

financing and commercial financing (except for installment payments), contracting officers will have to determine the form of contract financing and write individualized contract terms establishing the computation of amounts and certain other contract financing terms.

Item II—Special Contracting Methods (FAR Case 94–710)

This final rule implements Sections 1074, 1503, 1504, 1552, 1553, 2454 and 6002 of the Federal Acquisition Streamlining Act of 1994 (the Act). Section 1074 concerns placement of interagency orders under the Economy Act; Sections 1503, 1504, 1552, and 1553 address delegation of procurement functions and determinations and decisions; Section 2454 concerns contracted advisory and assistance services; and Section 6002 concerns contracting functions performed by Federal personnel. FAR 1.601, 7.103, 17.5, and 37.2 are revised to implement these sections of the Act.

Item III—Task and Delivery Order Contracts (FAR Case 94–711)

This final rule implements Sections 1004 and 1054 of the Federal Acquisition Streamlining Act of 1994 (the Act). Sections 1004 and 1054 created statutory definitions for “task order contract” and “delivery order contract” and created a statutory preference for making multiple awards of task and delivery order contracts. Sections 1004 and 1054 also established certain limitations on task order contracts for advisory and assistance services. FAR Subpart 16.5 is revised and new provisions are added at 52.216–27 and 52.216–28 to reflect these statutory requirements.

The final rule creates a preference for making multiple awards of indefinite-quantity contracts, and specifies when multiple awards should not be made. The rule contains no specific procedures for making awards of indefinite-quantity contracts, in order to empower agencies to develop selection criteria that meet the unique needs of each acquisition. However, the rule does include guidance with respect to the procedures that may be used for issuing orders under multiple award contracts.

FAR section 16.500 is issued as an interim rule pending receipt of public comments.

Item IV—Fraud Remedies (FAR Case 94–765)

This final rule implements Section 2051(e) of the Federal Acquisition Streamlining Act of 1994 (the Act). 10 U.S.C. 2307 contains a statutory

requirement entitled “Action in Case of Fraud” applicable to only the Department of Defense. Section 2051(e) of the Act added this statutory requirement to the Federal Property and Administrative Services Act (41 U.S.C. 255) applicable to civilian agencies.

The statutes at 10 U.S.C. 2307 and 41 U.S.C. 255 provide that, if the Government official concerned with coordinating the Government’s remedies for a particular case of fraud finds that an advance, partial, or progress payment is based on fraud, that official must recommend the head of the agency reduce or suspend further payments to that contractor. The statutes further provide due process requirements, standards for the amount of suspension or reduction, and other policy and procedural requirements. A new section is added at FAR 32.006 to reflect these statutory requirements.

Item V—Assignment of Claims (FAR Case 94–761)

This final rule implements Section 2451 of the Federal Acquisition Streamlining Act of 1994 (the Act). The rule revises FAR 32.803(d) to expand the authorization of a no-setoff commitment in contracts for which assignment of claims are made. Prior to the Act, the no-setoff commitment could only be included in a contract during time of war or national emergency. Under the Act, the inclusion of the no-setoff commitment is based solely on whether the President makes a determination of need. Until an agency has received such a determination of need, the “No-Setoff” Alternate I of the clause at 52.232–23, Assignment of Claims, shall not be used.

Information Item—Cost or Pricing Data Threshold

This information item is to provide notice that an adjustment to the cost or pricing data threshold at FAR 15.804–2 will not be made as of October 1, 1995. Sections 1201 and 1251 of the Federal Acquisition Streamlining Act of 1994 (the Act) require the threshold for obtaining cost or pricing data to be adjusted (in certain circumstances) once every five years beginning October 1, 1995. The required adjustment amount is the amount that reflects a constant dollar adjustment of the \$500,000 threshold, based on fiscal year 1994 dollars, rounded to the nearest \$50,000. The constant dollar adjustment amount did not exceed \$25,000. Accordingly, the Act does not require or authorize an adjustment as of October 1, 1995. This analysis and the required adjustment, if any, must be performed again in the year 2000.

Dated: September 21, 1995.

Edward C. Loeb,

Deputy Project Manager for the Implementation of the Federal Acquisition Streamlining Act of 1994.

Federal Acquisition Circular

Number 90–33

Federal Acquisition Circular (FAC) 90–33 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator for the National Aeronautics and Space Administration.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 90–33 is effective October 1, 1995. The rules contained in this FAC are applicable for solicitations issued on or after October 1, 1995.

Dated: September 19, 1995.

Eleanor R. Spector,

Director, Defense Procurement.

Dated: September 18, 1995.

Ida M. Ustad,

Associate Administrator for Acquisition Policy, General Services Administration.

Dated: September 19, 1995.

Thomas S. Luedtke,

Deputy Associate Administrator for Procurement, NASA.

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48 CFR Parts 1, 32, 42, and 52

[FAC 90–33; FAR Case 94–764; Item I]

RIN 9000–AG36

Federal Acquisition Regulation; Contract Financing

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

ACTION: Final rule.

SUMMARY: This final rule is issued pursuant to the Federal Acquisition Streamlining Act of 1994, Public Law 103–355 (the Act). The Federal Acquisition Regulatory Council is amending the Federal Acquisition Regulation (FAR) pertaining to Contract Financing as a result of changes to 10 U.S.C. 2307 and 41 U.S.C. 255 by sections 2001 and 2051 of the Act. This regulatory action was subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

EFFECTIVE DATE: October 1, 1995.

FOR FURTHER INFORMATION CONTACT: Mr. John Galbraith, Contract Financing/

Payment Team Leader, at (703) 697-6710 in reference to this FAR case. For general information, contact the FAR Secretariat, room 4037, GS Building, Washington, DC 20405; (202) 501-4755. Please cite FAC 90-33; FAR case 94-764.

SUPPLEMENTARY INFORMATION:

A. Background

The Federal Acquisition Streamlining Act of 1994, Pub. L. 103-355 (the Act), provides authorities that streamline the acquisition process and minimize burdensome government-unique requirements.

This rule implements sections 2001 and 2051 of the Act which substantially changed the statutory authorities for Government financing of contracts. Subsections 2001(f) and 2051(e) provide specific authority for Government financing of purchases of commercial items, and subsections 2001(b) and 2051(b) substantially revise the authority for Government financing of purchases of non-commercial items.

