

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

[FAC 2001-13; FAR Case 2001-006; Item IV]

RIN 9000-AJ23

**Federal Acquisition Regulation;
Progress Payment Requests Under
Indefinite-Delivery Contracts**

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

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to require, under indefinite-delivery contracts, the contractor to account for and submit progress payment requests under individual orders as if each order constitutes a separate contract, unless otherwise specified in the contract.

DATES: Effective Date: April 17, 2003.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC, 20405, (202) 501-4755, for information pertaining to status or publication schedules. For clarification of content, contact Mr. Ralph De Stefano, at (202) 501-1758. Please cite FAC 2001-13, FAR case 2001-006.

SUPPLEMENTARY INFORMATION:**A. Background**

The Councils have agreed to amend the Federal Acquisition Regulation (FAR) to require, under indefinite-delivery contracts, the contractor to account for and submit progress payment requests under individual orders as if each order constitutes a separate contract, unless otherwise specified in the contract.

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 66 FR 57294, November 14, 2001. Eight respondents submitted public comments. These comments are discussed below. The Councils concluded that the proposed rule should be converted to a final rule, with only minor editorial changes made to the proposed rule.

1. *Time requirement.* One respondent asked if the proposed rule change would have a time requirement other than 60 days, and if so, how that change would effect outside agencies. This question referenced an existing policy addressing progress schedules and reports.

Councils' response: No change. The proposed change focuses on how progress payments will be billed and processed on delivery orders under indefinite-delivery type contracts. It does not impact any existing timeframes.

2. *Statement of work.* One respondent asserted that the proposed change would increase the difficulty in preparing a statement of work to quantify a technical assistance contract.

Councils' response: No change. The proposed change would not impact the preparation of statements of work.

3. *Effect on costs.* Two respondents disagreed with the proposed change on the basis that existing FAR language contains the necessary flexibility, and that the proposed language would reduce latitude of the contracting officer, increase the costs of doing business with the government, and generate more paper. Other points made were that the inconsistency between FAR 32.503-5(c) and FAR 52.232-16 does not obtain the desired effect because many offices follow single billing for each task order, and that single billing for the entire contract is preferable to keep costs lower.

Councils' response: No change. The proposed change would have minimal impact on efficiency. The FAR currently requires that contracting officers administer indefinite-delivery type contracts on a delivery order basis. The vast majority of contractors comply with this guidance; so adding this requirement to the clause will simply eliminate an inconsistency between FAR guidance to contracting officers and the contract clause. Furthermore, the existing requirement for administering progress payments on a delivery-order basis is necessary to maintain proper control over payment processing and liquidations. Permitting progress payments on a whole contract basis would create inefficiencies in payment approval and processing, making it more difficult to ensure that progress payments are paid from the proper appropriations, and add complexity to surveillance.

4. *No inconsistency.* One respondent stated that there is not an inconsistency in the FAR between the coverage in FAR 32.503-5(c) and FAR 52.232-16; that if there is a perceived inconsistency it does not merit a revision to the Progress Payment clause; and that if any revision

to the FAR is necessary to resolve this perceived inconsistency, then the FAR should be revised to delete all references that imply that individual orders (under a contract) are to be treated as separate contracts.

Councils' response: No change. The inconsistency between the coverage in FAR 32.503-5(c) and the Progress Payment clause is clear. FAR 32.503-5(c) provides that under indefinite delivery contracts the contracting officer should administer progress payments made under each individual order as if the order constituted a separate contract, unless agency procedures provide otherwise. However, there is no related language in the clause at FAR 52.232-16, so the contractor is not currently required by contract to request progress payments on a delivery order basis. Although contractors almost always comply with the contracting officer's instructions regarding separation of progress payments by order, a contractor may erroneously contend that it incurred additional costs in complying with direction to prepare progress payments on an indefinite-delivery contract as if each delivery order were a separate contract. The Councils recommend adding the proposed language to the clause to preclude future misunderstandings.

With regard to the comment that FAR references implying that individual orders should be treated as separate contracts should be deleted, the Councils regard the existing requirements as necessary. The necessity is borne of the need to recognize that funds are typically obligated on the individual orders, and that individual orders must be treated as if they were separate contracts in order to effectively administer progress payments; and monitor production, payment requests, delivery payments and liquidations.

5. *Invoices.* One respondent expressed concern that the proposed changes would require submission of individual requests for payment of invoices on indefinite-delivery service contracts. Currently, some contractors submit single requests for payment under several task orders.

Councils' response: No change. The proposed rule addresses progress payment requests, not invoices. The rule does not address the submission of invoices and does not prohibit agencies from permitting their contractors to submit single invoices for multiple tasks. To the extent that progress payments are involved, existing contract coverage at 52.232-16, Progress Payments, acts to protect the Government's interests.

