

Federal Register

**Monday
March 17, 1997**

Part II

**Department of Defense
General Services
Administration**

**National Aeronautics and
Space Administration**

**48 CFR Chapter I, Part 3, et al.
Federal Acquisition Circular 90-46,
Introduction and Federal Acquisition
Regulations; Final Rules**

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

Federal Acquisition Circular 90-46; Introduction

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

ACTION: Summary presentation of final and interim rules.

SUMMARY: This document summarizes the Federal Acquisition Regulation (FAR) rules issued by the FAR Council in this Federal Acquisition Circular (FAC) 90-46. Each rule follows this document in the order listed below. A companion document, the Small Entity Compliance Guide, follows this FAC and may be located on the internet at <http://www.gsa.gov/far/SECG>.

DATES: For effective dates and comment dates, see separate documents which follow.

FOR FURTHER INFORMATION CONTACT: The analyst whose name appears (in the table below) in relation to each FAR case or subject area. For general information, contact Beverly Fayson, Room 4037, GS Building, Washington, DC 20405, (202) 501-4755. Please cite FAC 90-46 and specific FAR case number(s).

SUPPLEMENTARY INFORMATION: Federal Acquisition Circular 90-46 amends the Federal Acquisition Regulation (FAR) as specified below:

Item	Subject	FAR Case	Analyst
I	Gratuities	96-300	Linfield.
II	Electronic Contracting	91-104	DeStefano.
III	Office of Federal Procurement Policy Letter 93-1, Management Oversight of Service Contracting	94-008	O'Neill.
IV	Performance Incentives for Fixed-Price Contracts	93-603	DeStefano.
V	Federal Compliance with Right-to-Know Laws and Pollution Prevention Requirements (Interim)	92-054B	Linfield.
VI	Buy American Act—Construction (Grimberg Decision)	91-119	Linfield.
VII	Collection of Historically Black Colleges and Universities/Minority Institutions Award Data	95-306	Klein.
VIII	Allowability of Foreign Selling Costs	95-021	DeStefano.
IX	Independent Research and Development/Bid and Proposal Costs in Cooperative Agreements	95-024	Olson.
X	Prompt Payment	91-091	Olson.
XI	Attorneys' Fees in GAO Protests	96-016	O'Neill.
XII	Contractors' Purchasing Systems Reviews	94-605	Klein.
XIII	Performance-Based Payments	96-005	Olson.
XIV	Technical Corrections		

Item I—Gratuities (FAR Case 96-300)

The interim rule published as Item III of Federal Acquisition Circular (FAC) 90-40 is converted to a final rule without change. The rule amended FAR 3.202 and 52.203-3 to exempt solicitations and contracts which do not exceed the simplified acquisition threshold from the prescribed use of the "Gratuities" clause.

Item II—Electronic Contracting (FAR Case 91-104)

The interim rule published as Item II of FAC 90-29 is converted to a final rule with amendments in Parts 5, 14, 15, and 52. The rule facilitates the use of electronic data interchange in Government contracting and complements the rule published as Item II of FAC 90-40 pertaining to the Federal Acquisition Computer Network.

Item III—Office of Federal Procurement Policy Letter 93-1, Management Oversight of Service Contracting (FAR Case 94-008)

This final rule amends FAR 37.000 and 37.102, and adds a new Subpart 37.5, to implement OFPP Policy Letter 93-1, Management Oversight of Service Contracting. The policy letter provides

Governmentwide guiding principles which are intended to improve the acquisition, management, and administration of service contracts. This rule also amends FAR 9.505-3 and 35.017-2 to remove references to OMB Circular A-120, Guidelines for the Use of Advisory and Assistance Services, which was rescinded by OMB on November 19, 1993.

Item IV—Performance Incentives for Fixed-Price Contracts (FAR Case 93-603)

This final rule amends FAR Parts 16 and 52 to permit the use of award-fee provisions as performance incentives in fixed-price contracts.

Item V—Federal Compliance With Right-To-Know Laws and Pollution Prevention Requirements (FAR Case 92-054B)

This interim rule adds a new FAR Subpart 23.10, and a new clause at 52.223-5 to implement Executive Order (E.O.) 12856 of August 3, 1993, Federal Compliance with Right-To-Know Laws and Pollution Prevention Requirements. The E.O. requires that a contract performed on a Federal facility shall provide that the contractor supply information on its use of certain

hazardous or toxic substances in the performance of the contract. This information is required to enable Federal facilities to comply with the reporting and emergency planning requirements of the Pollution Prevention Act of 1990 and the Emergency Planning and Community Right-To-Know Act of 1986.

Item VI—Buy American Act—Construction (Grimberg Decision) (FAR Case 91-119)

This final rule amends FAR Subpart 25.2 and the associated clauses at 52.225-5 and 52.225-15 to add guidance on exceptions to the Buy American Act, both pre-award and post-award. The rule adds two new solicitation provisions at 52.225-12 and 52.225-13 for use in solicitations for construction in the United States. These solicitation provisions set forth procedures by which offerors may request determinations regarding the inapplicability of the Buy American Act. The rule also adds a new section at 25.206, which provides guidance regarding instances of noncompliance with the Buy American Act.

Item VII—Collection of Historically Black Colleges and Universities/ Minority Institutions Award Data (FAR Case 95-306)

This final rule adds a new FAR Subpart 26.3 and a new solicitation provision at 52.226-2 to implement Executive Order 12928, which requires agencies to provide periodic reporting on the progress made in award of contracts to Historically Black Colleges and Universities and Minority Institutions.

Item VIII—Allowability of Foreign Selling Costs (FAR Case 95-021)

This final rule revises FAR 31.205-38(c)(2) by removing the ceiling on allowable foreign selling costs. The rule also amends 31.205-1, Public relations and advertising costs, by deleting reference to the ceiling limitation, and further revises 31.205-38(c)(2) by deleting obsolete language.

Item IX—Independent Research and Development/Bid and Proposal Costs in Cooperative Agreements (FAR Case 95-024)

This final rule amends the cost principle at FAR 31.205-18, Independent research and development (IR&D) and bid and proposal costs, by removing from paragraph (e) the prohibition against treatment of contractor IR&D contributions under NASA cooperative arrangements as allowable indirect costs.

Item X—Prompt Payment (FAR Case 91-091)

This final rule amends FAR 32.102, Subpart 32.9, and related clauses at 52.212-4, 52.232-5, 52.232-8, 52.232-25, 52.232-26, and 52.232-27 in order to implement changes made in OMB Circular A-125 (Revised), dated December 12, 1989, to comply with the Prompt Payment Act Amendments of 1988 (Public Law 100-496). The rule also contains amendments to clarify and simplify the FAR text and clauses.

Item XI—Attorneys' Fees in GAO Protests (FAR Case 96-016)

This final rule amends FAR 33.104 to clarify that the \$150 hourly cap on attorneys' fees applies only to those protests filed on or after October 1, 1995. Protests filed with the General Accounting Office prior to October 1, 1995, are not subject to the hourly cap on attorneys' fees, in accordance with Sections 10001 and 10002 of the Federal Acquisition Streamlining Act of 1994 (Public Law 103-355).

Item XII—Contractors' Purchasing Systems Reviews (FAR Case 94-605)

This final rule amends FAR 44.302 to (1) add a requirement for the cognizant contract administration agency to determine the need for a contractor purchasing system review (CPSR) based on, but not limited to, the past performance of the contractor and volume, complexity, and dollar value of the contractor's subcontracting activity; and (2) delete the requirement for a CPSR to be performed initially and at least every 3 years thereafter, for contractors exceeding a certain sales level. Also, FAR sections 44.303 through 44.307 are amended to conform to amendments at 44.302.