Subsections 2001(f) and 2051(e) amend 10 U.S.C. 2307 and 41 U.S.C. 255 by adding a new paragraph, Conditions for Payments for Commercial Items, to each. These paragraphs authorize the Government to provide contract financing with certain limitations:

- The financing must be in the best interest of the Government;
- The financing cannot exceed 15 percent until some performance of work under the contract;
- The terms and conditions must be appropriate or customary in the commercial marketplace.

The above statutory provisions also remove from financing of commercial purchases certain restrictions applicable to financing of non-commercial purchases by other provisions of 10 U.S.C. 2307 and 41 U.S.C. 255.

Subsections 2001(b) and 2051(b) amend the authority for Government financing of non-commercial purchases by authorizing financing on the basis of certain classes of measures of performance.

The statutory changes create a fundamental distinction between financing of purchases of commercial and non-commercial items. As a result, the subparts of part 32, Contract Financing, fall into three logical categories:

- Subparts applicable to both commercial and non-commercial financing;
- Subparts applicable to only commercial financing; and
- Subparts applicable to only non-commercial financing.

The specific subparts in each category are identified at 32.002 (Applicability of subparts).

Subpart Discussion

Sections 32.000 thru 32.005 now contain the general policy and guidance which is applicable to Government contract financing of both commercial and non-commercial items.

Subpart 32.1 (Non-commercial Item Purchase Financing) now contains the general policy and guidance applicable to non-commercial purchases. The content of this subpart reflects existing policy and guidance that previously appeared in other locations in part 32. These policies have been moved to subpart 32.1 to give them general applicability to all forms of financing of non-commercial items.

Subpart 32.2 (Commercial Item Purchase Financing) contains the policy and guidance applicable to contract financing of commercial purchases. This subpart is wholly new. The new statute places Government financing of commercial purchases on a different statutory basis than for non-commercial purchases. As a result, the new subpart provides several alternative procedures for establishing contract financing terms for commercial items. The new subpart also provides standard terms for use of contracting officers in establishing financing in contracts.

The installment payment clause permits contracting officers to incorporate financing into contracts for commercial items without any administrative effort beyond incorporation of the clause.

Subpart 32.4 has been renamed "Advanced Payments for Non-Commercial Items", in order to reduce the confusion between this financing mechanism and commercial advance payments under subpart 32.2. Subpart 32.4 does not apply to commercial advance payments.

Subpart 32.5 (Progress Payments Based on Costs) has been slightly modified to reflect the separation of commercial from non-commercial items and to reflect the general policy in 32.1 for availability of financing for non-commercial purchases.

Subpart 32.10 (Performance-Based Payments) contains the policy and guidance applicable to contract financing through performance-based payments. This is a wholly new subpart which provides the policy and procedures for establishing and administering performance-based payments. Performance-based payments under this subpart are applicable only to non-commercial purchases.

Subpart 42.3 (Contract Administration) is amended to reflect delegations of functions for commercial financing and for performance based payments.

FAR 52.232 is amended to add the additional clauses and solicitation provisions required to implement the new statutory authorities. For performance-based financing and commercial financing (except for installment payments), contracting officers will have to determine the form of contract financing and write individualized contract terms establishing the computation of amounts and certain other contract financing terms.

B. Regulatory Flexibility Act

This rule is expected to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the proposed implementation of subsection 2001(f) and subsection 2051(e) of the Federal Acquisition Streamlining Act of 1994 (Act) (Public Law 103-355) will substantially increase the availability of Government contract financing for purchases of commercial items, thereby benefiting many small entities making commercial sales; and because the implementation of subsection 2001(b) and subsection 2051(b) of the Act permits contract financing of purchases of non-commercial items upon the basis of performance, without requiring contractor cost accounting systems for the contract financing, thereby benefiting many small entities who do not use such systems. A Final Regulatory Flexibility Analysis (FRFA) has been performed and will be provided to the Chief Counsel for Advocacy for the Small Business Administration. A copy of the FRFA may be obtained from the FAR Secretariat.

C. Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 96-511) is deemed to apply because the rule contains information collection requirements. A request for approval of the information collection requirement concerning Contract Financing was submitted to OMB and approved through May 31, 1998, OMB Control 9000-0138. Public comments concerning this request were invited through a Federal Register notice at 60 FR 14171, March 15, 1995.

D. Public Comments

A proposed rule was published in the Federal Register at 60 FR 14156, March

15, 1995. During the public comment period, 263 comments were received.

Agency Discretion

A number of commentors expressed concern over the provisions for agency discretion in the coverage. This discretion is unavoidable. The changes in the statutes cause contract financing to become a larger issue in conducting procurements. Given the wide differences in the various parts of the Executive Branch, and the even wider differences in the things many of them procure and finance, Government-wide regulation could not reasonably provide the breadth and depth of coverage needed to avoid the use of agency discretion.

Subcontracting Financing

A number of commentors raised the issue of Government contract financing for commercial subcontractors. The most recent comments have also raised the issue of commercial subcontracts under cost-reimbursement contracts, and subcontractor performance-based payments. While a recommendation to adopt these policies may be made, they are a refinement of policy, not essential to the initial implementation of the Act. The FARC will consider addressing the issue of subcontractor financing policy changes as a new policy issue at a later time.

Policy for Use of Contract Financing

FAR 32.203 (Determining Contract Financing Terms) has been extensively streamlined to increase the contracting officer's discretion in using financing for commercial item purchases. A major factor was industry advice that generally there are no organized markets with "customary" financing terms. In most situations financing terms are highly elastic and mutable; depending upon the relative size of the purchase, the relative costs of capital of the respective parties, the internal management objectives of the parties, the state of the world, national, and local economies and business cycles, the financial rating and reputation of the buyer and seller, and the parties' relative bargaining powers. It was concluded that it is not feasible at the beginning of this policy to establish at the Federal level a hard rule, for use of financing for all commercial purchases, that will always be in the best interests of the Government. It is expected that individual agencies will begin to discover markets and products where there is some consistency of practice (without anti-trust implications). The results of this exploration of commercial

item purchasing may ultimately be collectable at the FAR level.

