

Federal Register

Tuesday
September 26, 1995

Part III

**Department of Defense
General Services
Administration**

**National Aeronautics and
Space Administration**

48 CFR Ch. I and Part 1, et al.
Federal Acquisition Regulation
Amendments; Interim and Final Rules

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter I

[Federal Acquisition Circular 90-33]

Federal Acquisition Regulation; Introduction of Miscellaneous Amendments

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

and National Aeronautics and Space Administration (NASA).

ACTION: Summary presentation of final rules.

SUMMARY: This document serves to introduce the final rules which follow and which comprise Federal Acquisition Circular (FAC) 90-33. The Federal Acquisition Regulatory Council has agreed to issue FAC 90-33 to amend the Federal Acquisition Regulation (FAR).

DATES: For effective dates, see individual documents following this one.

FOR FURTHER INFORMATION CONTACT: The individual whose name appears in relation to each FAR case or subject area. For general information, contact the FAR Secretariat, Room 4037, GS Building, Washington, DC 20405 (202) 501-4755. Please cite FAC 90-33 and FAR case number(s).

SUPPLEMENTARY INFORMATION: Federal Acquisition Circular 90-33 amends the Federal Acquisition Regulation (FAR) as specified below:

| Item | Subject | FAR case | Contact point |
|-----------|---|----------|---------------------------------|
| I | Contract Financing | 94-764 | John Galbraith, (703) 697-6710. |
| II | Special Contracting Methods | 94-710 | Ed McAndrew, (202) 501-1474. |
| III | Task and Delivery Order Contracts | 94-711 | Ed McAndrew, (202) 501-1474. |
| IV | Fraud Remedies | 94-765 | John Galbraith, (703) 697-6710. |
| V | Assignment of Claims | 94-761 | John Galbraith, (703) 697-6710. |
| N/A | Information Item—Cost or Pricing Data Threshold | N/A | C. Allen Olson, (202) 501-0692. |

Case Summaries

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

Item I—Contract Financing (FAR Case 94-764)

This final rule implements sections 2001 and 2051 of the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103-355) (the Act). Sections 2001 and 2051 substantially changed the statutory authorities for Government financing of contracts. The Government is now authorized to provide contract financing that is appropriate or customary in the commercial marketplace for purchases of commercial items. The Government is also authorized to provide contract financing for non-commercial items, on the basis of measurements of the contractor's actual performance on the contract.

To implement these changes, the FAR has been amended by revising sections 32.000 and 32.001 and Subparts 32.1, 32.4, 32.5, and 42.3; by adding new sections 32.002 through 32.005 and Subparts 32.2 and 32.10; and by adding new clauses to 52.232.

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.

Sections 32.000 and 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 Act 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 by contracting officers in establishing financing for contracts.

The installment payment clause at 52.232-30 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 Subpart 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 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.

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.

[FR Doc. 95-23867 Filed 9-25-95; 8:45 am]

BILLING CODE 6820-EP-P

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/