

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 32 and 52**

[FAR Case 1999-016]

RIN 9000-A174

**Federal Acquisition Regulation;
Advance Payments for Non-
Commercial Items**

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

ACTION: Proposed rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are proposing to amend the Federal Acquisition Regulation (FAR) to permit federally insured credit unions to participate in the maintenance of special accounts for advance payments. **DATES:** Interested parties should submit comments in writing on or before July 3, 2000, to be considered in the formulation of a final rule.

ADDRESSES: Submit written comments to: General Services Administration, FAR Secretariat (MVRs), 1800 F Street, NW, Room 4035, ATTN: Laurie Duarte, Washington, DC 20405.

Submit electronic comments via the Internet to:

farcase.1999-016@gsa.gov
Please submit comments only and cite FAR case 1999-016 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC, 20405, at (202) 501-4755 for information pertaining to status or publication schedules. For clarification of content, contact Mr. Jeremy Olson, at (202) 501-0692. Please cite FAR case 1999-016.

SUPPLEMENTARY INFORMATION:**A. Background**

FAR 32.4, Advance Payments for Non-Commercial Items, requires, unless exempted by FAR 32.409-3(e) or (f), that contractors deposit advance payments in special accounts separate from their general or other funds. FAR 32.411 and other FAR text exclude credit unions from participating in the maintenance of these special accounts by requiring that contractors establish these special accounts only at banks that are members of the Federal Reserve System (FRS) or

insured by the Federal Deposit Insurance Corporation (FDIC). However, many credit unions are federally insured through the National Credit Union Administration (NCUA). Therefore, these credit unions are able to provide the Government a measure of security for Federal funds advanced to contractors, as well as those banks that are members of the FRS or insured by FDIC.

The proposed rule amends FAR 32.4 and FAR 52.232-12 to change certain terminology (e.g., change the word "bank" to financial institution") to provide contractors an additional option of depositing advance payments in special accounts maintained by credit unions insured by NCUA. This revision will foster competition among financial institutions who are in the business of providing special accounts for advance payment funds, without increasing the risk to the Government.

This rule was not subject to Office of Management and Budget review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The Councils do not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule only applies to the very limited number of contractors that receive advance payments and deposit these payments in special accounts. An Initial Regulatory Flexibility Analysis has, therefore, not been performed. Comments are invited from small businesses and other interested parties. The Councils will consider comments from small entities concerning the affected FAR subparts 32 and 52 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601 *et seq.*, (FAR case 1999-016), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 32 and 52:

Government procurement.

Dated: April 27, 2000.

Edward C. Loeb,

Director Federal Acquisition Policy Division.

Therefore, DoD, GSA, and NASA propose that 48 CFR parts 32 and 52 be amended as set forth below:

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

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

PART 32—CONTRACT FINANCING

2. Revise paragraph (a)(1) of section 32.407 to read as follows:

32.407 Interest.

(a) * * *

(1) The published prime rate of the financial institution (depository) in which the special account (see 32.409-3) is established; or

* * * * *

32.408 [Amended]

3. Amend paragraph (b)(4) of section 32.408 by removing "bank" both times it appears and adding "financial institution" in its place.

4. Amend section 32.409-3 as follows:

a. In paragraph (a) remove "bank" and add "special" in its place;

b. In paragraphs (b)(2), (c)(2), and (e) remove "bank".

c. Revise paragraph (f)(1); and

d. In paragraph (g) remove "bank" both times it appears.

The revised text reads as follows:

32.409-3 Security, supervision, and covenants.

* * * * *

(f) * * *

(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

* * * * *

5. In section 32.410, revise the second sentence in paragraph (a)(4) of the "Findings, Determination, and Authorization for Advance Payments Findings" to read as follows:

32.410 Findings, determination, and authorization.

* * * * *

(a) * * *

(4) * * * The clause requires that all payments will be deposited 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. * * *

* * * * *

6. The section heading and text of 32.411 is revised to read as follows:

32.411 Agreement for special account at a financial institution.

The contracting officer shall 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 institutions 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]

32.412 [Amended]

7. Amend paragraph (f) of section 32.412 by removing "bank".

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

8. Amend section 52.232–12 as follows:

- a. Revise the date of the clause;
 - b. Revise paragraph (b);
 - c. Remove "bank" from paragraphs (c) and (d);
 - d. Revise paragraph (f)(3);
 - e. Revise paragraph (g);
 - f. Remove "bank" from paragraphs (h), (k)(1) introductory text, (k)(1)(iv), (k)(2)(i), and (m)(1) each time it appears.
 - g. Revise paragraph (p)(11);
 - h. Amend Alternate II by revising the date to read "(DATE)"; and removing "bank" from paragraph (c);
 - i. Amend Alternate V by revising the date to read "(DATE)"; and removing from the introductory paragraph "bank"; and
 - j. Revise the heading of the clause in Alternate V and paragraph (m)(11).
- The revised text reads as follows:

52.232–12 Advance Payments.

* * * * *

ADVANCE PAYMENTS (DATE)

* * * * *

(b) *Special account.* Until (1) the Contractor has liquidated all advance payments made under the contract and related interest charges and (2) the administering office has approved in writing the release of any funds due and payable to the Contractor, all advance payments and other payments under this contract shall be made by check payable to the Contractor marked for deposit only in the Contractor's special account with the _____ [insert the name of the financial institution]. None of the funds in the special account shall be mingled with other funds of the Contractor. Withdrawals from the special account may be made only by check of the Contractor countersigned by the Contracting Officer or a Government countersigning agent designated in writing by the Contracting Officer.

* * * * *

(f) * * * * *
(3) If interest is required under the contract, the Contracting Officer shall determine a daily interest rate based on the higher of (i) the published prime rate of the financial institution (depository) in which the special account is established or (ii) the rate established by the Secretary of the Treasury under Pub. L. 92–41 (50 U.S.C. App. 1215(b)(2)). The Contracting Officer shall revise the daily interest rate during the contract period in keeping with any changes in the cited interest rates.

* * * * *

(g) *Financial institution agreement.* Before an advance payment is made under this contract, the Contractor shall transmit to the administering office, in the form prescribed by the administering office, an agreement in triplicate from the financial institution in which the special account is established, clearly setting forth the special character of the account and the responsibilities of the financial institution under the account. The Contractor shall select a financial institution that is a member bank of the Federal Reserve System, an "insured" bank within the meaning of the Federal Deposit Insurance Corporation Act (12 U.S.C. 1811), or is a credit union insured by the National Credit Union Administration.

* * * * *

(p) * * * * *
(11) Deposit any of its fund except in a bank or trust company insured by the Federal Deposit Insurance Corporation or a credit union insured by the National Credit Union Administration;

* * * * *

ADVANCE PAYMENTS WITHOUT SPECIAL ACCOUNT (DATE)

* * * * *

(m) * * * * *
(11) Deposit any of its funds except in a bank or trust company insured by the Federal Deposit Insurance Corporation or a credit union insured by the National Credit Union Administration;

* * * * *