Guidance on Security

A number of commentors discussed the guidance on security for commercial item financing. The authorizing statute explicitly requires security for all commercial financing. The rule provides the widest discretion to the contracting officers in complying with this requirement, however, it is necessarily different from the practices of profit-making businesses. It should be noted that in business, losses, from credit risk are a cost of sales. In business, credit losses are offset by resulting profits. In Government, credit losses are absolute, there are no offsetting profits. Thus, security will always be more critical to the Government.

Previous comments had complained that the OMB A-94 Circular rate previously proposed was not widely available. Those comments had lead to the adoption of the Treasury Note rate as being widely available in many newspapers throughout the country. However, in view of the advice that this rate is not uniformly reported, and to insure an authoritative interest rate for evaluating the cost to the Government of offeror-proposed financing, the coverage has been changed to specify the OMB A-94 interest rate for this evaluation.

Installment Payments

A number of commentors have recommended the extension of the concept of installment payments to non-commercial item financing. For a number of legal and practical reasons, that cannot be done. However, this final rule contains the installment payment provisions of the proposed rule for use in commercial item purchases.

Relation to Other Agency-Specific Financing Methods

Comments were received concerning the relationship of performance-based payments as implemented in subpart 32.10, to other agency-specific, or product-specific forms of performance-based financing. There are a number of specialized forms of contract financing, such as shipbuilding progress payments and construction progress payments, that are based on measures of contractor performance, such as percentage of completion. In addition, some agencies have also developed specialized financing terms that are based on measures of contractor performance, for example, milestone billings. Subpart 32.10 is designed for use with any of the bases for measuring contractor performance provided for in the Act. It

is therefore broader and more general than specifically tailored contract financing provisions. The policy and procedures in subpart 32.10 do not supersede or alter the existing forms of performance-based contract financing, nor are agencies restricted in future developments of innovative policy.

Combinations of Types of Financing

A large number of commentors urged allowing both progress payments based on costs, and performance-based payments, in the same contract. Previous review of the legal, computational, payment, and liquidation aspects of such a combination has indicated it is not practical. The issue has been reconsidered and no change is warranted.

Performance-Based Financing on Undefinitized Contracts

Some commentors raised the issue of performance-based payments on undefinitized contracts, arguing that this should be allowed. While the rule does not accept the concept of performance-based payments during the period the contract is undefinitized, the clause prescription has been modified to facilitate the negotiation of the Performance-Based Payment schedule for use after definitization.

Performance-Based Payments as Delivery Payments

A number of commentors recommended, rather than treating performance-based payments as contract financing payments, that they be treated as delivery payments. This idea, while attractive from an accounting standpoint, is not new. It has been repeatedly considered over the years. However, there are a number of essentially legal issues that have discouraged creation of a "delivery payment contract financing" mechanism. Both agency and industry commentors were invited to propose specific contractual language and provide the legal analysis needed to consider such a concept. The FAR Council will, in the future, consider such proposals, should they be submitted.

List of Subjects in 48 CFR Parts 1, 32, 42, and 52

Government procurement.

Dated: September 20, 1995.

Edward C. Loeb,

Deputy Project Manager for the Implementation of the Federal Acquisition Streamlining Act of 1994.

Therefore, 48 CFR parts 1, 32, 42, and 52 are amended as set forth below:

1. The authority citation for 48 CFR parts 1, 32, 42, and 52 continues to read as follows:

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

PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

2. The table in section 1.106 is amended under the “FAR Segment” and “OMB Control Number” columns by revising entries “32.1” and “32.5” and adding entries, in numerical order, to read as follows:

1.106 OMB approval under the Paperwork Reduction Act.

*	*	*	*	*
FAR segment			OMB control No	
*	*	*	*	*
32.000			9000–0138.	
32.1			9000–0070 and	
			9000–0138.	
32.2			9000–0138.	
*	*	*	*	*
32.5			9000–0010 and	
			9000–0138.	
*	*	*	*	*
32.10			9000–0138.	
*	*	*	*	*
52.232–29			9000–0138.	
52.232–30			9000–0138.	
52.232–31			9000–0138.	
52.232–32			9000–0138.	

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PART 32—CONTRACT FINANCING

3. Section 32.000 is amended at the end of paragraph (e) by removing the word “and”; in paragraph (f) by removing the period and inserting a semicolon in its place; and by adding paragraphs (g) and (h) to read as follows:

32.000 Scope of part.

* * * * *

- (g) Financing of purchases of commercial items; and
- (h) Performance-based payments.

4. Section 32.001 is amended by revising the section heading and adding, in alphabetical order, the definitions “customary contract financing” and “unusual contract financing” to read as follows:

32.001 Definitions.

* * * * *

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.

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.

5. Sections 32.002 through 32.005 are added to read as follows:

Sec.

32.002 Applicability of subparts.

32.003 Simplified acquisition procedures financing.

32.004 Contract performance in foreign countries.

32.005 Consideration for contract financing.

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 32.005.
- (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.
- (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.

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.

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.

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.

6. Subpart 32.1 heading and section 32.100 are revised to read as follows:

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.

32.101 [Amended]

7. Section 32.101 is amended by removing the period at the end of the section and inserting in its place “, as amended.”

8. Section 32.102 is amended in the last sentence of paragraph (a) by

removing the word "subadvances" and inserting in its place "advances"; in paragraph (b)(2) by removing the word "or"; in paragraph (b)(3) by removing the period and inserting in its place "; or"; adding paragraphs (b)(4) and (f); and in paragraph (d) by adding at the end of the first sentence "and 10 U.S.C. 2307". The revised text reads as follows:

32.102 Description of contract financing methods.

* * * * *

(b) * * *

(4) Performance-based payments.

* * * * *

(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.

32.103 Progress payments under construction contracts.

8. Section 32.103 is amended by revising the section heading to read as set forth above.

9. Section 32.104 is amended by adding paragraphs (c) and (d) to read as follows:

32.104 Providing contract financing.

* * * * *

(c) Subject to specific agency regulations, the contracting officer may provide customary contract financing in accordance with 32.113. Unusual contract financing shall not be provided except as authorized in 32.114.

(d) Unless otherwise authorized by agency regulation, contract financing may be provided for contracts with—

(1) Small business concerns, when the contract price will be greater than the simplified acquisition threshold; or

(2) Other than small business concerns, when the contract price will be \$1 million or more, or for a group of contracts, whose prices are greater than the simplified acquisition threshold, that total \$1 million or more.

