reference.* Executive Order 12979, Agency Procurement Protests, establishes policy on agency procurement protests.

(b) Prior to submission of an agency protest, all parties shall use their best efforts to resolve concerns raised by an interested party at the contracting officer level through open and frank discussions.

(c) The agency should provide for inexpensive, informal, procedurally simple, and expeditious resolution of protests. Where appropriate, the use of alternative dispute resolution techniques, third party neutrals, and another agency's personnel are acceptable protest resolution methods.

(d) The following procedures are established to resolve agency protests effectively, to build confidence in the Government's acquisition system, and to reduce protests outside of the agency:

(1) Protests shall be concise and logically presented to facilitate review by the agency. Failure to substantially comply with any of the requirements of paragraph (d)(2) of this section may be grounds for dismissal of the protest.

(2) Protests shall include the following information:

(i) Name, address, and fax and telephone numbers of the protester.

(ii) Solicitation or contract number.

(iii) Detailed statement of the legal and factual grounds for the protest, to include a description of resulting prejudice to the protester.

(iv) Copies of relevant documents.

(v) Request for a ruling by the agency.

(vi) Statement as to the form of relief requested.

(vii) All information establishing that the protester is an interested party for the purpose of filing a protest.

(viii) All information establishing the timeliness of the protest.

(3) All protests filed directly with the agency will be addressed to the contracting officer or other official designated to receive protests.

(4) In accordance with agency procedures, interested parties may request an independent review of their protest at a level above the contracting officer; solicitations should advise potential bidders and offerors that this review is available. Agency procedures and/or solicitations shall notify potential bidders and offerors whether this independent review is available as an alternative to consideration by the contracting officer of a protest or is available as an appeal of a contracting officer decision on a protest. Agencies shall designate the official(s) who are to conduct this independent review, but the official(s) need not be within the contracting officer's supervisory

chain. When practicable, officials designated to conduct the independent review should not have had previous personal involvement in the procurement. If there is an agency appellate review of the contracting officer's decision on the protest, it will not extend GAO's timeliness requirements. Therefore, any subsequent protest to the GAO must be filed within 10 days of knowledge of initial adverse agency action (4 CFR 21.2(a)(3)).

(e) Protests based on alleged apparent improprieties in a solicitation shall be filed before bid opening or the closing date for receipt of proposals. In all other cases, protests shall be filed no later than 10 days after the basis of protest is known or should have been known, whichever is earlier. The agency, for good cause shown, or where it determines that a protest raises issues significant to the agency's acquisition system, may consider the merits of any protest which is not timely filed.

(f) *Action upon receipt of protest.* (1) Upon receipt of a protest before award, a contract may not be awarded, pending agency resolution of the protest, unless contract award is justified, in writing, for urgent and compelling reasons or is determined, in writing, to be in the best interest of the Government. Such justification or determination shall be approved at a level above the contracting officer, or by another official pursuant to agency procedures.

(2) If award is withheld pending agency resolution of the protest, the contracting officer will inform the offerors whose offers might become eligible for award of the contract. If appropriate, the offerors should be requested, before expiration of the time for acceptance of their offers, to extend the time for acceptance to avoid the need for resolicitation. In the event of failure to obtain such extension of offers, consideration should be given to proceeding with award pursuant to paragraph (f)(1) of this section.

(3) Upon receipt of a protest within 10 days after contract award or within 5 days after a debriefing date offered to the protester under a timely debriefing request in accordance with 15.505 or 15.506, whichever is later, the contracting officer shall immediately suspend performance, pending resolution of the protest within the agency, including any review by an independent higher level official, unless continued performance is justified, in writing, for urgent and compelling reasons or is determined, in writing, to be in the best interest of the Government. Such justification or determination shall be approved at a level above the contracting officer, or by another official pursuant to agency procedures.

(4) Pursuing an agency protest does not extend the time for obtaining a stay at GAO. Agencies may include, as part of the agency protest process, a voluntary suspension period when agency protests are denied and the protester subsequently files at GAO.

(g) Agencies shall make their best efforts to resolve agency protests within 35 days after the protest is filed. To the extent permitted by law and regulation, the parties may exchange relevant information.

(h) Agency protest decisions shall be well-reasoned, and explain the agency position. The protest decision shall be provided to the protester using a method that provides evidence of receipt.

[61 FR 39219, July 29, 1996, as amended at 61 FR 69289, Dec. 31, 1996; 62 FR 270, Jan. 2, 1997; 62 FR 10710, Mar. 10, 1997; 62 FR 51271, Sept. 30, 1997]

33.104 Protests to GAO.

Procedures for protests to GAO are found at 4 CFR Part 21 (GAO Bid Protest Regulations). In the event guidance concerning GAO procedure in this section conflicts with 4 CFR part 21, 4 CFR part 21 governs.