Item XIII—Performance-Based Payments (FAR Case 96-005)

This final rule amends FAR 52.232-32, Performance-Based Payments, by adding paragraphs (f)(6) and (7) to address title to residual material and liability for Government-furnished property, for consistency with paragraphs (d)(6) and (7) of FAR 52.232-16, Progress Payments.

Item XIV—Technical Corrections

Corrections have been made to Federal Acquisition Circular 90-44, which appeared in the Federal Register at 61 FR 69286, December 31, 1996, to correct clause dates to correspond with the effective dates of the rules, and Federal Acquisition Circular 90-45, published in the Federal Register at 62 FR 224, January 2, 1997, to replace a reference inadvertently omitted in the original document.

Dated: March 7, 1997.
Edward C. Loeb,
Director, Federal Acquisition Policy Division.
[FR Doc. 97-6309 Filed 3-14-97; 8:45 am]
BILLING CODE 6820-EP-P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 3 and 52

[FAC 90-46; FAR Case 96-300; Item I]

RIN 9000-AH06

Federal Acquisition Regulation; Gratuities

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

ACTION: Interim rule adopted as final.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to exempt solicitations and contracts which do not exceed the simplified acquisition threshold from the prescribed use of the clause relating to gratuities. This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993. This is not a major rule under 5 U.S.C. 804.

DATES: Effective May 16, 1997.

FOR FURTHER INFORMATION CONTACT: Mr. Paul Linfield at (202) 501-1757 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 90-46, FAR case 96-300.

SUPPLEMENTARY INFORMATION:

A. Background

The interim rule published as Item III of Federal Acquisition Circular 90-40 in the Federal Register at 61 FR 39199, July 26, 1996, is adopted as final without change. The interim rule implemented Section 801 of the National Defense Authorization Act for Fiscal Year 1996 (Public Law 104-106). Section 801 amended 10 U.S.C. 2207, generally referred to as the Gratuities Act, to exempt contracts which do not exceed the simplified acquisition threshold from application of the Gratuities Act. Therefore, the clause at 52.203-3, Gratuities, is prescribed for inclusion in only those contracts which exceed the simplified acquisition threshold.

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 only a small number of Federal contractors have been subject to action under the Gratuities clause.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the 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.*

List of Subjects in 48 CFR Parts 3 and 52

Government procurement.

Dated: March 7, 1997.

Edward C. Loeb,
Director, Federal Acquisition Policy Division.

Interim Rule Adopted as Final Without Change

Accordingly, the interim rule amending 48 CFR Parts 3 and 52 which was published at 61 FR 39199 on July 26, 1996, is adopted as a final rule without change.

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

[FR Doc. 97-6310 Filed 3-14-97; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 5, 14, 15, and 52

[FAC 90-46; FAR Case 91-104; Item II]

RIN 9000-AF50

Federal Acquisition Regulation; Electronic Contracting

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 have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to address the use of electronic commerce/electronic data interchange in Government contracting. This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993. This is not a major rule under 5 U.S.C. 804.

DATES: Effective May 16, 1997.

FOR FURTHER INFORMATION CONTACT: Mr. Ralph DeStefano at (202) 501-1758 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 90-46, FAR case 91-104.

SUPPLEMENTARY INFORMATION:

A. Background

A proposed rule was published in the Federal Register at 58 FR 69588, December 30, 1993. The rule proposed amendments to the FAR to remove any barriers to the use of electronic data interchange in Government contracting. Thirty-six comments from ten respondents were received during the public comment period. After evaluating the public comments, the Councils agreed to publish another proposed rule as a result of significant changes to the previous proposed rule being deemed necessary. The revised proposed rule was published in the Federal Register at 60 FR 12384, March 6, 1995, and an interim rule was published at 60 FR 34735, July 3, 1995. Additional changes to the final rule include—

- Revisions at FAR 5.101(a)(2)(iv) to clarify requirements for electronic posting of solicitations;
- Revisions at FAR 14.209(b) to clarify procedures for informing bidders of cancellation of electronic invitations before opening; and
- Clarification of when electronic bids and proposals will be considered to have been received by the Government for the purposes of the late bid and late proposal rules in various clauses within FAR Part 52.

This rule complements the FACNET rule (FAR Case 94-770; 61 FR 39189, July 26, 1996), which implemented provisions of the Federal Acquisition Streamlining Act of 1994 (FASA) (Pub. L. 103-355) and the Clinger-Cohen Act of 1996 (Pub. L. 104-106).

B. Regulatory Flexibility Act

A Final Regulatory Flexibility Analysis (FRFA) has been performed and will be provided to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the FRFA may be obtained from the FAR Secretariat. The FRFA is summarized as follows:

This final rule authorizes the use of electronic commerce/electronic data interchange in Government contracting. The legal authority to use electronic commerce for Government contracting actions was confirmed in General Accounting Office (GAO) Advisory Opinion B-238449. The rule will apply to all actual or potential bidders or offerors, large and small, when the solicitation authorizes the use of electronic commerce/electronic data interchange. It is estimated that the rule will apply to at least 8,615,190 small entities. There are no significant alternatives which would accomplish the objectives of the rule.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the 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.*

List of Subjects in 48 CFR Parts 5, 14, 15, and 52

Government procurement.

Dated: March 7, 1997.

Edward C. Loeb,
Director, Federal Acquisition Policy Division.

Therefore, 48 CFR Parts 5, 14, 15, and 52 are amended as set forth below:

1. The authority citation for 48 CFR Parts 5, 14, 15, 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 5—PUBLICIZING CONTRACT ACTIONS

2. Section 5.101 is amended by revising the first sentence of paragraph (a)(2)(iv) to read as follows:

5.101 Methods of disseminating information.

* * * * *

(a) * * *

(2) * * *

(iv) Electronic posting of requirements in a place accessible by the general public at the Government installation may be used to satisfy the public display requirement. * * *

* * * * *

PART 14—SEALED BIDDING

3. Section 14.209 is amended by revising paragraph (b) to read as follows:

14.209 Cancellation of invitations before opening.

* * * * *

(b) When an invitation issued other than electronically is cancelled, bids that have been received shall be returned unopened to the bidders and notice of cancellation shall be sent to all prospective bidders to whom invitations were issued. When an invitation issued electronically is cancelled, a general notice of cancellation shall be posted electronically, the bids received shall not be viewed, and the bids shall be purged from primary and backup data storage systems.

* * * * *

4. Section 14.304-1 is amended by revising paragraph (a)(4) to read as follows:

14.304-1 General.

* * * * *

(a) * * *

(4) It was transmitted through an electronic commerce method authorized by the solicitation and was received at the initial point of entry to the Government infrastructure not later than 5:00 p.m. one working day prior to the date specified for receipt of bids.

* * * * *

PART 15—CONTRACTING BY NEGOTIATION

5. Section 15.410 is amended by revising the second and third sentences of paragraph (b) to read as follows:

15.410 Amendment of solicitations before closing date.

* * * * *

(b) * * * If the time available before closing is insufficient, prospective offerors or quoters shall be notified by electronic data interchange, facsimile transmission, telegram, or telephone of an extension of the closing date. Telephonic, facsimile, and telegraphic notices shall be confirmed in the written amendment to the solicitation. * * *

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

6. Section 52.214-7 is amended by revising the provision date, and paragraph (a)(4) to read as follows:

52.214-7 Late Submissions, Modifications, and Withdrawals of Bids.

* * * * *

Late Submissions, Modifications, and Withdrawals of Bids (May 1997)

(a) * * *

(4) Was transmitted through an electronic commerce method authorized by the solicitation and was received at the initial point of entry to the Government infrastructure not later than 5:00 p.m. one working day prior to the date specified for receipt of bids.