9. Section 32.106 is amended in the introductory text by inserting after "Government's" the word "best"; and by revising paragraphs (b) and (d) to read as follows:

32.106 Order of preference.

* * * * *

(b) Customary contract financing (see 32.113).

* * * * *

(d) Unusual contract financing (see 32.114).

* * * * *

32.110 [Reserved]

10. Section 32.110 is removed and reserved.

32.111 Contract clauses for non-commercial purchases.

11. The section heading for 32.111 is revised to read as set forth above.

12. Sections 32.113 and 32.114 are added to read as follows:

32.113 Customary contract financing.

The following contract financing arrangements 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, or under the competitive negotiation method of procurement in accordance with part 15, through progress payments based on costs in accordance with subpart 32.5;

(d) Financing of contracts for supplies or services awarded under a sole-source acquisition as defined in part 6 and using the procedures of part 15, through either progress payments based on costs in accordance with subpart 32.5, or performance-based payments in accordance with subpart 32.10 (but not both). Performance-based payments are the preferred method when the contracting officer finds them practical, and the contractor agrees to their use;

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

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

(g) 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.

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.

13. Subpart 32.2, consisting of sections 32.200 through 32.207, is added to read as follows:

Subpart 32.2—Commercial Item Purchase Financing

Sec.

32.200 Scope of subpart.

32.201 Statutory authority.

32.202 General.

32.202-1 Policy.

32.202-2 Types of payments for commercial item purchases.

32.202-3 Conducting market research about financing terms.

32.202-4 Security for Government financing.

32.203 Determining contract financing terms.

32.204 Procedures for contracting officer-specified commercial contract financing.

32.205 Procedures for offeror-proposed commercial contract financing.

32.206 Solicitation provisions and contract clauses.

32.207 Administration and payment of commercial financing payments.

Subpart 32.2—Commercial Item Purchase Financing

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. 255(f) 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.

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 in part 13;

(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.

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 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 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.

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.

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 32.202-2), 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 32.202-2).

32.202-4 Security for Government financing.

(a) *Policy.* (1) 10 U.S.C. 2307(f) and 41 U.S.C. 255(f) 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.

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 15.606 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.

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 shall include in the solicitation the provision at 52.232–31, Invitation to Propose Financing Terms. The contracting officer shall 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 time value of proposal-specified contract financing arrangements shall be calculated using as the interest rate the Nominal Discount Rate specified in Appendix C of OMB Circular A–94, "Benefit-Cost Analysis of Federal Programs; Guidelines and Discounts", 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).

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 32.4—Advance Payments for Non-Commercial Items

14. Subpart 32.4 heading is revised to read as set forth above.

15. Section 32.400 is amended by adding a third sentence to read as follows:

32.400 Scope of subpart.

* * * This subpart does not apply to commercial advance payments, which are subject to subpart 32.2.

16. Section 32.501-1 is amended by revising paragraph (d) to read as follows:

32.501-1 Customary progress payment rates.

* * * * *

(d) In accordance with the Defense Procurement Improvement Act of 1986 (Public Law 99-145), as amended, and for civilian agencies, in accordance with 41 U.S.C. 255, as amended, progress payments are limited to 80 percent on work accomplished under undefinitized contract actions. A higher rate is not authorized under unusual progress payments or other customary progress payments for the undefinitized actions.

32.501-4 [Reserved]

17. Section 32.501-4 is removed and reserved.

18. Section 32.502-1 is amended in paragraph (a) introductory text by removing the phrase "paragraphs (b) and (c) below," and inserting in its place "paragraph (b) of this subsection,"; by revising paragraph (b) introductory text and (b)(1); by removing paragraph (c); by redesignating paragraph (d) as paragraph (c); and in newly designated paragraph (c)(1) by removing the phrase "through (c) above," and inserting in its place "and (b) of this subsection,". The revised text reads as follows:

32.502-1 Use of customary progress payments.

* * * * *

(b) To reduce undue administrative effort and expense, unless otherwise provided in agency regulations, the contracting officer shall not provide for progress payments on contracts of less than \$1 million unless—

(1) The contractor is a small business concern and the contract will be equal to or greater than the simplified acquisition threshold; or

* * * * *

19. Subpart 32.10, consisting of sections 32.1000 through 32.1010, is added to read as follows:

Subpart 32.10—Performance-Based Payments

Sec.

32.1000 Scope of subpart.

32.1001 Policy.

32.1002 Bases for performance-based payments.

32.1003 Criteria for use.

32.1004 Procedure.

32.1005 Contract clauses.

32.1006 Agency approvals.

32.1007 Administration and payment of performance-based payments.

32.1008 Suspension or reduction of performance-based payments.

32.1009 Title.

32.1010 Risk of loss.

32.1000 Scope of subpart.

This subpart provides policy and procedures for performance-based payments under non-commercial purchases pursuant to subpart 32.1. This subpart does not apply to—

(a) Payments under cost-reimbursement contracts;

(b) 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;

(c) Contracts for research or development; or

(d) Contracts awarded through sealed bid or competitive negotiation procedures.

32.1001 Policy.

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

(b) Performance-based payments are fully recoverable, in the same manner as progress payments, in the event of default. Except as provided in 32.1003(c), performance-based payments shall not be used when other forms of contract financing are provided.

(c) For Government accounting purposes, performance-based payments should be treated like progress payments based on costs under subpart 32.5.

(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). However, these payments shall be made in accordance with the agency's policy for prompt payment of contract financing payments.

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

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; or

(c) Other quantifiable measures of results.

32.1003 Criteria for use.

Performance-based payments shall be used only if the following conditions are met:

(a) The contracting officer and offeror are able to agree on the performance-based payment terms;

(b) The contract is a definitized fixed-price type contract (but see 32.1005(b)); and

(c) The contract does not provide for other methods of contract financing, except that advance payments in accordance with subpart 32.4, or guaranteed loans in accordance with subpart 32.3 may be used.

32.1004 Procedure.

Performance-based payments may be made either on a whole contract or on a deliverable item basis, unless otherwise prescribed by agency regulations. Financing payments to be

made on a whole contract basis are applicable to the entire contract, and not to specific deliverable items. Financing payments to be made on a deliverable item basis are applicable to a specific individual deliverable item. (A deliverable item for these purposes is a separate item with a distinct unit price. Thus, a contract line item for 10 airplanes, with a unit price of \$1,000,000 each, has ten deliverable items—the separate planes. A contract line item for 1 lot of 10 airplanes, with a lot price of \$10,000,000, has only one deliverable item—the lot.)

