

use of equivalent domestic or designated country construction material other than Bahrainian, Mexican, or Omani construction material.

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[FR Doc. E9-13978 Filed 6-12-09; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 32, 43, 52, and 53

[FAC 2005-33; FAR Case 2005-032; Item II; Docket 2008-0002; Sequence 1]

RIN 9000-AI47

Federal Acquisition Regulation; FAR Case 2005-032, Contractor's Request for Progress Payments

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

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to incorporate improvements related to requests for progress payments and the Standard Form (SF) 1443, Contractor's Request for Progress Payments, used to request those progress payments. Changes made to the Standard Form as published in the proposed rule include correction of misspellings, and an editorial change made at Item 4 to better describe the order number.

DATES: *Effective Date:* July 15, 2009.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Ms. Meredith Murphy, Procurement Analyst, at (202) 208-6925. For information pertaining to status or publication schedules, contact the Regulatory Secretariat, 1800 F Street, NW, Room 4041, Washington, DC 20405, (202) 501-4755. Please cite FAC 2005-33, FAR case 2005-032.

SUPPLEMENTARY INFORMATION:

A. Background

The Councils published a proposed rule in the **Federal Register** at 73 FR 19035 on April 8, 2008, to (1) address revisions necessary to implement the paid-cost rule and (2) simplify the SF 1443 and related regulations and instructions to improve clarity.

No comments were received by the close of the public comment period on June 9, 2008. Subsequently, one comment was received from one commenter. The commenter specifically took no issue with the proposed FAR changes, but objected to the costs that would be incurred by its member companies to make programming changes that ensue from altering the SF 1443. The commenter reasoned that "(s)ince DOD's goal is to significantly expand the use of performance based payments, it would appear to be more cost effective not to incur significant expenditures on changes to a form (i.e., SF 1443) that is part of a system (progress payments) that is no longer the preferred system for providing financing payments."

The Councils were puzzled at the commenter's cost estimate of \$87,000 to update software to use the new SF 1443 because the changes incorporated into the SF 1443 by this case were, generally, necessitated by prior changes to the paid-cost rule and other changes to FAR Part 32. These changes had been in effect for some time, so contractors using SF 1443 to request progress payments have already made changes to their software to conform their progress payment requests to the updated FAR text.

The commenter, an association representing large defense aerospace corporations, was requested to provide the cost analysis upon which it based its estimate of the cost to reprogram software in order to enable electronic generation and submittal of the SF 1443 to request a progress payment. The commenter subsequently provided data supporting its estimate of approximately \$87,000 per contractor. This estimate and the supporting data were forwarded to the Small Business Administration (SBA) Office of Advocacy for review specifically to determine the impact of modifying the SF 1443 on small businesses. Two independent reviews were conducted, one by the SBA's regulatory economist and one by an outside small business expert selected by the SBA. Neither of these reviews discovered a substantial economic impact on a significant number of small entities.

Further, the Councils did not find the commenter's rationale regarding performance-based payments convincing. While it is the goal of Federal Government agencies, not just DoD, to use performance-based payments wherever possible, there remain many circumstances in which progress payments are an important financing mechanism. Therefore, the

Councils approved this case as a final rule.

During a final review by the Councils' Acquisition Finance Team, it was discovered that the last item in the "INSTRUCTIONS" section of the form on page 2 was labeled in error as pertaining to "Item 26." However, the instruction actually refers to paragraph (f) of the "CERTIFICATION" section. That correction has been made to the form. In addition, a sentence was added to the SF 1443 instructions for Items 14a-14e to clarify that the "financing payments" to be included do not include interim payments under a cost reimbursement contract.

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

B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not 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 changes are designed to simplify the form and improve clarity. (See also, the Background section above for a thorough discussion of lack of impact on small entities.)

C. Paperwork Reduction Act

The Paperwork Reduction Act does apply; however, these changes to the FAR do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Number 9000-0010.

List of Subjects in 48 CFR Parts 32, 43, 52, and 53

Government procurement.

Dated: June 9, 2009.

Al Matera,

Director, Office of Acquisition Policy.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 32, 43, 52, and 53 as set forth below:

■ 1. The authority citation for 48 CFR parts 32, 43, 52, and 53 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 32—CONTRACT FINANCING

■ 2. Amend section 32.001 by adding, in alphabetical order, the definition “Liquidate” to read as follows:

32.001 Definitions.

* * * * *

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.