* * * * *

7. Section 52.214-23 is amended by revising the provision date, and paragraph (a)(4) to read as follows:

52.214-23 Late Submissions, Modifications, and Withdrawals of Technical Proposals under Two-Step Sealed Bidding.

* * * * *

Late Submissions, Modifications, and Withdrawals of Technical Proposals Under Two-Step Sealed Bidding (MAY 1997)

(a) * * *

(4) Was transmitted through an electronic commerce method authorized by the solicitation and was received at the initial point of entry to the Government infrastructure not later than 5:00 p.m. one

working day prior to the date specified for receipt of technical proposals; or

* * * * *

8. Section 52.214-32 is amended by revising the date of the provision, and paragraph (a)(2) to read as follows:

52.214-32 Late Submissions, Modifications, and Withdrawals of Bids (Overseas).

* * * * *

Late Submissions, Modifications, and Withdrawals of Bids (Overseas) (May 1997)

(a) * * *

(2) Was transmitted through an electronic commerce method authorized by the solicitation and was received at the initial point of entry to the Government infrastructure not later than 5:00 p.m. one working day prior to the date specified for receipt of bids. The term "working day" excludes weekends and U.S. Federal holidays.

* * * * *

9. Section 52.214-33 is amended by revising the clause date, and paragraph (a)(2) to read as follows:

52.214-33 Late Submissions, Modifications, and Withdrawals of Technical Proposals Under Two-Step Sealed Bidding (Overseas).

* * * * *

Late Submissions, Modifications, and Withdrawals of Technical Proposals Under Two-Step Sealed Bidding (May 1997)

(a) * * *

(2) Was transmitted through an electronic commerce method authorized by the solicitation and was received at the initial point of entry to the Government infrastructure not later than 5:00 p.m. one working day prior to the date specified for receipt of technical proposals. The term "working day" excludes weekends and U.S. Federal holidays; or

* * * * *

10. Section 52.215-10 is amended by revising the provision date and paragraph (a)(4) to read as follows:

52.215-10 Late Submissions, Modifications, and Withdrawals of Proposals.

* * * * *

Late Submissions, Modifications, and Withdrawals of Proposals (May 1997)

(a) * * *

(4) It was transmitted through an electronic commerce method authorized by the solicitation and was received at the initial point of entry to the Government infrastructure not later than 5:00 p.m. one working day prior to the date specified for receipt of proposals;

* * * * *

11. Section 52.215-15 is revised to read as follows:

52.215-15 Failure to Submit Offer.

As prescribed in 15.407(d)(3), insert the following provision:

Failure to Submit Offer (May 1997)

Recipients of this solicitation not responding with an offer should not return this solicitation, unless it specifies otherwise. Instead, for paper transactions, they should advise the issuing office by letter, postcard, or established electronic commerce methods, whether they want to receive future solicitations for similar requirements. Electronic solicitations do not require notification of desire to receive future solicitations, since these solicitations will be openly available to any interested party. If a recipient does not submit an offer and does not notify the issuing office that future solicitations are desired, the recipient's name may be removed from the applicable mailing list.

(End of provision)

12. Section 52.215-36 is amended by revising the provision date and paragraph (a)(2) to read as follows:

52.215-36 Late Submissions, Modifications, and Withdrawals of Proposals (Overseas).

* * * * *

Late Submissions, Modifications, and Withdrawals of Proposals (OVERSEAS) (MAY 1997)

(a) * * *

(2) It was transmitted through an electronic commerce method authorized by the solicitation and was received at the initial point of entry to the Government infrastructure not later than 5:00 p.m. one working day prior to the date specified for receipt of proposals. The term "working day" excludes weekends and U.S. Federal holidays;

* * * * *

[FR Doc. 97-6311 Filed 3-14-97; 8:45 am]
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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 9, 35, and 37

[FAC 90-46; FAR Case 94-008; Item III]

RIN 9000-AG86

Federal Acquisition Regulation; Office of Federal Procurement Policy Letter 93-1, Management Oversight of Service Contracting

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 have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to provide agency guidance on the management of service contracts. This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993. This is not a major rule under 5 U.S.C. 804.

DATES: Effective May 16, 1997.

FOR FURTHER INFORMATION CONTACT: Mr. Jack O'Neill at (202) 501-3856 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 90-46, FAR case 94-008.

SUPPLEMENTARY INFORMATION:

A. Background

On May 24, 1994, the Office of Federal Procurement Policy (OFPP) reissued, as a final policy letter, and published in the Federal Register at 59 FR 26818, Policy Letter 93-1, Management Oversight of Service Contracting. The policy letter provides Governmentwide guiding principles which are intended to improve the acquisition, management, and administration of service contracts.

A proposed rule was published in the Federal Register at 61 FR 14946, April 3, 1996, to address FAR implementation of OFPP Policy Letter 93-1. Two sources submitted comments in response to the proposed rule. All comments were considered in the development of the final rule.

B. Regulatory Flexibility Act

A Final Regulatory Flexibility Analysis (FRFA) has been performed and will be provided to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the FRFA may be obtained from the FAR Secretariat. The analysis is summarized as follows:

There were no public comments in response to the Initial Regulatory Flexibility Analysis. There were approximately 16,662 small businesses with service contracts valued at \$25,000 or more in fiscal year 1996. The rule does not impose any reporting, recordkeeping, or other compliance requirements upon small entities. This rule is expected to have a beneficial impact on small and large entities because the rule emphasizes the need for good Government management practices. Although this rule does not specifically propose different procedures for small versus large entities, it should reduce the economic and administrative burden on small entities.

Consistent with the stated objectives of OFPP Policy Letter 93-1, routine services, frequently provided by small entities, will require less oversight than services that tend to affect Government decision-making, influence policy development, or affect program management, which are more susceptible to abuse and require a greater level of scrutiny.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the 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.*

List of Subjects in 48 CFR Parts 9, 35, and 37

Government procurement.

Dated: March 7, 1997.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.

Therefore, 48 CFR Parts 9, 35, and 37 are amended as set forth below:

1. The authority citation for 48 CFR Parts 9, 35, and 37 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 9—CONTRACTOR QUALIFICATIONS

2. Section 9.505-3 is revised to read as follows:

9.505-3 Providing evaluation services.

Contracts for the evaluation of offers for products or services shall not be awarded to a contractor that will evaluate its own offers for products or services, or those of a competitor, without proper safeguards to ensure objectivity to protect the Government's interests.

PART 35—RESEARCH AND DEVELOPMENT CONTRACTING

3. Section 35.017-2 is amended by revising paragraph (i) to read as follows:

35.017-2 Establishing or changing an FFRDC.

* * * * *

(i) Quantity production or manufacturing is not performed unless authorized by legislation.

* * * * *

PART 37—SERVICE CONTRACTING

4. Section 37.000 is revised to read as follows:

37.000 Scope of part.

This part prescribes policy and procedures that are specific to the acquisition and management of services by contract. This part applies to all contracts for services regardless of the type of contract or kind of service being acquired. Additional guidance for research and development services is in part 35; architect-engineering services is in part 36; information technology is in part 39; and transportation services is in part 47. Parts 35, 36, 39, and 47 take precedence over this part in the event of inconsistencies. This part includes, but is not limited to, contracts for services to which the Service Contract Act of 1965, as amended, applies (see subpart 22.10).

5. Section 37.102 is amended by adding paragraphs (d) through (g) to read as follows:

37.102 Policy.

* * * * *

(d) Agency program officials are responsible for accurately describing the need to be filled, or problem to be resolved, through service contracting in a manner that ensures full understanding and responsive performance by contractors and, in so doing, should obtain assistance from contracting officials, as needed.

(e) Agencies shall establish effective management practices in accordance with Office of Federal Procurement Policy (OFPP) Policy Letter 93-1, Management Oversight of Service Contracting, to prevent fraud, waste, and abuse in service contracting.