(a) *Establishing performance bases.*

(1) The basis for performance-based payments may be either specifically described events (e.g., milestones) or some measurable criterion of performance. Each event or performance criterion that will trigger a finance payment 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, or other such actions shall not be events or criteria for performance-based payments. An event need not be a critical event in order to trigger a payment, but successful performance of each such event or performance criterion shall be readily verifiable.

(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 following shall be included 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) Severable events or criteria shall be specifically identified in the contract.

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

(iv) 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 contract 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 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. The amount of each performance-based payment shall be specifically stated either as a dollar amount or as a percentage of a specifically identified price (e.g., contract price, or unit price of the deliverable item). The payment of contract financing has a cost to the Government in terms of interest paid by the Treasury to borrow funds to make the payment. Because the contracting officer has wide discretion as to the timing and amount of the performance-based payments, the contracting officer must ensure that the total contract price is fair and reasonable, all factors (including the financing costs to the Treasury of the performance-based payments) considered. Performance-based payment amounts may be established on any rational basis determined by the contracting officer, or agency procedures, which may include (but are 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.

(3) When subsequent contract modifications are issued, the performance-based payment schedule shall be adjusted 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 must

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 performance-based payments are established on a delivery item basis, the liquidation amount for each line item shall be 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 shall be by predesignated liquidation amounts or liquidation percentages.

32.1005 Contract clauses.

(a) If performance-based contract financing will be provided, the contracting officer shall insert the clause at 52.232–32, Performance-Based Payments, in the solicitation and contract with the description of the basis for payment and liquidation as required in 32.1004.

(b) In solicitations for undefinitized contracts, the contracting officer may include the clause at 52.232–32, Performance-Based Payments, with a provision that the clause is not effective until the contract is definitized and the performance-based payment schedule is included in the contract.

32.1006 Agency approvals.

The contracting officer shall obtain such approvals as are required by agency regulations.

32.1007 Administration and payment of performance-based payments.

(a) *Responsibility.* The contracting officer responsible for administration of the contract shall be responsible for review and approval of performance-based payments.

(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.

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 must 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.

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 for loss, theft, destruction, or damage to property affected by 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 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.

PART 42—CONTRACT ADMINISTRATION

20. Section 42.302 is amended by revising paragraph (a)(12) and adding (a)(69) to read as follows:

42.302 Contract administration functions.

(a) * * *

(12) Review and approve or disapprove the contractor's requests for payments under the progress payments or performance-based payments clauses.

* * * * *

(69) Administer commercial financing provisions and monitor contractor security to ensure its continued adequacy to cover outstanding payments, when on-site review is required.

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

21. Sections 52.232–29 through 52.232–32 are added to read as follows:

52.232–29 Terms for Financing of Purchases of Commercial Items.

As prescribed in 32.206(b)(2), insert the following clause:

Terms for Financing of Purchases of Commercial Items (Oct 1995)

(a) *Contractor entitlement to financing payments.* The Contractor may request, and the Government shall pay, a contract financing payment as specified elsewhere in this contract when: the payment requested is properly due in accordance with this contract; the supplies deliverable or services due under the contract will be delivered or performed in accordance with the contract; and there has been no impairment or diminution of the Government's security under this contract.

(b) *Special terms regarding termination for cause.* If this contract is terminated for cause, the Contractor shall, on demand, repay to the Government the amount of unliquidated contract financing payments. The Government shall be liable for no payment except as provided by the Termination for Cause paragraph of the clause at 52.212–4, Contract Terms and Conditions—Commercial Items.

(c) *Security for Government financing.* In the event the Contractor fails to provide adequate security, as required in this contract, no financing payment shall be made under this contract. Upon receipt of adequate security, financing payments shall be made, including all previous payments to which the Contractor is entitled, in accordance with the terms of the provisions for contract financing. If at any time the Contracting Officer determines that the security provided by the Contractor is insufficient, the Contractor shall promptly provide such additional security as the Contracting Officer determines necessary. In the event the Contractor fails to provide such additional security, the Contracting Officer may collect or liquidate such security that has been provided and suspend further payments to the Contractor; and the Contractor shall repay to the Government the amount of unliquidated financing payments as the Contracting Officer at his sole discretion deems repayable.

(d) *Reservation of rights.* (1) No payment or other action by the Government under this clause shall (i) excuse the Contractor from performance of obligations under this contract, or (ii) constitute a waiver of any of the rights or remedies of the parties under the contract.

(2) The Government's rights and remedies under this clause (i) shall not be exclusive, but rather shall be in addition to any other rights and remedies provided by law or this contract; and (ii) shall not be affected by delayed, partial, or omitted exercise of any right, remedy, power, or privilege, nor shall such exercise or any single exercise preclude or impair any further exercise under this clause or the exercise of any other right, power, or privilege of the Government.

(e) *Content of Contractor's request for financing payment.* The Contractor's request for financing payment shall contain the following:

(1) The name and address of the Contractor;

(2) The date of the request for financing payment;

(3) The contract number and/or other identifier of the contract or order under which the request is made; and

(4) An appropriately itemized and totaled statement of the financing payments requested and such other information as is necessary for computation of the payment, prepared in accordance with the direction of the Contracting Officer.

(f) *Limitation on frequency of financing payments.* Contractor financing payments shall be provided no more frequently than monthly.

(g) In the event of any conflict between the terms proposed by the offeror in response to an invitation to propose financing terms (52.232–31) and the terms in this clause, the terms of this clause shall govern.

(End of clause)

52.232–30 Installment Payments for Commercial Items.

As prescribed in 32.206(g), insert the following clause:

Installment Payments for Commercial Items (Oct 1995)

(a) *Contractor entitlement to financing payments.* The Contractor may request, and the Government shall pay, a contract financing installment payment as specified in this contract when: the payment requested is properly due in accordance with this contract; the supplies deliverable or services due under the contract will be delivered or performed in accordance with the contract; and there has been no impairment or diminution of the Government's security under this contract.

(b) *Computation of amounts.* Installment payment financing shall be paid to the Contractor when requested for each separately priced unit of supply (but not for services) of each contract line item in amounts approved by the Contracting Officer pursuant to this clause.