6. *Agency procedures.* One respondent submitted the following comments:

a. The need for the rule is not evident, since the prescription in FAR 32.502-4(e) directs contracting officers to provide special contract instructions for severable work, where accounting segregation is needed, and furthermore, FAR 32.503-5(c) provides guidance to treat task orders under existing indefinite-delivery contracts as if they were separate contracts.

Councils' response: No change. Although the prescription at FAR 32.502-4(c) directs that special contract instructions be provided for severable work, the existing language at FAR 32.503-5(c) establishes a default requirement for separate administration of progress payments on delivery orders. There is a need for accompanying standard language in the clause at FAR 52.232-16, rather than requiring that special provisions be constructed for each occurrence of a fairly common situation. If special instructions were determined to be the solution to this inconsistency and those provisions were not written into a contract through an oversight, then the inconsistency would be incorporated into the contract. This would result in complications in the administration and payment of progress payments under the affected contract.

b. To fully implement the policy changes of the proposed rule, the first sentence of existing coverage in FAR 32.503(c) should be revised to add the phrase "or the contract" after the phrase "unless agency procedures."

Councils' response: No change. The recommended language is redundant because a provision should not be in the contract if it does not comply with the procedures of the awarding agency.

c. In the second sentence of FAR 32.503(c), recommend changing "if the awarding agency wants the administration* * *" to "when the awarding agency's procedures, the contract administration office's procedures, or the contract* * *" require the contract administration to be on a basis other than order-by-order.

Councils' response: No change. The recommended language contains potential conflicts, e.g., if the awarding agency procedures and the contract administration office procedures are not in step. Furthermore, the Councils regard referencing the contract in this sentence as redundant, since an alternate procedure should not be in the contract unless it complies with the awarding agency procedures. The central point of the sentence under discussion is that progress payments will be administered on an order-by-

order basis if the contract is administered by an agency other than the awarding agency, unless the awarding agency has previously coordinated that alternate arrangement with the administering agency. This point is diluted if an alternate procedure can be established simply by putting it in the contract.

d. In FAR 52.232-16(l), the FAR Council recognizes the appropriateness of special attention to the terms of the contract, but fails to take into account special agency procedures that may exist, and that are covered under existing FAR 32.503-5(c). To fully implement the policy and maintain consistency within the FAR, we recommend revising the phrase "unless otherwise specified in the contract" to "unless agency procedures or the contract provide otherwise."

Councils' response: No change. The Councils believe that the language in the proposed rule for FAR 52.232-16 obtains the desired effect, is consistent with the language in the proposed rule for FAR 32.503-5, and does effectively implement the policy. Specifically, by limiting the exceptions in FAR 52.232-16(l) to other contractual provisions, this language eliminates the potential for a requirement to be expressed in agency procedures, but not executed in the contract itself. This existing proposed rule enforces consistency between regulation and contract.

7. *Concurrence of the CAO.* The respondent recommended that the case be revised to require that the contracting officer obtain the concurrence of the contract administration office if the awarding agency wants the administration of progress payments to be on a basis other than order-by-order. This change would remove any ambiguity with regard to whether coordination with the contract administration office constitutes concurrence.

Councils' response: No change. The Councils recognize that the term "coordination" may not always be construed to mean that the awarding office will obtain the agreement of the administering office prior to deciding that progress payments will be administered on a basis other than order-by-order. However, the term "coordinate" provides more flexibility, which may be appropriate at certain times.

8. *Performance-based payments.* One respondent stated that the FAR should be revised to include a similar concept for performance-based payments. Specifically, language should be inserted into FAR part 32.10 and FAR 52.232-32, Performance-Based

Payments, to provide that, under indefinite-delivery contracts, the performance-based payments would be administered under each individual order as if the order constituted a separate contract, unless agency procedures provide otherwise. In addition to the language proposed for FAR 32.1007, this recommendation includes accompanying proposed language to be inserted in the Performance Based Payments clause at FAR 32.232-32. In addition, the FAR should be revised to provide that, for indefinite-delivery contracts, that performance-based payments be used only on individual delivery orders or task orders, and not on the basic contract.

Councils' response: The Councils believe that these recommendations are beyond the scope of the subject case.

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

B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because most contracts awarded to small entities have a dollar value less than the simplified acquisition threshold and, therefore, do not have the progress payment type of financing.

C. Paperwork Reduction Act

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

List of Subjects in 48 CFR Parts 32 and 52

Government procurement.

Dated: March 12, 2003.