(f) Services are to be obtained in the most cost-effective manner, without barriers to full and open competition, and free of any potential conflicts of interest.

(g) Agencies shall ensure that sufficiently trained and experienced officials are available within the agency to manage and oversee the contract administration function.

6. Subpart 37.5 is added to read as follows:

Subpart 37.5—Management Oversight of Service Contracts

Sec.	
37.500	Scope of subpart.
37.501	Definition.
37.502	Exclusions.
37.503	Agency-head responsibilities.
37.504	Contracting officials' responsibilities.

37.500 Scope of subpart.

This subpart establishes responsibilities for implementing Office of Federal Procurement Policy (OFPP) Policy Letter 93-1, Management Oversight of Service Contracting.

37.501 Definition.

Best practices, as used in this subpart, means techniques that agencies may use to help detect problems in the acquisition, management, and administration of service contracts. Best practices are practical techniques gained from experience that agencies may use to improve the procurement process.

37.502 Exclusions.

- (a) This subpart does not apply to services that are
 - (1) Obtained through personnel appointments and advisory committees;
 - (2) Obtained through personal service contracts authorized by statute;
 - (3) For construction as defined in 36.102; or
 - (4) Obtained through interagency agreements where the work is being performed by in-house Federal employees.

(b) Services obtained under contracts below the simplified acquisition threshold and services incidental to supply contracts also are excluded from the requirements of this subpart. However, good management practices and contract administration techniques should be used regardless of the contracting method.

37.503 Agency-head responsibilities.

The agency head or designee should ensure that—

- (a) Requirements for services are clearly defined and appropriate performance standards are developed so that the agency's requirements can be understood by potential offerors and that performance in accordance with contract terms and conditions will meet the agency's requirements;
- (b) Service contracts are awarded and administered in a manner that will provide the customer its supplies and services within budget and in a timely manner;
- (c) Specific procedures are in place before contracting for services to ensure compliance with OFPP Policy Letters 92-1, Inherently Governmental Functions, 91-2, Service Contracting, and 89-1, Conflicts of Interest Policies Applicable to Consultants; and
- (d) Strategies are developed and necessary staff training is initiated to ensure effective implementation of the policies in 37.102.

37.504 Contracting officials' responsibilities.

Contracting officials should ensure that "best practices" techniques are used when contracting for services and in contract management and

administration (see OFPP Policy Letter 93-1).

[FR Doc. 97-6312 Filed 3-14-97; 8:45 am]
BILLING CODE 6820-EP-P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 16 and 52

[FAC 90-46; FAR Case 93-603; Item IV]
RIN 9000-AH07

Federal Acquisition Regulation; Performance Incentives for Fixed-Price 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 have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to permit the use of award-fee provisions as performance incentives in fixed-price contracts. This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993. This is not a major rule under 5 U.S.C. 804.

DATES: Effective May 16, 1997.

FOR FURTHER INFORMATION CONTACT: Mr. Ralph DeStefano at (202) 501-1758 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 90-46, FAR case 93-603.

SUPPLEMENTARY INFORMATION:

A. Background

The FAR currently provides for the use of performance incentives when used with cost incentives. This FAR revision allows the use of performance incentives alone. This revision will allow agencies to recognize and reward contractors who exceed minimum standards in terms of quality, timeliness, technical ingenuity, and effective management.

A proposed rule was published in the Federal Register at 61 FR 31798, June 20, 1996. One comment was received from one respondent. The comment was considered in developing the final rule.

B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule merely authorizes the use of performance incentives for contractors under fixed-price contracts. The rule authorizes the Government to reward a contractor for exceeding minimum performance standards.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the 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.*

List of Subjects in 48 CFR Parts 16 and 52

Government procurement.

Dated: March 7, 1997.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.

Therefore, 48 CFR Parts 16 and 52 are amended as set forth below:

1. The authority citation for 48 CFR Parts 16 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 16—TYPES OF CONTRACTS

16.204 [Amended]

2. Section 16.204 is amended in the last sentence by removing the citation "16.405" and inserting "16.406".

16.304 [Amended]

3. Section 16.304 is amended by removing "16.404-1" and inserting "16.405-1".

16.305 [Amended]

4. Section 16.305 is amended by removing "16.404-2" and inserting "16.405-2" each time it appears.

5. Section 16.401 is amended in paragraph (c) by revising the first sentence; and adding paragraph (d) to read as follows:

16.401 General.

* * * * *

(c) The two basic categories of incentive contracts are fixed-price incentive contracts (see 16.403 and

16.404) and cost-reimbursement incentive contracts (see 16.405). * * *
 (d) Award-fee contracts are a type of incentive contract.

16.402-1 [Amended]

6. Section 16.402-1 is amended in paragraph (b) by removing "16.404-2" and inserting "16.405-2".

16.404 and 16.405 [Redesignated as 16.405 and 16.406]

7. Sections 16.404 and 16.405 are redesignated as 16.405 and 16.406, respectively.

8. A new section 16.404 is added to read as follows:

16.404 Fixed-price contracts with award fees.

(a) Award-fee provisions may be used in fixed-price contracts when the Government wishes to motivate a contractor and other incentives cannot be used because contractor performance cannot be measured objectively. Such contracts shall—

(1) Establish a fixed price (including normal profit) for the effort. This price will be paid for satisfactory contract performance. Award fee earned (if any) will be paid in addition to that fixed price; and

(2) Provide for periodic evaluation of the contractor's performance against an award-fee plan.

(b) A solicitation contemplating award of a fixed-price contract with award fee shall not be issued unless the following conditions exist:

(1) The administrative costs of conducting award-fee evaluations are not expected to exceed the expected benefits;

(2) Procedures have been established for conducting the award-fee evaluation;

(3) The award-fee board has been established; and

(4) An individual above the level of the contracting officer approved the fixed-price-award-fee incentive.

16.404-1 and 16.404-2 [Redesignated as 16.405-1 and 16.405-2].

9. Sections 16.404-1 and 16.404-2 are redesignated as 16.405-1 and 16.405-2, respectively.

10.-11. The newly designated section 16.406 is amended by revising the introductory text of paragraph (e) to read as follows:

16.406 Contract clauses.

(e) The contracting officer shall insert an appropriate award-fee clause in solicitations and contracts when an award-fee contract is contemplated, provided that the clause—

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

12. Section 52.216-16 is amended by revising the introductory paragraph, and Alternate I introductory text to read as follows:

52.216-16 Incentive Price Revision—Firm Target.

As prescribed in 16.406(a), insert the following clause:

* * * * *
Alternate I (APR 1984). As prescribed in 16.406(a), add the following paragraph (o) to the basic clause:

* * * * *
 13. Section 52.216-17 is amended by revising the introductory paragraph, and Alternate I introductory text to read as follows:

52.216-17 Incentive Price Revision Successive Targets.

As prescribed in 16.406(b), insert the following clause:

* * * * *
Alternate I (APR 1984). As prescribed in 16.406(b), add the following paragraph (q) to the basic clause:

* * * * *
 [FR Doc. 97-6313 Filed 3-14-97; 8:45 am]

BILLING CODE 6820-EP-P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 23 and 52

[FAC 90-46; FAR Case 92-054B; Item V]
 RIN 9000-AH39

Federal Acquisition Regulation; Federal Compliance With Right-To-Know Laws and Pollution Prevention Requirements

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

ACTION: Interim rule with request for comments.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council have agreed on an interim rule amending the Federal Acquisition Regulation (FAR) to implement Executive Order 12856 of August 3, 1993, "Federal Compliance with Right-To-Know Laws and Pollution Prevention Requirements." This Executive order requires that Federal facilities comply with the planning and

reporting requirements of the Pollution Prevention Act of 1990 (42 U.S.C. 13101-13109), and the Emergency Planning and Community Right-to-Know Act of 1986 (42 U.S.C. 11001-11050). This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993, and is not a major rule under 5 U.S.C. 804.