(a) *General procedures.* (1) A protester is required to furnish a copy of its complete protest to the official and location designated in the solicitation or, in the absence of such a designation, to the contracting officer, so it is received no later than 1 day after the protest is filed with the GAO. The GAO may dismiss the protest if the protester fails to furnish a complete copy of the protest within 1 day.

(2) Immediately after receipt of the GAO's written notice that a protest has been filed, the agency shall give notice of the protest to the contractor if the award has been made, or, if no award has been made, to all parties who appear to have a reasonable prospect of

receiving award if the protest is denied. The agency shall furnish copies of the protest submissions to such parties with instructions to (i) communicate directly with the GAO, and (ii) provide copies of any such communication to the agency and to other participating parties when they become known. However, if the protester has identified sensitive information and requests a protective order, then the contracting officer shall obtain a redacted version from the protester to furnish to other interested parties, if one has not already been provided.

(3)(i) Upon notice that a protest has been filed with the GAO, the contracting officer shall immediately begin compiling the information necessary for a report to the GAO. The agency shall submit a complete report to the GAO within 30 days after the GAO notifies the agency by telephone that a protest has been filed, or within 20 days after receipt from the GAO of a determination to use the express option, unless the GAO—

(A) Advises the agency that the protest has been dismissed; or

(B) Authorizes a longer period in response to an agency's request for an extension. Any new date is documented in the agency's file.

(ii) When a protest is filed with the GAO, and an actual or prospective offeror so requests, the procuring agency shall, in accordance with any applicable protective orders, provide actual or prospective offerors reasonable access to the protest file. However, if the GAO dismisses the protest before the documents are submitted to the GAO, then no protest file need be made available. Information exempt from disclosure under 5 U.S.C. 552 may be redacted from the protest file. The protest file shall be made available to non-intervening actual or prospective offerors within a reasonable time after submittal of an agency report to the GAO. The protest file shall include an index and as appropriate—

(A) The protest;

(B) The offer submitted by the protester;

(C) The offer being considered for award or being protested;

(D) All relevant evaluation documents;

(E) The solicitation, including the specifications or portions relevant to the protest;

(F) The abstract of offers or relevant portions; and

(G) Any other documents that the agency determines are relevant to the protest, including documents specifically requested by the protester.

(iii) At least 5 days prior to the filing of the report, in cases in which the protester has filed a request for specific documents, the agency shall provide to all parties and the GAO a list of those documents, or portions of documents, that the agency has released to the protester or intends to produce in its report, and those documents that the agency intends to withhold from the protester and the reasons for the proposed withholding. Any objection to the scope of the agency's proposed disclosure or nondisclosure of the documents must be filed with the GAO and the other parties within 2 days after receipt of this list.

(iv) The agency report to the GAO shall include—

(A) A copy of the documents described in 33.104(a)(3)(ii);

(B) The contracting officer's signed statement of relevant facts, including a best estimate of the contract value, and a memorandum of law. The contracting officer's statement shall set forth findings, actions, and recommendations, and any additional evidence or information not provided in the protest file that may be necessary to determine the merits of the protest; and

(C) A list of parties being provided the documents.

(4)(i) At the same time the agency submits its report to the GAO, the agency shall furnish copies of its report to the protester and any intervenors. A party shall receive all relevant documents, except—

(A) Those that the agency has decided to withhold from that party for any reason, including those covered by a protective order issued by the GAO. Documents covered by a protective order shall be released only in accordance with the terms of the order. Examples of documents the agency may

decide to exclude from a copy of the report include documents previously furnished to or prepared by a party; classified information; and information that would give the party a competitive advantage; and

(B) Protester's documents which the agency determines, pursuant to law or regulation, to withhold from any interested party.

(ii)(A) If the protester requests additional documents within 2 days after the protester knew the existence or relevance of additional documents, or should have known, the agency shall provide the requested documents to the GAO within 2 days of receipt of the request.

(B) The additional documents shall also be provided to the protester and other interested parties within this 2-day period unless the agency has decided to withhold them for any reason (see subdivision (a)(4)(i) of this section). This includes any documents covered by a protective order issued by the GAO. Documents covered by a protective order shall be provided only in accordance with the terms of the order.

(C) The agency shall notify the GAO of any documents withheld from the protester and other interested parties and shall state the reasons for withholding them.