(1) *Number of installment payments for each contract line item.* Each separately priced unit of each contract line item is authorized a fixed number of monthly

installment payments. The number of installment payments authorized for each unit of a contract line item is equal to the number of months from the date of contract award to the date one month before the first delivery of the first separately priced unit of the contract line item. For example, if the first scheduled delivery of any separately priced unit of a contract line item is 9 months after award of the contract, all separately priced units of that contract line item are authorized 8 installment payments.

(2) *Amount of each installment payment.* The amount of each installment payment for each separately priced unit of each contract line item is equal to 70 percent of the unit price divided by the number of installment payments authorized for that unit.

(3) *Date of each installment payment.* Installment payments for any particular separately priced unit of a contract line item begin the number of months prior to the delivery of that unit that are equal to the number of installment payments authorized for that unit. For example, if 8 installment payments are authorized for each separately priced unit of a contract line item, the first installment payment for any particular unit of that contract line item would be 8 months before the scheduled delivery date for that unit. The last installment payment would be 1 month before scheduled delivery of a unit.

(4) *Limitation on payment.* Prior to the delivery payment for a separately priced unit of a contract line item, the sum of all installment payments for that unit shall not exceed 70 percent of the price of that unit.

(c) *Contractor request for installment payment.* The Contractor may submit requests for payment of installment payments not more frequently than monthly, in a form and manner acceptable to the Contracting Officer. Unless otherwise authorized by the Contracting Officer, all installment payments in any month for which payment is being requested shall be included in a single request, appropriately itemized and totaled.

(d) *Dates for payment.* An installment payment under this clause is a contract financing payment under the Prompt Payment clause of this contract, and except as provided in paragraph (e) of this clause, approved requests shall be paid within 30 days of submittal of a proper request for payment.

(e) *Liquidation of installment payments.* Installment payments shall be liquidated by deducting from the delivery payment of each item the total unliquidated amount of installment payments made for that separately priced unit of that contract line item. The liquidation amounts for each unit of each line item shall be clearly delineated in each request for delivery payment submitted by the Contractor.

(f) *Security for installment payment financing.* In the event the Contractor fails to provide adequate security as required in this contract, no financing payment shall be made under this contract. Upon receipt of adequate security, financing payments shall be made, including all previous payments to which the Contractor is entitled, in accordance with the terms of the contract. If at any time the Contracting Officer determines that the security provided by the Contractor is

insufficient, the Contractor shall promptly provide such additional security as the Contracting Officer determines necessary. In the event the Contractor fails to provide such additional security, the Contracting Officer may collect or liquidate such security that has been provided, and suspend further payments to the Contractor; the Contractor shall repay to the Government the amount of unliquidated financing payments as the Contracting Officer at his sole discretion deems repayable.

(g) *Special terms regarding termination for cause.* If this contract is terminated for cause, the Contractor shall, on demand, repay to the Government the amount of unliquidated installment payments. The Government shall be liable for no payment except as provided by the Termination for Cause paragraph of the clause at 52.212-4, Contract Terms and Conditions—Commercial Items.

(h) *Reservation of rights.* (1) No payment, vesting of title under this clause, or other action taken by the Government under this clause shall (i) excuse the Contractor from performance of obligations under this contract, or (ii) constitute a waiver of any of the rights or remedies of the parties under the contract.

(2) The Government's rights and remedies under this clause (i) shall not be exclusive, but rather shall be in addition to any other rights and remedies provided by law or this contract, and (ii) shall not be affected by delayed, partial, or omitted exercise of any right, remedy, power, or privilege, nor shall such exercise or any single exercise preclude or impair any further exercise under this clause or the exercise of any other right, power, or privilege of the Government.

(i) *Content of Contractor's request for installment payment.* The Contractor's request for installment payment shall contain the following:

- (1) The name and address of the Contractor;
- (2) The date of the request for installment payment;
- (3) The contract number and/or other identifier of the contract or order under which the request is made; and
- (4) An itemized and totaled statement of the items, installment payment amount, and month for which payment is being requested, for each separately priced unit of each contract line item.

(End of clause)

52.232-31 Invitation to Propose Financing Terms.

As prescribed in 32.205(b) and 32.206, insert the following provision:

Invitation to Propose Financing Terms (Oct 1995)

(a) The offeror is invited to propose terms under which the Government shall make contract financing payments during contract performance. The financing terms proposed by the offeror shall be a factor in the evaluation of the offeror's proposal. The financing terms of the successful offeror and the clause, Terms for Financing of Purchases of Commercial Items, at 52.232-29, shall be incorporated in any resulting contract.

(b) The offeror agrees that in the event of any conflict between the terms proposed by

the offeror and the terms in the clause at 52.232-29, Terms for Financing of Purchases of Commercial Items, the terms of the clause at 52.232-29 shall govern.

(c) Because of statutory limitations (10 U.S.C. 2307(f) and 41 U.S.C. 255(f)), the offeror's proposed financing shall not be acceptable if it does not conform to the following limitations:

(1) Delivery payments shall be made only for supplies delivered and accepted, or services rendered and accepted in accordance with the payment terms of this contract;

(2) Contract financing payments shall not exceed 15 percent of the contract price in advance of any performance of work under the contract;

(3) The terms and conditions of the contract financing must be appropriate or customary in the commercial marketplace; and

(4) The terms and conditions of the contract financing must be in the best interests of the United States.

(d) The offeror's proposal of financing terms shall include the following:

(1) The proposed contractual language describing the contract financing (see FAR 32.202-2 for appropriate definitions of types of payments); and

(2) A listing of the earliest date and greatest amount at which each contract financing payment may be payable and the amount of each delivery payment. Any resulting contract shall provide that no contract financing payment shall be made at any earlier date or in a greater amount than shown in the offeror's listing.

(e) The offeror's proposed prices and financing terms shall be evaluated to determine the cost to the United States of the proposal using the interest rate and delivery schedule specified elsewhere in this solicitation.

(End of provision)

52.232-32 Performance-Based Payments.

As prescribed in 32.1005, insert the following clause:

Performance-Based Payments (Oct 1995)

(a) *Amount of payments and limitations on payments.* Subject to such other limitations and conditions as are specified in this contract and this clause, the amount of payments and limitations on payments shall be specified in the contract's description of the basis for payment.