DATES: Effective Date: March 17, 1997.

Comment Date: Comments should be submitted to the FAR Secretariat at the address shown below on or before May 16, 1997, to be considered in the formulation of a final rule.

ADDRESSES: Interested parties should submit written comments to: General Services Administration, FAR Secretariat (MVR), 18th & F Streets, NW., Room 4035, Attn: Ms. Beverly Fayson, Washington, DC 20405.

E-Mail comments submitted over the Internet should be addressed to:

92-054B@www.ARNET.gov

Please cite FAC 90-46, FAR case 92-054B in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: Mr. Paul Linfield at (202) 501-1757 in reference to this FAR case. For general information, contact the FAR Secretariat, Room 4035, GS Building, Washington, DC 20405 (202) 501-4755. Please cite FAC 90-46, FAR case 92-054B.

SUPPLEMENTARY INFORMATION:

A. Background

This interim rule implements Executive Order 12856 of August 3, 1993, "Federal Compliance with Right-To-Know Laws and Pollution Prevention Requirements." The Executive Order requires that Federal facilities comply with the planning and reporting requirements of the Pollution Prevention Act of 1990 (PPA) and the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA).

The amendments at FAR Parts 23 and 52 require that contracts to be performed on a Federal facility provide for the contractor to supply to the Federal agency all information the Federal agency deems necessary to comply with the reporting requirements of the PPA and EPCRA.

B. Regulatory Flexibility Act

This interim rule may 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 this rule will apply to any contractor that uses certain hazardous or

toxic substances in the performance of a contract at a Federal facility. It is estimated that approximately 50 percent of these contracts are performed by small entities. An Initial Regulatory Flexibility Analysis (IRFA) has been prepared and will be provided to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the FAR Secretariat. Comments are invited. Comments from small entities concerning the affected FAR subparts also will be considered in accordance with 5 U.S.C. 610. Such comments must be submitted separately and cite 5 U.S.C. 601, *et seq.* (FAC 90-46, FAR case 92-054B), in correspondence. The IRFA is summarized as follows:

This interim rule implements the requirements of Executive Order 12856 of August 3, 1993, "Federal Compliance with Right-To-Know Laws and Pollution Prevention Requirements." The Executive order requires that Federal facilities comply with the planning and reporting requirements of the Pollution Prevention Act of 1990 (PPA) and the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA). The Executive order also requires that contracts to be performed on a Federal facility provide for the contractor to supply to the Federal agency all information the Federal agency deems necessary to comply with these reporting requirements. The objective of this rule is to enable Federal facilities to comply with the planning and reporting requirements of PPA and EPCRA by requiring contractors who perform contracts on such facilities to provide information on their use of certain substances in the performance of the contracts.

This interim rule will apply to all contractors that use certain hazardous or toxic substances in the performance of contracts on a Federal facility. We estimate that there are approximately 7,250 small business contractors to which the rule will apply. Such contractors must provide any information necessary to enable the Federal facility to fulfill its reporting requirements under EPCRA, PPA, and Executive order 12856. The information collection would be prepared by contractor employees using records that the contractor is required to maintain under existing law and regulation. No special professional skills are needed for preparation of the required information.

C. Paperwork Reduction Act

The Paperwork Reduction Act is deemed to apply because the final rule contains information collection requirements. Accordingly, a request for approval of a new information collection requirement has been submitted to the Office of Management and Budget under 44 U.S.C. 3501, *et seq.* Public comments concerning this request were invited through a Federal Register notice published on January 13, 1997.

D. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DOD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary because Executive Order 12856, Federal Compliance with Right-to-Know Laws and Pollution Prevention Requirements, required implementation and incorporation of its policies into the FAR by August 3, 1995. However, pursuant to Public Law 98-577 and FAR 1.501, public comments received in response to this interim rule will be considered in the formation of the final rule.

List of Subjects in 48 CFR Parts 23 and 52

Government procurement.

Dated: March 7, 1997.

Edward C. Loeb

Director, Federal Acquisition Policy Division.

Therefore, 48 CFR Parts 23 and 52 are amended as set forth below:

1. The authority citation for 48 CFR Parts 23 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 23—ENVIRONMENT, CONSERVATION, OCCUPATIONAL SAFETY, AND DRUG-FREE WORKPLACE

2. Subpart 23.10, consisting of sections 23.1001 through 23.1005, is added to read as follows:

Subpart 23.10—Federal Compliance With Right-To-Know Laws and Pollution Prevention Requirements

Sec.

- 23.1001 Purpose.
- 23.1002 Applicability.
- 23.1003 Definition.
- 23.1004 Requirements.
- 23.1005 Contract clause.

23.1001 Purpose.

This subpart implements requirements of Executive Order (E.O.) 12856 of August 3, 1993, Federal Compliance with Right-To-Know Laws and Pollution Prevention Requirements.

23.1002 Applicability.

The requirements of this subpart apply to facilities owned or operated by a Federal agency except those facilities located outside the several states of the

United States, the District of Columbia, and the Commonwealth of Puerto Rico.

23.1003 Definition.

Federal agency, as used in this subpart, means an executive agency (see 2.101).

23.1004 Requirements.

(a) E.O. 12856 requires Federal facilities to comply with the provisions of the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA)(42 U.S.C. 11001-11050) and the Pollution Prevention Act of 1990 (PPA)(42 U.S.C. 13101-13109).

(b) Pursuant to Section 1-104 of E.O. 12856, and any agency implementing procedures, every new contract that provides for performance on a Federal facility shall require the contractor to provide information necessary for the Federal agency to comply with the emergency planning and toxic release reporting requirements of EPCRA and PPA.

23.1005 Contract clause.

The contracting officer shall insert the clause at 52.223-5, Pollution Prevention and Right-to-Know Information, in all solicitations and contracts that provide for performance, in whole or in part, on a Federal facility.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

3. Section 52.223-5 is added to read as follows:

52.223-5 Pollution Prevention and Right-to-Know Information.

As prescribed in 23.1005, insert the following clause:

Pollution Prevention and Right-to-Know Information (March 1997)

(a) Executive Order 12856 of August 3, 1993, requires Federal facilities to comply with the provisions of the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA) (42 U.S.C. 11001-11050) and the Pollution Prevention Act of 1990 (PPA) (42 U.S.C. 13101-13109).

(b) The Contractor shall provide all information needed by the Federal facility to comply with the emergency planning reporting requirements of Section 302 of EPCRA, the emergency notice requirements of Section 304 of EPCRA, the list of Material Data Safety Sheets required by Section 311 of EPCRA, the emergency and hazardous chemical inventory forms of Section 312 of EPCRA, and the toxic chemical release inventory of Section 313 of EPCRA, which includes the reduction and recycling information required by Section 6607 of PPA. (End of clause)

[FR Doc. 97-6314 Filed 3-14-97; 8:45 am]

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DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 25 and 52**

[FAC 90-46; FAR Case 91-119; Item VI]

RIN 9000-AG81

**Federal Acquisition Regulation; Buy
American Act—Construction
(Grimberg Decision)**

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 have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to add guidance on pre-award and post-award exceptions to the Buy American Act for construction, and also to provide guidance regarding instances of noncompliance with the Buy American Act. This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993. This is not a major rule under 5 U.S.C. 804.

DATES: Effective May 16, 1997.

FOR FURTHER INFORMATION CONTACT: Mr. Paul Linfield at (202) 501-1757 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 90-46, FAR case 91-119.