* * * * *

■ 3. Amend section 32.501–3 by revising paragraph (a)(1) and the first sentence of paragraph (a)(3) to read as follows:

32.501–3 Contract price.

(a) * * *

(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.

* * * * *

(3) Under a fixed-price incentive contract, the contract price is the target price plus the not-to-exceed amount of unpriced modifications. * * *

* * * * *

32.503–1 [Removed and Reserved]

■ 4. Remove and reserve section 32.503–1.

■ 5. Amend section 32.503–6 by revising paragraphs (a)(3), (f), and (g)(1)(i) to read as follows:

32.503–6 Suspension or reduction of payments.

(a) * * *

(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.

* * * * *

(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) * * *

(1) * * *

(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.

* * * * *

PART 43—CONTRACT MODIFICATIONS

43.102 [Amended]

■ 6. Amend section 43.102 by removing from paragraph (b) the word “maximum” and adding the word “ceiling” in its place.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 7. Amend section 52.232–16 by revising the date of the clause; adding paragraph (a)(9); and revising paragraphs (c)(5) and (g) to read as follows:

52.232–16 Progress Payments.

* * * * *

Progress Payments (JUL 2009)

* * * * *

(a) * * *

(9) The costs applicable to items delivered, invoiced, and accepted shall not include

costs in excess of the contract price of the items.

* * * * *

(c) * * *

(5) The fair value of the undelivered work is less than the amount of unliquidated progress payments for that work.

* * * * *

(g) *Reports, forms, and access to records.*

(1) The Contractor shall promptly furnish reports, certificates, financial statements, and other pertinent information (including estimates to complete) reasonably requested by the Contracting Officer for the administration of this clause. Also, the Contractor shall give the Government reasonable opportunity to examine and verify the Contractor’s books, records, and accounts.

(2) The Contractor shall furnish estimates to complete that have been developed or updated within six months of the date of the progress payment request. The estimates to complete shall represent the Contractor’s best estimate of total costs to complete all remaining contract work required under the contract. The estimates shall include sufficient detail to permit Government verification.

(3) Each Contractor request for progress payment shall:

- (i) Be submitted on Standard Form 1443, Contractor’s Request for Progress Payment, or the electronic equivalent as required by agency regulations, in accordance with the form instructions and the contract terms; and
- (ii) Include any additional supporting documentation requested by the Contracting Officer.

* * * * *

PART 53—FORMS

53.232 [Amended]

■ 8. Amend section 53.232 by removing “(10/82)” and adding “(JUL 2009)” in its place; and by removing “, as specified in 32.503.1”.

■ 9. Amend section 53.301–1443 by revising the form to read as follows:

53.301–1443 Contractor’s Request for Progress Payment.

BILLING CODE 6820–EP–S

| | |
|--|---------------------------------------|
| CONTRACTOR'S REQUEST FOR PROGRESS PAYMENT | Form Approved OMB Number 9000-0010 |
| IMPORTANT: This form is to be completed in accordance with instructions on the reverse. | |

SECTION I - IDENTIFICATION INFORMATION

| | | | |
|---|--|--|--|
| 1 TO NAME AND ADDRESS OF CONTRACTING OFFICE ADMINISTERING THE CONTRACT (Include ZIP Code) | | 2 FROM NAME AND ADDRESS OF CONTRACTOR (Include ZIP Code) | |
| PAYING OFFICE | | 3 SMALL BUSINESS <input type="checkbox"/> YES <input type="checkbox"/> NO | |
| | | 4 CONTRACT NUMBER A BASIC CONTRACT NUMBER B TASK OR DELIVERY ORDER NUMBER | |
| | | 5 CONTRACT PRICE \$ | |
| 6. RATES A PROGRESS PAYMENTS 0 % B LIQUIDATION 0 % | | 7. DATE OF INITIAL AWARD A YEAR B MONTH | |
| | | 8A PROGRESS PAYMENT REQUEST NUMBER 8B DATE OF THIS REQUEST | |