(b) *Contractor request for performance-based payment.* The Contractor may submit requests for payment of performance-based payments not more frequently than monthly, in a form and manner acceptable to the Contracting Officer. Unless otherwise authorized by the Contracting Officer, all performance-based payments in any period for which payment is being requested shall be included in a single request, appropriately itemized and totaled. The Contractor's request shall contain the information and certification detailed in paragraphs (l) and (m) of this clause.

(c) *Approval and payment of requests.* (1) The Contractor shall not be entitled to payment of a request for performance-based

payment prior to successful accomplishment of the event or performance criterion for which payment is requested. The Contracting Officer shall determine whether the event or performance criterion for which payment is requested has been successfully accomplished in accordance with the terms of the contract. The Contracting Officer may, at any time, require the Contractor to substantiate the successful performance of any event or performance criterion which has been or is represented as being payable.

(2) A payment under this performance-based payment clause is a contract financing payment under the Prompt Payment clause of this contract, and approved requests shall be paid in accordance with the prompt payment period and provisions specified for contract financing payments by that clause. However, if the Contracting Officer requires substantiation as provided in paragraph (c)(1) of this clause, or inquires into the status of an event or performance criterion, or into any of the conditions listed in paragraph (e) of this clause, or into the Contractor certification, payment is not required, and the prompt payment period shall not begin until the Contracting Officer approves the request.

(3) The approval by the Contracting Officer of a request for performance-based payment does not constitute an acceptance by the Government and does not excuse the Contractor from performance of obligations under this contract.

(d) *Liquidation of performance-based payments.* (1) Performance-based finance amounts paid prior to payment for delivery of an item shall be liquidated by deducting a percentage or a designated dollar amount from the delivery payment. If the performance-based finance payments are on a delivery item basis, the liquidation amount for each such line item shall be the percent of that delivery item price that was previously paid under performance-based finance payments or the designated dollar amount. If the performance-based finance payments are on a whole contract basis, liquidation shall be by either predesignated liquidation amounts or a liquidation percentage.

(2) If at any time the amount of payments under this contract exceeds any limitation in this contract, the Contractor shall repay to the Government the excess. Unless otherwise determined by the Contracting Officer, such excess shall be credited as a reduction in the unliquidated performance-based payment balance(s), after adjustment of invoice payments and balances for any retroactive price adjustments.

(e) *Reduction or suspension of performance-based payments.* The Contracting Officer may reduce or suspend performance-based payments, liquidate performance-based payments by deduction from any payment under the contract, or take a combination of these actions after finding upon substantial evidence any of the following conditions:

(1) The Contractor failed to comply with any material requirement of this contract (which includes paragraphs (h) and (i) of this clause).

(2) Performance of this contract is endangered by the Contractor's (i) failure to

make progress, or (ii) unsatisfactory financial condition.

(3) The Contractor is delinquent in payment of any subcontractor or supplier under this contract in the ordinary course of business.

(f)(1) *Title.* Title to the property described in this paragraph (f) shall vest in the Government. Vestiture shall be immediately upon the date of the first performance-based payment under this contract, for property acquired or produced before that date. Otherwise, vestiture shall occur when the property is or should have been allocable or properly chargeable to this contract.

(2) *Property*, as used in this clause, includes all of the following described items acquired or produced by the Contractor that are or should be allocable or properly chargeable to this contract under sound and generally accepted accounting principles and practices:

(i) Parts, materials, inventories, and work in process;

(ii) Special tooling and special test equipment to which the Government is to acquire title under any other clause of this contract;

(iii) Nondurable (*i.e.*, noncapital) tools, jigs, dies, fixtures, molds, patterns, taps, gauges, test equipment and other similar manufacturing aids, title to which would not be obtained as special tooling under subparagraph (f)(2)(ii) of this clause; and

(iv) Drawings and technical data, to the extent the Contractor or subcontractors are required to deliver them to the Government by other clauses of this contract.

(3) Although title to property is in the Government under this clause, other applicable clauses of this contract (*e.g.*, the termination or special tooling clauses) shall determine the handling and disposition of the property.

(4) The Contractor may sell any scrap resulting from production under this contract, without requesting the Contracting Officer's approval, provided that any significant reduction in the value of the property to which the Government has title under this clause is reported in writing to the Contracting Officer.

(5) In order to acquire for its own use or dispose of property to which title is vested in the Government under this clause, the Contractor must obtain the Contracting Officer's advance approval of the action and the terms. If approved, the basis for payment (the events or performance criteria) to which the property is related shall be deemed to be not in compliance with the terms of the contract and not payable (if the property is part of or needed for performance), and the Contractor shall refund the related performance-based payments in accordance with paragraph (d) of this clause.

(g) *Risk of loss.* Before delivery to and acceptance by the Government, the Contractor shall bear the risk of loss for property, the title to which vests in the Government under this clause, except to the extent the Government expressly assumes the risk. If any property is damaged, lost, stolen, or destroyed, the basis of payment (the events or performance criteria) to which the property is related shall be deemed to be not

in compliance with the terms of the contract and not payable (if the property is part of or needed for performance), and the Contractor shall refund the related performance-based payments in accordance with paragraph (d) of this clause.

(h) *Records and controls.* The Contractor shall maintain records and controls adequate for administration of this clause. The Contractor shall have no entitlement to performance-based payments during any time the Contractor's records or controls are determined by the Contracting Officer to be inadequate for administration of this clause.

(i) *Reports and Government access.* The Contractor shall promptly furnish reports, certificates, financial statements, and other pertinent information requested by the Contracting Officer for the administration of this clause and to determine that an event or other criterion prompting a financing payment has been successfully accomplished. The Contractor shall give the Government reasonable opportunity to examine and verify the Contractor's records and to examine and verify the Contractor's performance of this contract for administration of this clause.

(j) *Special terms regarding default.* If this contract is terminated under the Default clause, (1) the Contractor shall, on demand, repay to the Government the amount of unliquidated performance-based payments, and (2) title shall vest in the Contractor, on full liquidation of all performance-based payments, for all property for which the Government elects not to require delivery under the Default clause of this contract. The Government shall be liable for no payment except as provided by the Default clause.

(k) *Reservation of rights.* (1) No payment or vesting of title under this clause shall (i) excuse the Contractor from performance of obligations under this contract, or (ii) constitute a waiver of any of the rights or remedies of the parties under the contract.