(5) The GAO may issue protective orders which establish terms, conditions, and restrictions for the provision of any document to an interested party. Protective orders prohibit or restrict the disclosure by the party of procurement sensitive information, trade secrets or other proprietary or confidential research, development or commercial information that is contained in such document. Protective orders do not authorize withholding any documents or information from the United States Congress or an executive agency.

(i) *Requests for protective orders.* Any party seeking issuance of a protective order shall file its request with the GAO as soon as practicable after the protest is filed, with copies furnished simultaneously to all parties.

(ii) *Exclusions and rebuttals.* Within 2 days after receipt of a copy of the protective order request, any party may file with the GAO a request that particular documents be excluded from the coverage of the protective order, or that particular parties or individuals be included in or excluded from the protective order. Copies of the request shall be furnished simultaneously to all parties.

(iii) *Additional documents.* If the existence or relevance of additional documents first becomes evident after a protective order has been issued, any party may request that these additional documents be covered by the protective order. Any party to the protective order also may request that individuals not already covered by the protective order be included in the order. Requests shall be filed with the GAO, with copies furnished simultaneously to all parties.

(iv) *Sanctions and remedies.* The GAO may impose appropriate sanctions for any violation of the terms of the protective order. Improper disclosure of protected information will entitle the aggrieved party to all appropriate remedies under law or equity. The GAO may also take appropriate action against an agency which fails to provide documents designated in a protective order.

(6) The protester and other interested parties are required to furnish a copy of any comments on the agency report directly to the GAO within 10 days, or 5 days if express option is used, after receipt of the report, with copies provided to the contracting officer and to other participating interested parties. If a hearing is held, these comments are due within 5 days after the hearing.

(7) Agencies shall furnish the GAO with the name, title, and telephone number of one or more officials (in both field and headquarters offices, if desired) whom the GAO may contact who are knowledgeable about the subject matter of the protest. Each agency shall be responsible for promptly advising the GAO of any change in the designated officials.

(b) *Protests before award.* (1) When the agency has received notice from the GAO of a protest filed directly with the GAO, a contract may not be awarded unless authorized, in accordance with agency procedures, by the head of the contracting activity, on a nondelegable basis, upon a written finding that—

(i) Urgent and compelling circumstances which significantly affect the interest of the United States will not permit awaiting the decision of the GAO; and

(ii) Award is likely to occur within 30 days of the written finding.

(2) A contract award shall not be authorized until the agency has notified the GAO of the finding in subparagraph (b)(1) of this section.

(3) When a protest against the making of an award is received and award will be withheld pending disposition of the protest, the contracting officer should inform the offerors whose offers might become eligible for award of the protest. If appropriate, those offerors should be requested, before expiration of the time for acceptance of their offer, to extend the time for acceptance to avoid the need for resolicitation. In the event of failure to obtain such extensions of offers, consideration should be given to proceeding under subparagraph (b)(1) of this section.

(c) *Protests after award.* (1) When the agency receives notice of a protest from the GAO within 10 days after contract award or within 5 days after a debriefing date offered to the protester for any debriefing that is required by 15.505 or 15.506, whichever is later, the contracting officer shall immediately suspend performance or terminate the awarded contract, except as provided in paragraphs (c) (2) and (3) of this section.

(2) In accordance with agency procedures, the head of the contracting activity may, on a nondelegable basis, authorize contract performance, notwithstanding the protest, upon a written finding that—

(i) Contract performance will be in the best interests of the United States; or

(ii) Urgent and compelling circumstances that significantly affect the interests of the United States will not permit waiting for the GAO's decision.

(3) Contract performance shall not be authorized until the agency has notified the GAO of the finding in subparagraph (c)(2) of this section.

(4) When it is decided to suspend performance or terminate the awarded contract, the contracting officer should attempt to negotiate a mutual agreement on a no-cost basis.

(5) When the agency receives notice of a protest filed with the GAO after the dates contained in subparagraph (c)(1), the contracting officer need not suspend contract performance or terminate the awarded contract unless the contracting officer believes that an award may be invalidated and a delay in receiving the supplies or services is not prejudicial to the Government's interest.

(d) *Findings and notice.* If the decision is to proceed with contract award, or continue contract performance under paragraphs (b) or (c) of this section, the contracting officer shall include the written findings or other required documentation in the file. The contracting officer also shall give written notice of the decision to the protester and other interested parties.

(e) *Hearings.* The GAO may hold a hearing at the request of the agency, a protester, or other interested party who has responded to the notice in paragraph (a)(2) of this section. A recording or transcription of the hearing will normally be made, and copies may be obtained from the GAO. All parties may file comments on the hearing and the agency report within 5 days of the hearing.

(f) *GAO decision time.* GAO issues its recommendation on a protest within 100 days from the date of filing of the protest with the GAO, or within 65 days under the express option. The GAO attempts to issue its recommendation on an amended protest that adds a new ground of protest within the time limit of the initial protest. If an amended protest cannot be resolved within the initial time limit, the GAO may resolve the amended protest through an express option.

(g) *Notice to GAO.* If the agency has not fully implemented the GAO recommendations with respect to a solicitation for a contract or an award or a proposed award of a contract within 60 days of receiving the GAO recommendations, the head of the contracting activity responsible for that contract shall report the failure to the GAO not later than 5 days after the expiration of the 60-day period. The report shall explain the reasons why the

GAO's recommendation, exclusive of costs, has not been followed by the agency.

(h) *Award of costs.* (1) If the GAO determines that a solicitation for a contract, a proposed award, or an award of a contract does not comply with a statute or regulation, the GAO may recommend that the agency pay to an appropriate protester the cost, exclusive of profit, of filing and pursuing the protest, including reasonable attorney, consultant, and expert witness fees, and bid and proposal preparation costs. The agency shall use funds available for the procurement to pay the costs awarded.

(2) The protester shall file its claim for costs with the contracting agency within 60 days after receipt of the GAO's recommendation that the agency pay the protester its costs. Failure to file the claim within that time may result in forfeiture of the protester's right to recover its costs.

(3) The agency shall attempt to reach an agreement on the amount of costs to be paid. If the agency and the protester are unable to agree on the amount to be paid, the GAO may, upon request of the protester, recommend to the agency the amount of costs that the agency should pay.

(4) Within 60 days after the GAO recommends the amount of costs the agency should pay the protester, the agency shall notify the GAO of the action taken by the agency in response to the recommendation.

(5) No agency shall pay a party, other than a small business concern within the meaning of section 3(a) of the Small Business Act (see 2.101, ''Small business concern''), costs under paragraph (h)(2) of this section—

(i) For consultant and expert witness fees that exceed the highest rate of compensation for expert witnesses paid by the Government pursuant to 5 U.S.C. 3109 and 5 CFR 304.105; or

(ii) For attorney's fees that exceed $150 per hour, unless the agency determines, based on the recommendation of the Comptroller General on a case-by-case basis, that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee. The cap placed on attorneys' fees for businesses, other than small businesses, constitutes a benchmark as to a ''reasonable'' level for attorney's fees for small businesses.

(6) Before paying a recommended award of costs, agency personnel should consult legal counsel. Section 33.104(h) applies to all recommended awards of costs that have not yet been paid.

(7) Any costs the contractor receives under this section shall not be the subject of subsequent proposals, billings, or claims against the Government, and those exclusions should be reflected in the cost agreement.

(8) If the Government pays costs, as provided in paragraph (h)(1) of this section, where a postaward protest is sustained as the result of an awardee's intentional or negligent misstatement, misrepresentation, or miscertification, the Government may require the awardee to reimburse the Government the amount of such costs. In addition to any other remedy available, and pursuant to the requirements of subpart 32.6, the Government may collect this debt by offsetting the amount against any payment due the awardee under any contract between the awardee and the Government.

[57 FR 60585, Dec. 21, 1992, as amended at 60 FR 48227, 48275, Sept. 18, 1995; 61 FR 41470, Aug. 8, 1996; 61 FR 69289, Dec. 31, 1996; 62 FR 12718, Mar. 17, 1997; 62 FR 51271, Sept. 30, 1997; 62 FR 64933, Dec. 9, 1997; 63 FR 1532, Jan. 9, 1998; 63 FR 58603, Oct. 30, 1998; 72 FR 63065, Nov. 7, 2007]

33.105 Protests at the U.S. Court of Federal Claims.

Procedures for protests at the U.S. Court of Federal Claims are set forth in the rules of the U.S. Court of Federal Claims. The rules may be found at *http://www.uscfc.uscourts.gov/rules-and-forms*.

[77 FR 56743, Sept. 13, 2012]

33.106 Solicitation provision and contract clause.

(a) The contracting officer shall insert the provision at 52.233–2, Service of Protest, in solicitations for contracts expected to exceed the simplified acquisition threshold.

(b) The contracting officer shall insert the clause at 52.233–3, Protest

After Award, in all solicitations and contracts. If a cost reimbursement contract is contemplated, the contracting officer shall use the clause with its *Alternate I*.

[50 FR 25681, June 20, 1985, as amended at 60 FR 34759, July 3, 1995]

Subpart 33.2—Disputes and Appeals

SOURCE: 48 FR 42349, Sept. 19, 1983, unless otherwise noted. Redesignated at 50 FR 2270, Jan. 15, 1985.

33.201 Definitions.

As used in this subpart—

Accrual of a claim means the date when all events, that fix the alleged liability of either the Government or the contractor and permit assertion of the claim, were known or should have been known. For liability to be fixed, some injury must have occurred. However, monetary damages need not have been incurred.

Alternative dispute resolution (ADR) means any type of procedure or combination of procedures voluntarily used to resolve issues in controversy. These procedures may include, but are not limited to, conciliation, facilitation, mediation, fact-finding, minitrials, arbitration, and use of ombudsmen.

Defective certification means a certificate which alters or otherwise deviates from the language in 33.207(c) or which is not executed by a person authorized to bind the contractor with respect to the claim. Failure to certify shall not be deemed to be a defective certification.

Issue in controversy means a material disagreement between the Government and the contractor that (1) may result in a claim or (2) is all or part of an existing claim.

Misrepresentation of fact means a false statement of substantive fact, or any conduct which leads to the belief of a substantive fact material to proper understanding of the matter in hand, made with intent to deceive or mislead.

[48 FR 42349, Sept. 19, 1983. Redesignated and amended at 50 FR 2270, Jan. 15, 1985; 56 FR 67417, Dec. 30, 1991; 59 FR 11381, Mar. 10, 1994; 60 FR 48230, Sept. 18, 1995; 63 FR 58594, Oct. 30, 1998; 66 FR 2132, Jan. 10, 2001; 67 FR 43514, June 27, 2002; 79 FR 24212, Apr. 29, 2014]

33.202 Disputes.

41 U.S.C. chapter 71, Disputes, establishes procedures and requirements for asserting and resolving claims subject to the Disputes statute. In addition, the Disputes statute provides for— (a) the payment of interest on contractor claims; (b) certification of contractor claims; and (c) a civil penalty for contractor claims that are fraudulent or based on a misrepresentation of fact.

[56 FR 67417, Dec. 30, 1991, as amended at 59 FR 11381, Mar. 10, 1994; 79 FR 24212, Apr. 29, 2014]

33.203 Applicability.

(a) Except as specified in paragraph (b) below, this part applies to any express or implied contract covered by the Federal Acquisition Regulation.

(b) This subpart does not apply to any contract with

(1) A foreign government or agency of that government; or

(2) an international organization or a subsidiary body of that organization, if the agency head determines that the application of the Disputes statute to the contract would not be in the public interest.

(c) This part applies to all disputes with respect to contracting officer decisions on matters ''arising under'' or ''relating to'' a contract. Agency Boards of Contract Appeals (BCAs) authorized under the Disputes statute continue to have all of the authority they possessed before the Disputes statute with respect to disputes arising under a contract, as well as authority to decide disputes relating to a contract. The clause at 52.233–1, Disputes, recognizes the ''all disputes'' authority established by the Disputes statute and states certain requirements and limitations of the Disputes statute for the guidance of contractors and contracting agencies. The clause is not intended to affect the rights and obligations of the parties as provided by the

Disputes statute or to constrain the authority of the statutory agency BCAs in the handling and deciding of contractor appeals under the Disputes statute.

[48 FR 42349, Sept. 19, 1983. Redesignated and amended at 50 FR 2270, Jan. 15, 1985; 79 FR 24212, Apr. 29, 2014]

33.204 Policy.

The Government's policy is to try to resolve all contractual issues in controversy by mutual agreement at the contracting officer's level. Reasonable efforts should be made to resolve controversies prior to the submission of a claim. Agencies are encouraged to use ADR procedures to the maximum extent practicable. Certain factors, however, may make the use of ADR inappropriate (see 5 U.S.C. 572(b)). Except for arbitration conducted pursuant to the Administrative Dispute Resolution Act (ADRA), (5 U.S.C. 571, *et seq.*), agencies have authority which is separate from that provided by the ADRA to use ADR procedures to resolve issues in controversy. Agencies may also elect to proceed under the authority and requirements of the ADRA.

[59 FR 11381, Mar. 10, 1994, as amended at 63 FR 58595, Oct. 30, 1998]

33.205 Relationship of the Disputes statute to Pub. L. 85–804.

(a) Requests for relief under Pub. L. 85–804 (50 U.S.C. 1431–1435) are not claims within the Disputes statute or the Disputes clause at 52.233–1, Disputes, and shall be processed under Subpart 50.1, Extraordinary Contractual Actions. However, relief formerly available only under Pub. L. 85–804; i.e., legal entitlement to rescission or reformation for mutual mistake, is now available within the authority of the contracting officer under the Disputes statute and the Disputes clause. In case of a question whether the contracting officer has authority to settle or decide specific types of claims, the contracting officer should seek legal advice.

(b) A contractor's allegation that it is entitled to rescission or reformation of its contract in order to correct or mitigate the effect of a mistake shall be treated as a claim under the Dispute statute. A contract may be reformed or rescinded by the contracting officer if the contractor would be entitled to such remedy or relief under the law of Federal contracts. Due to the complex legal issues likely to be associated with allegations of legal entitlement, contracting officers shall make written decisions, prepared with the advice and assistance of legal counsel, either granting or denying relief in whole or in part.

(c) A claim that is either denied or not approved in its entirety under paragraph (b) above may be cognizable as a request for relief under Pub. L. 85–804 as implemented by subpart 50.1. However, the claim must first be submitted to the contracting officer for consideration under the Disputes statute because the claim is not cognizable under Public Law 85–804, as implemented by subpart 50.1, unless other legal authority in the agency concerned is determined to be lacking or inadequate.

[48 FR 42349, Sept. 19, 1983, as amended at 72 FR 63030, Nov. 7, 2007; 79 FR 24212, Apr. 29, 2014]

33.206 Initiation of a claim.

(a) Contractor claims shall be submitted, in writing, to the contracting officer for a decision within 6 years after accrual of a claim, unless the contracting parties agreed to a shorter time period. This 6-year time period does not apply to contracts awarded prior to October 1, 1995. The contracting officer shall document the contract file with evidence of the date of receipt of any submission from the contractor deemed to be a claim by the contracting officer.

(b) The contracting officer shall issue a written decision on any Government claim initiated against a contractor within 6 years after accrual of the claim, unless the contracting parties agreed to a shorter time period. The 6-year period shall not apply to contracts awarded prior to October 1, 1995, or to a Government claim based on a contractor claim involving fraud.

[60 FR 48230, Sept. 18, 1995]

33.207 Contractor certification.

(a) Contractors shall provide the certification specified in paragraph (c) of

this section when submitting any claim exceeding $100,000.

(b) The certification requirement does not apply to issues in controversy that have not been submitted as all or part of a claim.

(c) The certification shall state as follows:

I certify that the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable; and that I am duly authorized to certify the claim on behalf of the contractor.

(d) The aggregate amount of both increased and decreased costs shall be used in determining when the dollar thresholds requiring certification are met (see example in 15.403–4(a)(1)(iii) regarding certified cost or pricing data).

(e) The certification may be executed by any person authorized to bind the contractor with respect to the claim.

(f) A defective certification shall not deprive a court or an agency BCA of jurisdiction over that claim. Prior to the entry of a final judgment by a court or a decision by an agency BCA, however, the court or agency BCA shall require a defective certification to be corrected.

[59 FR 11381, Mar. 10, 1994, as amended at 60 FR 48218, 48230, Sept. 18, 1995; 62 FR 51271, Sept. 30, 1997; 63 FR 58595, Oct. 30, 1998; 75 FR 53149, Aug. 30, 2010; 79 FR 24212, Apr. 29, 2014]

33.208 Interest on claims.

(a) The Government shall pay interest on a contractor's claim on the amount found due and unpaid from the date that—

(1) The contracting officer receives the claim (certified if required by 33.207(a)); or

(2) Payment otherwise would be due, if that date is later, until the date of payment.

(b) Simple interest on claims shall be paid at the rate, fixed by the Secretary of the Treasury as provided in the Disputes statute, which is applicable to the period during which the contracting officer receives the claim and then at the rate applicable for each 6-month period as fixed by the Treasury Secretary during the pendency of the claim. (See the clause at 52.232–17 for the right of the Government to collect interest on its claims against a contractor).

(c) With regard to claims having defective certifications, interest shall be paid from either the date that the contracting officer initially receives the claim or October 29, 1992, whichever is later. However, if a contractor has provided a proper certificate prior to October 29, 1992, after submission of a defective certificate, interest shall be paid from the date of receipt by the Government of a proper certificate.

[59 FR 11381, Mar. 10, 1994, as amended at 60 FR 48230, Sept. 18, 1995; 73 FR 54005, Sept. 17, 2008; 79 FR 24212, Apr. 29, 2014]

33.209 Suspected fraudulent claims.

If the contractor is unable to support any part of the claim and there is evidence that the inability is attributable to misrepresentation of fact or to fraud on the part of the contractor, the contracting officer shall refer the matter to the agency official responsible for investigating fraud.