Laura G. Smith,

Director, Acquisition Policy Division.

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

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

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

PART 32—CONTRACT FINANCING

2. Amend section 32.503–5 by adding a sentence to the end of paragraph (c) to read as follows:

32.503–5 Administration of progress payments.

* * * * *
 (c) * * * When the contract will be administered by an agency other than the awarding agency, the contracting officer shall coordinate with the contract administration office if the awarding agency wants the administration of progress payments to be on a basis other than order—by—order.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

- 3. Amend section 52.232–16 by—
 - a. Revising the date of the clause;
 - b. Adding paragraph (m);
 - c. Revising the date and introductory text of Alternate II;
 - d. Redesignating paragraphs (m) and (n) of Alternate II as (n) and (o), respectively;
 - e. Revising the introductory text of the newly designated paragraph (n), and paragraph (n)(3);
 - f. Revising the date and the introductory text of Alternate III; and
 - g. Redesignating paragraph (m) of Alternate III as paragraph (n).

52.232–16 Progress Payments.

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Progress Payments (April 2003)

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(m) *Progress payments under indefinite—delivery contracts.* The Contractor shall account for and submit progress payment

requests under individual orders as if the order constituted a separate contract, unless otherwise specified in this contract. (End of clause)

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Alternate II (Apr 2003). If the contract is a letter contract, add paragraphs (n) and (o). The amount specified in paragraph (o) shall not exceed 80 percent of the maximum liability of the Government under the letter contract. The contracting officer may specify separate limits for separate parts of the work.

(n) The Contracting Officer will liquidate progress payments made under this letter contract, unless previously liquidated under paragraph (b) of this clause, using the following procedures:

- (1) * * *
- (2) * * *

(3) If this letter contract is partly terminated and partly superseded by a contract, the Government will allocate the unliquidated progress payments to the terminated and unterminated portions as the Government deems equitable, and will liquidate each portion under the relevant procedure in paragraphs (n)(1) and (n)(2) of this clause.

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Alternate III (Apr 2003). As prescribed in 32.502–4(d), add the following paragraph (n) to the basic clause. If Alternate II is also being used, redesignate the following paragraph as paragraph (p):

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[FR Doc. 03–6375 Filed 3–17–03; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

Federal Acquisition Regulation; Small Entity Compliance Guide

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

ACTION: Small Entity Compliance Guide.

SUMMARY: This document is issued under the joint authority of the Secretary of Defense, the Administrator of General Services and the Administrator for the National Aeronautics and Space Administration. This *Small Entity Compliance Guide* has been prepared in accordance with section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 104–121). It consists of a summary of the rules appearing in Federal Acquisition Circular (FAC) 2001–13 which amends the FAR. An asterisk (*) next to a rule indicates that a regulatory flexibility analysis has been prepared in accordance with 5 U.S.C. 604. Interested parties may obtain further information regarding these rules by referring to FAC 2001–13 which precedes this document. These documents are also available via the Internet at <http://www.arnet.gov/far>.

FOR FURTHER INFORMATION CONTACT: Laurie Duarte, FAR Secretariat, (202) 501–4225. For clarification of content, contact the analyst whose name appears in the table below.

LIST OF RULES IN FAC 2001–13

Item	Subject	FAR case	Analyst
I	Contract Types for Commercial Item Acquisitions	2000–013	Moss
II	Preference for U.S.-Flag Vessels—Subcontracts for Commercial Items	1999–024	Klein
III	Federal, State, and Local Taxes	2000–016	De Stefano
IV	Progress Payment Requests	2001–006	De Stefano

Item I—Contract Types for Commercial Item Acquisitions (FAR Case 2000–013)

This final rule amends FAR 12.207, 16.202–1, and 16.203–1 to indicate that award fee and performance or delivery incentives based solely on factors other than cost may be used in conjunction with firm-fixed-price (FFP) contracts and fixed-price contracts with economic price adjustment (FP/EPA) without changing the FFP or FP/EPA nature of

the contract. A cross reference to these sections is added to FAR 12.207 to ensure clarity of the revisions relative to commercial item acquisitions.

Item II—Preference for U.S.-Flag Vessels—Subcontracts for Commercial Items (FAR Case 1999–024)

This final rule amends FAR parts 12, 32, 47, and associated clauses to limit the types of subcontracts for which the

waiver of cargo preference statutes is applicable. The rule is intended to ensure compliance with cargo preference statutes if ocean cargoes are clearly destined for Government use, while avoiding disruption of commercial delivery systems. This final rule also amends FAR part 12 by adding 10 U.S.C. 2631, Transportation of Supplies by Sea, to the list of laws inapplicable to subcontracts for the