(2) The Government's rights and remedies under this clause (i) shall not be exclusive, but rather shall be in addition to any other rights and remedies provided by law or this contract, and (ii) shall not be affected by delayed, partial, or omitted exercise of any right, remedy, power, or privilege, nor shall such exercise or any single exercise preclude or impair any further exercise under this clause or the exercise of any other right, power, or privilege of the Government.

(l) *Content of Contractor's request for performance-based payment.* The Contractor's request for performance-based payment shall contain the following:

(1) The name and address of the Contractor;

(2) The date of the request for performance-based payment;

(3) The contract number and/or other identifier of the contract or order under which the request is made;

(4) Such information and documentation as is required by the contract's description of the basis for payment; and

(5) A certification by a Contractor official authorized to bind the Contractor, as specified in paragraph (m) of this clause.

(m) *Content of Contractor's certification.* As required in paragraph (l)(5) of this clause,

the Contractor shall make the following certification in each request for performance-based payment:

I certify to the best of my knowledge and belief that—

(1) This request for performance-based payment is true and correct; this request (and attachments) has been prepared from the books and records of the Contractor, in accordance with the contract and the instructions of the Contracting Officer;

(2) (Except as reported in writing on _____), all payments to subcontractors and suppliers under this contract have been paid, or will be paid, currently, when due in the ordinary course of business;

(3) There are no encumbrances (except as reported in writing on _____) against the property acquired or produced for, and allocated or properly chargeable to, the contract which would affect or impair the Government's title;

(4) There has been no materially adverse change in the financial condition of the Contractor since the submission by the Contractor to the Government of the most recent written information dated _____; and

(5) After the making of this requested performance-based payment, the amount of all payments for each deliverable item for which performance-based payments have been requested will not exceed any limitation in the contract, and the amount of all payments under the contract will not exceed any limitation in the contract.

(End of clause)

[FR Doc. 95-23866 Filed 9-25-95; 8:45 am]

BILLING CODE 6820-EP-P

48 CFR Parts 1, 7, 9, 17, 37, 49, and 52

[FAC 90-33; FAR Case 94-710; Item II]

RIN 9000-AG32

Federal Acquisition Regulation; Special Contracting Methods

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

ACTION: Final rule.

SUMMARY: This final rule is issued pursuant to the Federal Acquisition Streamlining Act of 1994, Public Law 103-355 (the Act). The Federal Acquisition Regulatory Council is amending the Federal Acquisition Regulation (FAR) to implement Section 1074 on the Economy Act; Sections 1503, 1504, 1552, and 1553 on the delegation of procurement functions and determinations and decisions; Section 2454 on advisory and assistance services; and Section 6002 on contracting functions performed by Federal personnel. This regulatory action was subject to Office of

Management and Budget review under Executive Order 12866, dated September 30, 1993.

EFFECTIVE DATE: October 1, 1995.

FOR FURTHER INFORMATION CONTACT: Mr. Ed McAndrew, Special Contracting Team Leader, at (202) 501-1474 in reference to this FAR case. For general information, contact the FAR Secretariat, Room 4037, GSA Building, Washington, DC 20405 (202) 501-4755. Please cite FAC 90-33, FAR case 94-710.

SUPPLEMENTARY INFORMATION:

A. Background

The Federal Acquisition Streamlining Act of 1994, Pub. L. 103-355 (the Act), provides authorities that streamline the acquisition process and minimize burdensome government-unique requirements.

This final rule implements sections 1074, 1503, 1504, 1552, 1553, 2454 and 6002 of the Act. Section 1074 concerns the Economy Act. Sections 1503, 1504, 1552, and 1553 deal with the delegation of procurement functions and determinations and decisions. Section 2454 concerns advisory and assistance services. Section 6002 concerns contracting functions performed by Federal personnel.

While the proposed rule included coverage implementing sections 1022 and 1072 dealing with multiyear contracting, that coverage has been removed from this final rule and will be issued separately.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, applies to this final rule and a Final Regulatory Flexibility Analysis (FRFA) has been performed. A copy of the FRFA may be obtained from the FAR Secretariat, Room 4037, GS Building, 18th & F Streets, N.W., Washington, DC, 20405 (202) 501-4755.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed changes to the FAR do not impose recordkeeping or information collection requirements, or collections of information from offerors, contractors, or members of the public which require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

D. Public Comments

On March 16, 1995, a proposed rule implementing these sections of the Act was published in the Federal Register (60 FR 14340). In response to the notice of proposed rulemaking, 25 comments were received. The comments of all

respondents were considered in developing this final rule.

While the proposed rule included coverage implementing sections 1022 and 1072 dealing with multiyear contracting, that coverage has been removed from this final rule and will be issued separately.

Sections 1074, 1503, 1504, 1552, and 1553 dealt with Federal agencies' purchasing of goods and services under contracts entered into or administered by other agencies. Several comments related to this section were adopted, such as clarification of the text, ensuring that FAR payment and cost principles clauses are included in contracts issued by servicing agencies, and clarifying that the agency head's approval of Economy Act Determination and Findings may be delegated.

Section 2454, Codification of Accounting Requirement for Contracting Advisory and Assistance Services, redefined "advisory and assistance services". This was the most controversial issue faced by the team. The redefinition was so broad that the team had little latitude in deciding how to implement it. The team attempted to clarify the definition as much as possible; however, the definition contained in this final rule does not revise the definition to the extent recommended by commentors. Nonetheless, the team feels that it can go no further in revising the definition without violating the intent of the statute. The team has decided to adopt the recommendation to add the definition of Contract for Advisory and Assistance Services (CAAS) contained in OMB Circular A-11 for consistency between the procurement and accounting systems.

Section 6002 concerns the actions Federal agencies are required to take to determine whether expertise is readily available within the Federal Government before contracting for advisory and technical services to conduct acquisitions and the manner in which personnel with expertise may be shared with agencies needing expertise.

List of Subjects in 48 CFR Parts 1, 7, 9, 17, 37, 49, and 52

Government procurement.

Dated: September 20, 1995.

Edward C. Loeb,

Deputy Project Manager for the Implementation of the Federal Acquisition Streamlining Act of 1994.

Therefore, 48 CFR Parts 1, 7, 9, 17, 37, 49, and 52 are amended as set forth below:

1. The authority citation for 48 CFR Parts 1, 7, 9, 17, 37, 49, and 52 continues to read as follows: