

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 32, 52, 232, and 252****Federal Acquisition Regulation (FAR);
and Defense Federal Acquisition
Regulation Supplement (DFARS);
Progress Payments**

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

ACTION: Advance notice of proposed rulemaking and public meeting.

SUMMARY: A special interagency team formed by the Director of Defense Procurement has identified potential changes to progress payment policies and solicits comments from both government and industry personnel regarding those changes.

Comments may be submitted in two formats: By letter to the address specified below, or by electronic response on the Director of Defense Procurement Office of Cost, Pricing, and Finance Internet Home Page: <http://www.acq.osd.mil/dp/cpf>. Comments may address any of the potential changes identified in this notice, as well as any other changes to existing regulations, forms, or procedures that pertain to progress payments. Comments should be accompanied by a supporting rationale for proposed changes.

In addition, a public meeting will be held to discuss the potential changes under consideration by the interagency team, as well as comments received in response to this notice.

DATES: Comments should be submitted on or before April 6, 1998.

ADDRESSES: Interested parties should submit written comments to: Chair, Progress Payments Rewrite Team, Mr. Richard Brown, PDUSD (A&T) DP/CPF, Room 3C800, The Pentagon, Washington, DC 20301-3060.

Public Meeting: A public meeting will be conducted at the Headquarters, Defense Logistics Agency, Command Conference Room (Room 2419), 8725 John J. Kingman Road, Fort Belvoir, Virginia, from 9:30 a.m. to 3:00 p.m., local time, on April 23, 1998. Those who plan to attend the public meeting are asked to pre-register, if possible. The names of expected attendees should be provided, no later than 4:00 p.m., local time, April 21, 1998, to Mr. Richard

Brown, by telephone, FAX, mail, or e-mail, at the phone number(s) and address indicated herein. Walk-in attendance will be accommodated. However, pre-registration is desired, as the names of pre-registrants will be provided to building security to facilitate building access.

FOR FURTHER INFORMATION CONTACT: Mr. Richard Brown, by telephone at (703) 695-7197, by FAX at (703) 693-9616, or by e-mail at brownrg@acq.osd.mil.

SUPPLEMENTARY INFORMATION:**I. Draft Materials**

The potential changes to the Federal Acquisition Regulation (FAR) and Defense Federal Acquisition Regulation Supplement (DFARS) discussed herein are available in draft form electronically in Microsoft Word 6.0 text format at the Cost, Pricing, and Finance Internet Office Home Page—<http://www.acq.osd.mil/dp/cpf/>

Note: The draft changes do not reflect a proposed rule, nor do they reflect agreement by all members of the interagency team; they are provided for information and discussion purposes only.

Paper copies may be obtained from Mr. Richard Brown, PDUSD (A&T) DP/CPF, Washington, DC 20301-3060.

II. Background

The Director of Defense Procurement, Department of Defense, established a special interagency team, with participants from the Office of the Under Secretary of Defense (Comptroller), the Military Departments, the Defense Logistics Agency, the Defense Contract Audit Agency, the Defense Finance and Accounting Service, the Departments of Energy and Transportation, and the National Aeronautics and Space Administration, to review and rewrite FAR Part 32 and Part 52 provisions regarding progress payments, to make them easier to understand and to minimize the burdens imposed on contractors and contracting officers. An advance notice of proposed rulemaking (ANPR), published in the **Federal Register** on May 1, 1997 (62 FR 23740), solicited comments on how FAR Subpart 32.5, Progress Payments Based on Costs, the clause at FAR 52.232.16, Progress Payments, and Standard Form 1443, Contractor's Request For Progress Payments, might be revised to improve the process of applying for and administering progress payments. The interagency team has considered public comments received in response to the ANPR, reviewed progress payment policies, and identified potential areas

for policy changes. The purpose of this notice is to provide the public with a preliminary indication of changes under consideration, and solicit comments and suggestions on those changes, via public comments and a public hearing. The interagency working group will submit a report, including a draft proposed rule, for consideration by the Defense Acquisition Regulations Council and the Civilian Agency Acquisition Council. Subsequently, a proposed rule will be published for additional public comments.

III. Overview of Policy Changes Under Consideration

The interagency team has identified the following areas for potential policy changes. Comments are requested on these areas and any other ideas interested parties may offer:

A. Elimination of the "Paid Cost Rule"

Currently, large businesses must have actually paid a subcontractor before including the payment in progress payment billings. This is the so-called "paid cost rule." In contrast, small businesses need only have incurred the subcontract cost, provided the payment will be made in the ordinary course of business. The interagency team proposes the elimination of this "paid cost rule" by revising the Progress Payments clause (FAR 52.232-16), as needed, to put large and small businesses on the same footing.

B. Subcontractor Performance-Based Payments and Commercial Financing Payments

The interagency team recommends that the Progress Payments clause (FAR 52.232-16) be revised as necessary to permit prime contractors that receive progress payments to use performance-based payments or commercial financing payments with their subcontractors, provided the subcontracts that include such payments meet the same criteria and use similar provisions that the Government uses with its prime contractors. As a consequence, prime contractors will be reimbursed 100 percent of all subcontractor financing, instead of just progress payment financing.

C. Expand Use of Performance-Based Payments to Competitive Solicitations

This would remove the limitation at FAR 32.1000(d), and allow performance-based payments to be used in competitive solicitations, provided it is practicable to do so.

D. Increase Threshold for Progress Payments

The interagency team recommends raising the threshold at FAR 32.502-1(b), for use of progress payments with large businesses, from \$1 million to \$2 million. This threshold has not been increased in over 30 years, and should be raised in order to reduce the administrative burden that small dollar actions place on the contract administration and payment process.

E. Limit Applicability of Progress Payments on Ordering Contracts

When ordering contracts are used and include a provision for progress payments, the interagency team recommends that progress payments be made applicable to only those orders that exceed the simplified acquisition threshold. This will ease the burden of administering progress payments on numerous small dollar actions.

F. Eliminate Coverage for Flexible Progress Payments

DoD has not used flexible progress payments in new contracts since fiscal year 1994. Flexible progress payments are administratively complex and burdensome, and may be replaced with performance-based payments in some situations. Consequently, the interagency team recommends

elimination of all DFARS coverage related to flexible progress payments.

G. Ensure Consideration of Performance-Based Payments

The interagency team recommends additional coverage be added to FAR 32.502-1 to ensure that use of performance-based payments is initially considered, and deemed impractical by the contracting officer, before a decision is made to provide customary progress payments. This is a more appropriate implementation of the 10 U.S.C. 2307(b) requirement that performance-based payments be used wherever practicable.

H. Clarify Purpose of the Loss Ratio

The interagency team recommends that FAR 32.503-6(f) be revised to make clear that, on a loss contract, application of the loss ratio constitutes the adjustment that ensures that progress payments do not exceed the value of work performed. This is in response to those who believe that an additional adjustment, over and above the application of the loss ratio, may be necessary to preclude overpayment of progress payments.

I. Remove the Limitation on General & Administrative Expenses

This limitation at FAR 32.503-7 applies to only those contractors that

have established an inventory suspense account under 48 CFR 9904.410, Allocation of Business Unit General and Administrative Expenses to Final Cost Objectives. The provision dates from 1979 and the interagency team believes it is no longer needed.

J. Remove the Requirement for Contracting Officer Review of Quarterly Statements

This requirement at FAR 32.503-13 applies to quarterly statements submitted under price revision contracts, for comparison with progress payment requests. The interagency team has concluded that it adds little or no value to progress payment administration, provided the contracting officer is otherwise adequately administering progress payments.

List of Subjects in 48 CFR Parts 32, 52, 232, and 252

Government procurement.

Dated: February 27, 1998.

Michele P. Peterson,

Executive Editor, Defense Acquisition, Regulations Council, Department of Defense.

Edward C. Loeb,

Director, Federal Acquisition, Policy Division, General Services Administration.

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