SECTION II - STATEMENT OF COSTS UNDER THIS CONTRACT THROUGH _____ (Date)

| | |
|---|--|
| 9. RESERVED | |
| 10. RESERVED | |
| 11. COSTS ELIGIBLE FOR PROGRESS PAYMENTS UNDER THE PROGRESS PAYMENTS CLAUSE | |
| 12a. TOTAL CONTRACT COST(S) INCURRED TO DATE | |
| b. ESTIMATED COST TO COMPLETE | c. TOTAL ESTIMATED COST OF PERFORMANCE |
| 13. ITEM 11 MULTIPLIED BY ITEM 6a | |
| 14a. FINANCING PAYMENTS PAID TO SUBCONTRACTORS | |
| b. LIQUIDATED FINANCING PAYMENTS TO SUBCONTRACTORS | |
| c. UNLIQUIDATED FINANCING PAYMENTS PAID TO SUBCONTRACTORS (Item 14a less 14b) | |
| d. SUBCONTRACT FINANCING PAYMENTS APPROVED FOR CURRENT PAYMENT | |
| e. ELIGIBLE SUBCONTRACTOR FINANCING PAYMENTS (Item 14c plus 14d) | |
| 15. TOTAL DOLLAR AMOUNT (Item 13 plus 14e) | |
| 16. ITEM 5 MULTIPLIED BY ITEM 6b | |
| 17. LESSER OF ITEM 15 OR ITEM 16 | |
| 18. TOTAL AMOUNT OF PREVIOUS PROGRESS PAYMENTS REQUESTED | |
| 19. MAXIMUM BALANCE ELIGIBLE FOR PROGRESS PAYMENTS (Item 17 less 18) | |

SECTION III - COMPUTATION OF LIMITS FOR OUTSTANDING PROGRESS PAYMENTS

| | |
|--|--|
| 20. COMPUTATION OF PROGRESS PAYMENT CLAUSE LIMITATION | |
| a. COSTS INCLUDED IN ITEM 11, APPLICABLE TO ITEMS DELIVERED, INVOICED, AND ACCEPTED TO THE DATE IN HEADING OF SECTION II | |
| b. COSTS ELIGIBLE FOR PROGRESS PAYMENTS, APPLICABLE TO UNDELIVERED ITEMS AND TO DELIVERED ITEMS NOT INVOICED AND ACCEPTED (Item 11 less 20a) | |
| c. ITEM 20b MULTIPLIED BY ITEM 6a | |
| d. ELIGIBLE SUBCONTRACTOR FINANCING PAYMENTS (Same as Item 14e) | |
| e. LIMITATION (Item 20c plus 20d) | |
| 21. COMPUTATION OF PROGRESS PAYMENT CLAUSE LIMITATION | |
| a. CONTRACT PRICE OF ITEMS DELIVERED, ACCEPTED AND INVOICED AS OF THE DATE SHOWN IN THE HEADING OF SECTION II | |
| b. CONTRACT PRICE OF ITEMS NOT DELIVERED, ACCEPTED AND INVOICED (Item 5 less 21a) | |
| c. ITEM 21b MULTIPLIED BY ITEM 6b | |
| d. UNLIQUIDATED ADVANCE PAYMENTS PLUS ACCRUED INTEREST | |
| e. LIMITATION (Item 21c less 21d) | |
| 22. MAXIMUM UNLIQUIDATED PROGRESS PAYMENTS (Lesser of Item 20e or 21e) | |
| 23. TOTAL AMOUNT LIQUIDATED AND TO BE LIQUIDATED | |
| 24. UNLIQUIDATED PROGRESS PAYMENTS (Item 18 less 23) | |
| 25. MAXIMUM PERMISSIBLE PROGRESS PAYMENTS (Item 22 less 24) | |
| 26. AMOUNT OF CURRENT INVOICE FOR PROGRESS PAYMENT (Lesser of item 25 or 19) | |
| 27. AMOUNT APPROVED BY CONTRACTING OFFICER | |

CERTIFICATION

DATE _____
I Certify that

- (a) The above statement (with attachments) has been prepared from the books and records of the above-named contractor in accordance with the contract and the instructions hereon, and to the best of my knowledge and belief, that it is correct.
- (b) All the costs of contract performance (except as herewith reported in writing) have been paid to the extent shown herein, or where not shown as paid have been paid or will be paid currently, by the contractor, when due, in the ordinary course of business.
- (c) The work reflected above has been performed.
- (d) The quantities and amounts involved are consistent with the requirements of the contract.
- (e) There are no encumbrances (except as reported in writing herewith, or on previous progress payment request number _____) against the property acquired or produced for, and allocated or properly chargeable to the contract which would affect or impair the Government's title.
- (f) There has been no materially adverse change in the financial condition of the contractor since the contractor's (insert 'as of' date of financial information) _____ submission of its last financial information dated (insert date of prior submission/certification) _____ to the Government in connection with the contract.
- (g) To the extent of any contract provision limiting progress payments pending first article approval, such provision has been complied with, and
- (h) After the making of the requested progress payment the unliquidated progress payments will not exceed the maximum unliquidated progress payments permitted by the contract

| | |
|---|-----------|
| NAME AND TITLE OF CONTRACTOR REPRESENTATIVE SIGNING THIS FORM | SIGNATURE |
| NAME AND TITLE OF CONTRACTING OFFICER | SIGNATURE |

INSTRUCTIONS

GENERAL - All dollar amounts must be shown in whole dollars, rounded using a consistent methodology (e.g., always round up, always round down, always round to the nearest dollar). All line item numbers not included in the instructions below are self-explanatory.

SECTION I - IDENTIFICATION INFORMATION. Complete items 1 through 8b in accordance with the following instructions.

Item 1. TO - Enter the name and address of the cognizant Contract Administration Office (the office administering the contract).

PAYING OFFICE - Enter the designation of the paying office, as indicated on the contract.

Item 2. FROM - CONTRACTOR'S NAME AND ADDRESS/ZIP CODE - Enter the name and mailing address of the contractor. If applicable, the division of the company performing the contract should be entered immediately following the contractor's name.

Item 3. Enter an "X" in the appropriate block to indicate whether or not the contractor is a small business concern.

Item 4. Enter the contract number, including the task or delivery order number if applicable. Progress payment requests under individual orders shall be submitted as if the order constituted a separate contract, unless otherwise specified in this contract (FAR 52.232-16(m)).

Item 5. Enter the total contract price in accordance with the following (See FAR 32.501-3):

(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 for any 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.

Item 6A. PROGRESS PAYMENT RATES - Enter the 2-digit progress payment percentage rate shown in paragraph (a) (1) of the progress payment clause

Item 6B. LIQUIDATED RATE - Enter the current progress payment liquidation rate prescribed in the contract (FAR 52.232-16(b)) using three digits - Example. show 80% as 800 - show 72.3% as 723. Decimals between tenths must 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 (FAR 32.503-10(b) (4)).

Item 7. DATE OF INITIAL AWARD - Enter the four digit calendar year Use two digits to indicate the month. Example: Show January 2005 as 2005/01.

Item 8A. PROGRESS PAYMENT REQUEST NUMBER - Enter the number assigned to this request. All requests under a single contract must be numbered consecutively, beginning with 1 Each subsequent request under the same contract must continue in sequence, using the same series of numbers without omission.

Item 8B. Enter the date of the request.

SECTION II - STATEMENT OF COSTS UNDER THIS CONTRACT.

Date. In the space provided in the heading enter the date through which costs have been accumulated from inception for inclusion in this request. This date is applicable to item entries in Sections II and III.

Cost Basis. In accordance with FAR 52.232-16 (a) (1), the basis for progress payments is the contractor's total costs incurred under this contract, whether or not actually paid, plus financing payments to subcontractors (computed in accordance with FAR 52.232-16(j)), less the sum of all previous progress payments made by the Government under this contract.

Item 11. Costs eligible for progress payments under the progress payments clause. Compute the eligible costs in accordance with the requirements at FAR 52.232-16(a)(1) through (4) First articles: Before first article approval, the acquisition of materials or components for, or the commencement of production of, the balance of the contract quantity is at the sole risk of the contractor. Before the first article approval, the costs thereof shall not be allowable for purposes of progress payments (See FAR 52.209-3(g) and FAR 52.209-4(h))

Item 12a. Enter the total contract costs incurred to date, if the actual amount is not known, enter the best possible estimate If an estimate is used, enter (E) after the amount

Item 12b. Enter the estimated cost to complete the contract. The contractor shall furnish estimates to complete that have been developed or updated within six months of the date of the progress payment request. The estimates to complete shall represent the contractor's best estimate of total costs to complete all remaining contract work required under the contract. The estimates shall include sufficient detail to permit Government verification.

Items 14a through 14e. Include only financing payments (progress payments, performance-based payments, and commercial item financing) on subcontracts which are in accordance with the requirements of FAR 52.232-16(j) Do not include interim payments under a cost reimbursement contract

Item 14a. Enter only financing payments actually paid.

Item 14b. Enter total financing payments recouped from subcontractors.

Item 14d. Include the amount of unpaid subcontract progress payment billings which have been approved by the contractor for the current payment in the ordinary course of business.

SECTION III - ADVANCE PAYMENTS/ACCEPTED ITEMS. This Section must be completed only if the contractor has received advance payments against this contract, or if the items have been delivered, invoiced and accepted as of the date indicated in the heading of Section II above.

EXCEPTION: Item 27 must be completed for all progress payment requests where the line 12c amount exceeds the amount on Line 5

Item 20a. Of the costs reported in Item 11, compute and enter only costs which are properly allocable to items delivered, invoiced and accepted to the applicable date. In order of preference, these costs are to be computed on the basis of one of the following: (a) The actual unit cost of items delivered, giving proper consideration to the deferment of the starting load costs or (b) projected unit costs (based on experienced costs plus the estimated cost to complete the contract), where the contractor maintains cost data which will clearly establish the reliability of such estimates.

Item 23. Enter total progress payments liquidated (monies recouped from the contractor on prior billings) and those to be liquidated from billings submitted but not yet paid (monies to be recouped from the contractor on submitted but unpaid billings).

CERTIFICATION

Paragraph (f). If no financial information has been provided previously in connection with this contract, insert "N/A" in the submission date block and the financial information date block Otherwise, insert respectively, the "as of" date of the financial information submitted last and the date of the last submission.

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DEPARTMENT OF DEFENSE

**GENERAL SERVICES
 ADMINISTRATION**

**NATIONAL AERONAUTICS AND
 SPACE ADMINISTRATION**

48 CFR Chapter 1

[Docket FAR 2009-0002, Sequence 4]

**Federal Acquisition Regulation;
 Federal Acquisition Circular 2005-33;
 Small Entity Compliance Guide**

AGENCIES: Department of Defense (DoD),
 General Services Administration (GSA),

and National Aeronautics and Space
 Administration (NASA).

ACTION: Small Entity Compliance Guide.

SUMMARY: This document is issued under the joint authority of the Secretary of Defense, the Administrator of General Services and the Administrator of the National Aeronautics and Space Administration. This *Small Entity Compliance Guide* has been prepared in accordance with Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. It consists of a summary of rules appearing in Federal Acquisition Circular (FAC) 2005-33 which amend the FAR. Interested parties may obtain further information regarding these rules by referring to FAC 2005-33,

which precedes this document. These documents are also available via the Internet at <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Ms. Hada Flowers, Regulatory Secretariat, (202) 208-7282. For clarification of content, contact the analyst whose name appears in the table below.

LIST OF RULES IN FAC 2005-33

| Item | Subject | FAR case | Analyst |
|----------|---|----------|---------|
| I | Trade Agreements—Costa Rica, Oman, and Peru (Interim) | 2008-036 | Murphy. |
| II | Contractor's Request for Progress Payments | 2005-032 | Murphy. |

SUPPLEMENTARY INFORMATION:

Summaries for each FAR rule follow. For the actual revisions and/or amendments to these FAR cases, refer to the specific item number and subject set forth in the documents following these item summaries.

FAC 2005-33 amends the FAR as specified below:

Item I—Trade Agreements—Costa Rica, Oman, and Peru (FAR Case 2008-036) (Interim)

This interim rule allows contracting officers to purchase the goods and services of Costa Rica, Oman, and Peru without application of the Buy American Act if the acquisition is subject to the applicable trade

agreements. The free trade agreements with Costa Rica, Oman, and Peru join the North American Free Trade Agreement (NAFTA), the Australia, Bahrain, Chile, Morocco, and Singapore Free Trade Agreements, and the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR) with respect to the Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua, which are already in the FAR.

The threshold for supplies and services is \$67,826 for the CAFTA-DR and \$194,000 for the Oman and Peru FTAs. The threshold for construction is \$7,443,000 for the CAFTA-DR and the Peru FTA and \$8,817,449 for the Oman FTA.

Item II—Contractor's Request for Progress Payments (FAR Case 2005-032)

This final rule converts the proposed rule published at 73 FR 19035 on April 8, 2008, to a final rule with one editorial change. This final rule incorporates improvements related to requests for progress payments and the Standard Form (SF) 1443, Contractor's Request for Progress Payments, used to request those progress payments.

Dated: June 9, 2009.

Al Matera,

Director, Office of Acquisition Policy.

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