33.210 Contracting officer's authority.

Except as provided in this section, contracting officers are authorized, within any specific limitations of their warrants, to decide or resolve all claims arising under or relating to a contract subject to the Disputes statute. In accordance with agency policies and 33.214, contracting officers are authorized to use ADR procedures to resolve claims. The authority to decide or resolve claims does not extend to—

(a) A claim or dispute for penalties or forfeitures prescribed by statute or regulation that another Federal agency is specifically authorized to administer, settle, or determine; or

(b) The settlement, compromise, payment or adjustment of any claim involving fraud.

[48 FR 42349, Sept. 19, 1983. Redesignated and amended at 50 FR 2270, Jan. 15, 1985; 51 FR 36972, Oct. 16, 1986; 59 FR 11381, Mar. 10, 1994; 79 FR 24212, Apr. 29, 2014]

33.211 Contracting officer's decision.

(a) When a claim by or against a contractor cannot be satisfied or settled by mutual agreement and a decision on

the claim is necessary, the contracting officer shall—

(1) Review the facts pertinent to the claim;

(2) Secure assistance from legal and other advisors;

(3) Coordinate with the contract administration officer or contracting office, as appropriate; and

(4) Prepare a written decision that shall include—

(i) A description of the claim or dispute;

(ii) A reference to the pertinent contract terms;

(iii) A statement of the factual areas of agreement and disagreement;

(iv) A statement of the contracting officer's decision, with supporting rationale;

(v) Paragraphs substantially as follows:

''This is the final decision of the Contracting Officer. You may appeal this decision to the agency board of contract appeals. If you decide to appeal, you must, within 90 days from the date you receive this decision, mail or otherwise furnish written notice to the agency board of contract appeals and provide a copy to the Contracting Officer from whose decision this appeal is taken. The notice shall indicate that an appeal is intended, reference this decision, and identify the contract by number.

With regard to appeals to the agency board of contract appeals, you may, solely at your election, proceed under the board's—

(1) Small claim procedure for claims of $50,000 or less or, in the case of a small business concern (as defined in the Small Business Act and regulations under that Act), $150,000 or less; or

(2) Accelerated procedure for claims of $100,000 or less.

Instead of appealing to the agency board of contract appeals, you may bring an action directly in the United States Court of Federal Claims (except as provided in 41 U.S.C. 7102(d), regarding Maritime Contracts) within 12 months of the date you receive this decision''

(vi) Demand for payment prepared in accordance with 32.604 and 32.605) in all cases where the decision results in a finding that the contractor is indebted to the Government.

(b) The contracting officer shall furnish a copy of the decision to the contractor by certified mail, return receipt requested, or by any other method that provides evidence of receipt. This requirement shall apply to decisions on claims initiated by or against the contractor.

(c) The contracting officer shall issue the decision within the following statutory time limitations:

(1) For claims of $100,000 or less, 60 days after receiving a written request from the contractor that a decision be rendered within that period, or within a reasonable time after receipt of the claim if the contractor does not make such a request.

(2) For claims over $100,000, 60 days after receiving a certified claim; *provided, however,* that if a decision will not be issued within 60 days, the contracting officer shall notify the contractor, within that period, of the time within which a decision will be issued.

(d) The contracting officer shall issue a decision within a reasonable time, taking into account—

(1) The size and complexity of the claim;

(2) The adequacy of the contractor's supporting data; and

(3) Any other relevant factors.

(e) The contracting officer shall have no obligation to render a final decision on any claim exceeding $100,000 which contains a defective certification, if within 60 days after receipt of the claim, the contracting officer notifies the contractor, in writing, of the reasons why any attempted certification was found to be defective.

(f) In the event of undue delay by the contracting officer in rendering a decision on a claim, the contractor may request the tribunal concerned to direct the contracting officer to issue a decision in a specified time period determined by the tribunal.

(g) Any failure of the contracting officer to issue a decision within the required time periods will be deemed a decision by the contracting officer denying the claim and will authorize the contractor to file an appeal or suit on the claim.

(h) The amount determined payable under the decision, less any portion already paid, should be paid, if otherwise proper, without awaiting contractor

action concerning appeal. Such payment shall be without prejudice to the rights of either party.

[48 FR 42349, Sept. 19, 1983. Redesignated at 50 FR 2270, Jan. 15, 1985, and amended at 54 FR 34755, Aug. 21, 1989; 59 FR 11382, Mar. 10, 1994; 60 FR 48230, Sept. 18, 1995; 73 FR 21800, Apr. 22, 2008; 73 FR 54005, Sept. 17, 2008; 79 FR 24212, Apr. 29, 2014]

33.212 Contracting officer's duties upon appeal.

To the extent permitted by any agency procedures controlling contacts with agency BCA personnel, the contracting officer shall provide data, documentation, information, and support as may be required by the agency BCA for use on a pending appeal from the contracting officer's decision.

33.213 Obligation to continue performance.

(a) In general, before passage of the Disputes statute, the obligation to continue performance applied only to claims arising under a contract. However, the Disputes statute, at 41 U.S.C. 7103(g), authorizes agencies to require a contractor to continue contract performance in accordance with the contracting officer's decision pending a final resolution of any claim arising under, or relating to, the contract. (A claim arising under a contract is a claim that can be resolved under a contract clause, other than the clause at 52.233–1, Disputes, that provides for the relief sought by the claimant; however, relief for such claim can also be sought under the clause at 52.233–1. A claim relating to a contract is a claim that cannot be resolved under a contract clause other than the clause at 52.233–1.) This distinction is recognized by the clause with its *Alternate I* (see 33.215).

(b) In all contracts that include the clause at 52.233–1, Disputes, with its *Alternate I*, in the event of a dispute not arising under, but relating to, the contract, the contracting officer shall consider providing, through appropriate agency procedures, financing of the continued performance; *provided*, that the Government's interest is properly secured.

[48 FR 42349, Sept. 19, 1983. Redesignated at 50 FR 2270, Jan. 15, 1985, as amended at 64 FR 72451, Dec. 27, 1999; 67 FR 43514, June 27, 2002; 79 FR 24212, Apr. 29, 2014]

33.214 Alternative dispute resolution (ADR).

(a) The objective of using ADR procedures is to increase the opportunity for relatively inexpensive and expeditious resolution of issues in controversy. Essential elements of ADR include—

(1) Existence of an issue in controversy;

(2) A voluntary election by both parties to participate in the ADR process;

(3) An agreement on alternative procedures and terms to be used in lieu of formal litigation; and

(4) Participation in the process by officials of both parties who have the authority to resolve the issue in controversy.

(b) If the contracting officer rejects a contractor's request for ADR proceedings, the contracting officer shall provide the contractor a written explanation citing one or more of the conditions in 5 U.S.C. 572(b) or such other specific reasons that ADR procedures are inappropriate for the resolution of the dispute. In any case where a contractor rejects a request of an agency for ADR proceedings, the contractor shall inform the agency in writing of the contractor's specific reasons for rejecting the request.

(c) ADR procedures may be used at any time that the contracting officer has authority to resolve the issue in controversy. If a claim has been submitted, ADR procedures may be applied to all or a portion of the claim. When ADR procedures are used subsequent to the issuance of a contracting officer's final decision, their use does not alter any of the time limitations or procedural requirements for filing an appeal of the contracting officer's final decision and does not constitute a reconsideration of the final decision.

(d) When appropriate, a neutral person may be used to facilitate resolution of the issue in controversy using the procedures chosen by the parties.

(e) The confidentiality of ADR proceedings shall be protected consistent with 5 U.S.C. 574.

(f)(1) A solicitation shall not require arbitration as a condition of award, unless arbitration is otherwise required by law. Contracting officers should have flexibility to select the appropriate ADR procedure to resolve the issues in controversy as they arise.

(2) An agreement to use arbitration shall be in writing and shall specify a maximum award that may be issued by the arbitrator, as well as any other conditions limiting the range of possible outcomes.

(g) Binding arbitration, as an ADR procedure, may be agreed to only as specified in agency guidelines. Such guidelines shall provide advice on the appropriate use of binding arbitration and when an agency has authority to settle an issue in controversy through binding arbitration.

[56 FR 67417, Dec. 30, 1991, as amended at 59 FR 11382, Mar. 10, 1994; 60 FR 48230, Sept. 18, 1995; 63 FR 58595, Oct. 30, 1998]

33.215 Contract clauses.

(a) Insert the clause at 52.233–1, Disputes, in solicitations and contracts, unless the conditions in 33.203(b) apply. If it is determined under agency procedures that continued performance is necessary pending resolution of any claim arising under or relating to the contract, the contracting officer shall use the clause with its *Alternate I*.

(b) Insert the clause at 52.233–4 in all solicitations and contracts.

[69 FR 59700, Oct. 5, 2004]