SUPPLEMENTARY INFORMATION:**A. Background**

A proposed rule was published in the Federal Register at 60 FR 67028, December 27, 1995. The revisions in the final rule are based on the analysis of public comments and further clarification of the rule. The final rule—

- Permits the contracting officer to specify in the solicitation if there is insufficient time to consider requests for determinations under the Buy American Act in advance of receipt of offers;
- Uses more precise terminology for determinations regarding the inapplicability of the Buy American Act;
- Adds guidance regarding exceptions to the Buy American Act that are based on the Trade Agreements Act and North American Free Trade Agreement; and

—Clarifies when supporting information and price comparisons are needed.

B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule does not change the impact of the Buy American Act or alter the exceptions to the Act, but only clarifies the procedures for implementation of the Act.

C. Paperwork Reduction Act

The Paperwork Reduction Act is deemed to apply because the clauses at FAR 52.225-5 and 52.225-15 require offerors/contractors requesting a determination regarding the inapplicability of the Buy American Act to provide the Government with certain information relating to foreign construction material the offeror/contractor proposes to use on the contract. A request for clearance of the information collection requirement previously was submitted to the Office of Management and Budget (OMB) under 44 U.S.C. 3501, *et seq.*, and approved through February 28, 1999, under OMB Control Number 9000-0141.

List of Subjects in 48 CFR Parts 25 and 52

Government procurement.

Dated: March 7, 1997.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.

Therefore, 48 CFR Parts 25 and 52 are amended as set forth below:

1. The authority citation for 48 CFR Parts 25 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 25—FOREIGN ACQUISITION**25.108 [Amended]**

2. Section 25.108 is amended in paragraph (b) by removing “25.202(a)(3)” and inserting “25.202(a)(2)”.

25.201 [Amended]

3. Section 25.201 is amended in the definition of “Domestic construction material” by removing “25.202(a)(3)” and inserting “25.202(a)(2)”.

4. Subpart 25.2 is amended by revising sections 25.202 through 25.205 and adding sections 25.206 and 25.207 to read as follows:

25.202 Policy.

(a) The Buy American Act requires that only domestic construction materials be used in construction in the United States, except when—

(1) The cost would be unreasonable, i.e., the cost of domestic construction material exceeds the cost of foreign construction material by more than 6 percent, unless the agency head determines a higher percentage to be appropriate (see Executive Order 10582);

(2) The head of the contracting activity or designee determines the construction material is not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality (see 25.108);

(3) The agency head determines that application of the restrictions of the Buy American Act to a particular construction material would be impracticable; or

(4) The agency head determines that application of the restrictions of the Buy American Act to a particular construction material would be inconsistent with the public interest. Under this authority, agencies may have agreements with foreign governments that provide blanket exceptions to the Buy American Act (e.g., Trade Agreements Act and North American Free Trade Agreement (NAFTA)).

(b) Unless the contracting officer determines that insufficient time is available, offerors should request determinations regarding the inapplicability of the Buy American Act in time to allow determination before submission of offers.

(c) When it is determined for any of the reasons stated in this section that certain foreign construction materials may be used, the excepted materials shall be listed in the contract. Findings justifying the exception shall be available for public inspection.

(d) For construction contracts with an acquisition value of \$6,500,000 or more, but less than \$7,311,000, see 25.402(a)(3). If the acquisition value is \$7,311,000 or more, see 25.402(a)(1).

25.203 Determinations requested before submission of offers.

(a) Any request for a determination regarding the inapplicability of the Buy American Act made before receipt of offers shall be evaluated based on the information requested in the applicable clause at 52.225-5, Buy American Act—Construction Materials, paragraphs (c) and (d), or 52.225-15, Buy American Act—Construction Materials under Trade Agreements Act and North

American Free Trade Agreement, paragraphs (c) and (d), and may be supplemented by other information readily available to the contracting officer.

(b) If the Government determines before receipt of offers that an exception to the Buy American Act applies (other than a general exception based on the Trade Agreements Act or NAFTA), the excepted material shall be identified by the Government in the clause at 52.225-5(b)(2) or 52.225-15(b)(3).

25.204 Evaluating offers of foreign construction material.

(a) Offerors proposing to use foreign construction material other than that listed by the Government in the applicable clause at 52.225-5(b)(2) or 52.225-15(b)(3) or excepted under the Trade Agreements Act or NAFTA (52.225-15(b)(2)) must provide the information required by paragraphs (c) and (d) of the respective clauses.

(b) Unless agency regulations specify a higher percentage, the Government will add to the offered price 6 percent of the cost of any foreign construction material proposed for exception from the requirements of the Buy American Act based on the unreasonable cost of domestic construction materials. If the evaluation of offers results in a tie between an offer including foreign construction material excepted on the basis of unreasonable cost, as evaluated, and an offer including solely domestic construction material or other foreign construction material that is excepted by the Government in the solicitation under the clause at 52.225-5(b)(2) or 52.225-15(b)(2) or (3) or subsequently excepted on a basis other than unreasonable cost, award shall be made to the offeror that submitted the latter offer.

(c) Offerors also may submit alternate offers based on use of equivalent domestic construction material to avoid possible rejection of the entire offer, if the Government determines that an exception permitting use of a particular foreign construction material does not apply.

(d) If, upon evaluation of an offer, the Government determines that an exception to the Buy American Act applies, and the Government accepts that offer, the excepted material shall be listed in the contract at 52.225-5(b)(2) or 52.225-15(b)(3).

25.205 Postaward determinations.

(a) If a contractor requests a determination regarding the inapplicability of the Buy American Act after contract award, the contractor shall explain why the determination could

not have been requested before contract award or why the need for such determination otherwise was not reasonably foreseeable. If the contractor does not submit a satisfactory explanation, the Government need not make a determination regarding the inapplicability of the Buy American Act.

(b) Evaluation of any request for a determination regarding the inapplicability of the Buy American Act made after contract award shall be based on information similar to that required before award by the applicable clause at 52.225-5 (c) and (d) or 52.225-15 (c) and (d) and/or other information readily available to the contracting officer.

(c) If a determination is made after contract award that an exception to the Buy American Act applies, the contract shall be modified to allow use of foreign construction material, and adequate consideration shall be negotiated. However, when the basis for the exception is the unreasonable price of a domestic construction material, adequate consideration shall not be less than the differential established in 25.202(a)(1) or agency procedures.

25.206 Noncompliance.

(a) The contracting officer is responsible for conducting Buy American Act investigations when available information indicates such action is warranted.

(b) Unless fraud is suspected, the contracting officer shall notify the contractor of the apparent unauthorized use of foreign construction material and request a reply, to include proposed corrective action.

(c) If an investigation reveals that a contractor or subcontractor has used foreign construction material without authorization, the contracting officer shall take appropriate action, including one or more of the following:

(1) Process a determination with regard to inapplicability of the Buy American Act in accordance with 25.205.

(2) Consider requiring the removal and replacement of the unauthorized foreign construction material.

(3) If removal and replacement of foreign construction material incorporated in a building or work would be impracticable, cause undue delay, or otherwise be detrimental to the interests of the Government, the contracting officer may determine in writing that the foreign construction material need not be removed and replaced. Such a determination to retain foreign construction material does not constitute a determination that an exception to the Buy American Act

applies, and this should be so stated in the determination. Further, such a determination to retain foreign construction material does not affect the Government's right to suspend and/or debar a contractor, subcontractor, or supplier for violation of the Buy American Act, or to exercise other contractual rights and remedies, such as reducing the contract price or terminating the contract for default.

(4) If the noncompliance is sufficiently serious, consider exercising appropriate contractual remedies, such as terminating the contract for default. Also consider preparing and forwarding a report for suspension and/or debarment, including findings and supporting evidence in accordance with subpart 9.4, Debarment, Suspension, and Ineligibility. If the noncompliance appears to be fraudulent, consider referring the matter to other appropriate agency officials, such as the officer responsible for criminal investigation and prosecution.

25.207 Solicitation provisions and contract clauses.

(a) The contracting officer shall insert the clause at 52.225-5, Buy American Act—Construction Materials, in solicitations and contracts for construction inside the United States, except when the clause at 52.225-15, Buy American Act—Construction Materials under Trade Agreements Act and North American Free Trade Agreement, is prescribed.

(b)(1) The contracting officer shall insert the provision at 52.225-12, Notice of Buy American Act Requirement—Construction Materials, in solicitations for construction that contain the clause at 52.225-5, Buy American Act—Construction Materials.

(2) If the contracting officer determines that insufficient time is available to process a determination regarding the inapplicability of the Buy American Act prior to receipt of offers, the contracting officer shall use the provision with its Alternate I.

(c)(1) The contracting officer shall insert the provision at 52.225-13, Notice of Buy American Act Requirement—Construction Materials under Trade Agreements Act and North American Free Trade Agreement, in solicitations for construction that contain the clause at 52.225-15, Buy American Act—Construction Materials under Trade Agreements Act and North American Free Trade Agreement.

(2) If the contracting officer determines that insufficient time is available to process a determination regarding the inapplicability of the Buy American Act prior to receipt of offers,

the contracting officer shall use the provision with its Alternate I.

(d)(1) The contracting officer shall insert the clause at 52.225-15, Buy American Act—Construction Materials under Trade Agreements Act and North American Free Trade Agreement, in solicitations and contracts for construction inside the United States with an estimated acquisition value of \$7,311,000 or more.

(2) For solicitations and contracts for construction inside the United States with an estimated acquisition value of \$6,500,000 or more, but less than \$7,311,000, the contracting officer shall use the clause with its Alternate I.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

5. Section 52.225-5 is amended by revising the introductory paragraph; revising the clause date; revising paragraph (a) introductory text; by removing the phrase “as used in this clause” from the definitions of “Components”, “Construction material” and “Domestic construction material”; by removing from the definition of Domestic construction material “25.202(a)(3)” and inserting “25.202(a)(2)”; by revising paragraph (b) (the undesignated paragraph following paragraph (b) is removed); and adding paragraphs (c) and (d) to read as follows:

52.225-5 Buy American Act—Construction Materials.

As prescribed in 25.207(a), insert the following clause:

Buy American Act—Construction Materials (May 1997)

(a) *Definitions.* As used in this clause—
* * * * *

(b)(1) The Buy American Act (41 U.S.C. 10a-10d) requires that only domestic construction material be used in performing this contract, except as provided in paragraphs (b)(2) and (b)(3) of this clause.

(2) This requirement does not apply to the excepted construction material or components listed by the Government as follows:

(List applicable accepted materials or indicate “none”)

(3) Other foreign construction material may be added to the list in paragraph (b)(2) of this clause if the Government determines that—

(i) The cost would be unreasonable (the cost of a particular domestic construction material shall be determined to be unreasonable when the cost of such material exceeds the cost of foreign material by more than 6 percent, unless the agency head determines a higher percentage to be appropriate);

(ii) The application of the restriction of the Buy American Act to a particular construction material would be impracticable or inconsistent with the public interest; or

(iii) The construction material is not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality.

(4) The Contractor agrees that only domestic construction material will be used by the Contractor, subcontractors, material men, and suppliers in the performance of this contract, except for foreign construction materials, if any, listed in paragraph (b)(2) of this clause.

(c) *Request for determination.* (1) Contractors requesting to use foreign

construction material under paragraph (b)(3) of this clause shall provide adequate information for Government evaluation of the request for a determination regarding the inapplicability of the Buy American Act. Each submission shall include a description of the foreign and domestic construction materials, including unit of measure, quantity, price, time of delivery or availability, location of the construction project, name and address of the proposed contractor, and a detailed justification of the reason for use of foreign materials cited in accordance with paragraph (b)(3) of this clause. A submission based on unreasonable cost shall include a reasonable survey of the market and a completed price comparison table in the format in paragraph (d) of this clause. The price of construction material shall include all delivery costs to the construction site and any applicable duty (whether or not a duty-free certificate may be issued).

(2) If the Government determines after contract award that an exception to the Buy American Act applies, the contract shall be modified to allow use of the foreign construction material, and adequate consideration shall be negotiated. However, when the basis for the exception is the unreasonable price of a domestic construction material, adequate consideration shall not be less than the differential established in paragraph (b)(3)(i) of this clause.

(3) If the Government does not determine that an exception to the Buy American Act applies, the use of that particular foreign construction material will be a failure to comply with the Act.

(d) For evaluation of requests under paragraph (c) of this clause based on unreasonable cost, the following information and any applicable supporting data based on the survey of suppliers shall be included in the request:

FOREIGN AND DOMESTIC CONSTRUCTION MATERIALS PRICE COMPARISON

Construction material description	Unit of measure	Quantity	Price (dollars) ¹
Item 1:			
Foreign construction material
Domestic construction material
Item 2:			
Foreign construction material
Domestic construction material

List name, address, telephone number, and contact for suppliers surveyed. Attach copy of response; if oral, attach summary. Include other applicable supporting information.

¹ Include all delivery costs to the construction site and any applicable duty (whether or not a duty-free entry certificate is issued).

(End of clause)

6. Sections 52.225-12 and 52.225-13 are added to read as follows:

52.225-12 Notice of Buy American Act Requirement—Construction Materials.

As prescribed in 25.207(b), insert the following provision:

Notice of Buy American Act Requirement—Construction Materials (May 1997)

(a) Offerors are required to comply with the requirements of Federal Acquisition Regulation (FAR) clause 52.225-5, Buy American Act Construction Materials, of this solicitation. The terms “construction material” and “domestic construction material,” as used in this provision, have the meanings set forth in FAR clause 52.225-5.

(b) Offerors should request a determination regarding the inapplicability of the Buy

American Act in time to allow determination before submission of offers. For evaluation of a request for a determination regarding the inapplicability of the requirements of the Buy American Act prior to the time set for receipt of offers, the information and applicable supporting data required by paragraphs (c) and (d) of FAR clause 52.225-5 shall be included in the request. If an offeror has not requested a determination regarding the inapplicability of the Buy American Act prior to submission of its offer, or has not received

a response to a request made prior to submission of its offer, the information and supporting data shall be included in the offer.

(c) *Evaluation of offers.* (1) For evaluation of offers, (unless agency regulations specify a higher percentage) the Government will add to the offered price 6 percent of the cost of any foreign construction material proposed for exception from the requirements of the Buy American Act based on claimed unreasonable cost of domestic construction materials in accordance with paragraph (b)(3)(i) of FAR clause 52.225-5.

(2) If the evaluation of offers results in a tie between an offer including such foreign construction material excepted on the basis of unreasonable cost, as evaluated, and an offer including solely domestic construction material or other foreign construction material listed in the solicitation at paragraph (b)(2) of FAR clause 52.225-5, or subsequently excepted in accordance with paragraphs (b)(3) (ii) or (iii) of FAR clause 52.225-5, award shall be made to the offeror that submitted the latter offer.

(d) *Alternate offers.* (1) When an offer includes foreign construction material not listed by the Government in the solicitation at paragraph (b)(2) of FAR clause 52.225-5, offerors also may submit alternate offers based on use of equivalent domestic construction material.

(2) If alternate offers are submitted, a separate Standard Form 1442 shall be submitted for each alternate offer, and a separate price comparison table, prepared in accordance with paragraphs (c) and (d) of FAR clause 52.225-5, shall be submitted for each offer that is based on the use of any foreign construction material for which the Government has not yet determined an exception to apply.

(3) If the Government determines that a particular exception requested under paragraph (c) of FAR clause 52.225-5 does not apply, the Government will evaluate only those offers based on use of the equivalent domestic construction material, and the offeror shall be required to furnish such domestic construction material.

(i) In sealed bid procurements, any offer based on use of that particular foreign construction material shall be rejected as nonresponsive.

(ii) In negotiated procurements, any offer based on use of that particular foreign construction material may not be accepted unless revised during negotiations.

(End of provision)

Alternate I. (MAY 1997) As prescribed in 25.207(b)(2), substitute the following paragraph (b) for paragraph (b) of the basic provision:

(b) An offeror requesting a determination regarding the inapplicability of the Buy American Act shall submit such request with its offer, including the information and applicable supporting data required by paragraphs (c) and (d) of FAR clause 52.225-5.

52.225-13 Notice of Buy American Act Requirement—Construction Materials under Trade Agreements Act and North American Free Trade Agreement.

As prescribed in 25.207(c)(1), insert the following provision:

Notice of Buy American Act Requirement—Construction Materials under Trade Agreements Act and North American Free Trade Agreement (May 1997)

(a) Offerors are required to comply with the requirements of Federal Acquisition Regulation (FAR) clause 52.225-15, Buy American Act—Construction Materials Under Trade Agreements Act and North American Free Trade Agreement, of this solicitation. The terms defined in FAR clause 52.225-15 have the same meaning in this provision.

(b) Offerors should request a determination regarding the inapplicability of the Buy American Act in time to allow determination before submission of offers. For evaluation of a request for a determination regarding the inapplicability of the requirements of the Buy American Act prior to the time set for receipt of offers, the information and applicable supporting data required by paragraphs (c) and (d) of FAR clause 52.225-15 shall be included in the request. If an offeror has not requested a determination regarding the inapplicability of the Buy American Act prior to submission of its offer, or has not received a response to a request made prior to submission of its offer, the information and supporting data shall be included in the offer.

(c) *Evaluation of offers.* (1) For evaluation of offers, (unless agency regulations specify a higher percentage) the Government will add to the offered price 6 percent of the cost of any foreign construction material proposed for exception from the requirements of the Buy American Act based on claimed unreasonable cost of domestic construction materials in accordance with paragraph (b)(4)(i) of FAR clause 52.225-15.

(2) If the evaluation of offers results in a tie between an offer including such foreign construction material excepted on the basis of unreasonable cost, as evaluated, and an offer including solely domestic construction material or other foreign construction material, listed in the solicitation at paragraph (b)(3) of FAR clause 52.225-15, or subsequently excepted in accordance with paragraphs (b)(4)(ii) or (iii) of FAR clause 52.225-15, award shall be made to the offeror that submitted the latter offer.

(d) *Alternate offers.* (1) When an offer includes foreign construction material not listed by the Government in the solicitation at paragraph (b)(3) of FAR clause 52.225-15, offerors also may submit alternate offers based on use of equivalent domestic construction material.

(2) If alternate offers are submitted, a separate Standard Form 1442 shall be submitted for each alternate offer, and a separate price comparison table, prepared in accordance with paragraphs (c) and (d) of FAR clause 52.225-15, shall be submitted for each offer that is based on the use of any foreign construction material for which the Government has not yet determined an exception to apply.

(3) If the Government determines that a particular exception requested under paragraph (c) of FAR clause 52.225-15 does not apply, the Government will evaluate only those offers based on use of the equivalent domestic construction material, and the offeror shall be required to furnish such domestic construction material.

(i) In sealed bid procurements, any offer based on use of that particular foreign construction material shall be rejected as nonresponsive.

(ii) In negotiated procurements, any offer based on use of that particular foreign construction material may not be accepted unless revised during negotiations.

(End of provision)

Alternate I (MAY 1997). As prescribed in 25.207(c)(2), substitute the following paragraph (b) for paragraph (b) of the basic provision:

(b) An offeror requesting a determination regarding the inapplicability of the Buy American Act shall submit such request with its offer, including the information and applicable supporting data required by paragraphs (c) and (d) of FAR clause 52.225-15.

7. Section 52.225-15 is amended by revising the introductory paragraph, and the clause date; in the definition of "Domestic construction material" by removing "25.202(a)(3)" and inserting "25.202(a)(2)"; by revising paragraphs (b) and (c); and by adding paragraph (d) to read as follows:

52.225-15 Buy American Act—Construction Materials under Trade Agreements Act and North American Free Trade Agreement.

As prescribed in 25.207(d), insert the following clause:

Buy American Act—Construction Materials Under Trade Agreements Act and North American Free Trade Agreement (May 1997)

* * * * *

(b)(1) The Buy American Act (41 U.S.C. 10a-10d) requires that only domestic construction material be used in performing this contract, except as provided in paragraphs (b)(2), (b)(3), and (b)(4) of this clause.

(2) The Trade Agreements Act and the North American Free Trade Agreement (NAFTA) provide that designated country and NAFTA country construction materials are exempted from application of the Buy American Act.

(3) The requirement in paragraph (b)(1) of this clause does not apply to the excepted construction material or components listed by the Government as follows:

(List applicable accepted materials or indicate "none")

(4) Other foreign construction material may be added to the list in paragraph (b)(3) of this clause if the Government determines that—

(i) The cost would be unreasonable (the cost of a particular domestic construction material shall be determined to be unreasonable when the cost of such material

exceeds the cost of foreign material by more than 6 percent, unless the agency head determines a higher percentage to be appropriate);

(ii) The application of the restriction of the Buy American Act to a particular construction material would be impracticable or inconsistent with the public interest; or (iii) The construction material is not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality.

(5) The Contractor agrees that only domestic construction materials, NAFTA country construction materials, or designated country construction materials will be used by the Contractor, subcontractors, material men, and suppliers in the performance of this contract, except for foreign construction materials, if any, listed in paragraph (b)(3) of this clause.

(c) *Request for determination.* (1) Contractors requesting to use foreign

construction material under paragraph (b)(4) of this clause shall provide adequate information for Government evaluation of the request for a determination regarding the inapplicability of the Buy American Act. Each submission shall include a description of the foreign and domestic construction materials, including unit of measure, quantity, price, time of delivery or availability, location of the construction project, name and address of the proposed contractor, and a detailed justification of the reason for use of foreign materials cited in accordance with paragraph (b)(4) of this clause. A submission based on unreasonable cost shall include a reasonable survey of the market and a completed price comparison table in the format in paragraph (d) of this clause. The price of construction material shall include all delivery costs to the construction site and any applicable duty (whether or not a duty-free certificate may be issued).

(2) If the Government determines after contract award that an exception to the Buy American Act applies, the contract shall be modified to allow use of the foreign construction material, and adequate consideration shall be negotiated. However, when the basis for the exception is the unreasonable price of a domestic construction material, adequate consideration shall not be less than the differential established in paragraph (b)(4)(i) of this clause.

(3) If the Government does not determine that an exception to the Buy American Act applies, the use of that particular foreign construction material will be a failure to comply with the Act.

(d) For evaluation of requests under paragraph (c) of this clause based on unreasonable cost, the following information and any applicable supporting data based on the survey of suppliers shall be included in the request:

FOREIGN AND DOMESTIC CONSTRUCTION MATERIALS PRICE COMPARISON

Construction material description	Unit of measure	Quantity	Price (dollars) ¹
Item 1:			
Foreign construction material
Domestic construction material
Item 2:			
Foreign construction material
Domestic construction material

List name, address, telephone number, and contact for suppliers surveyed. Attach copy of response; if oral, attach summary. Include other applicable supporting information.

¹ Include all delivery costs to the construction site and any applicable duty (whether or not a duty-free entry certificate is issued).

(End of clause)

Alternate I (MAY 1997). As prescribed in 25.207(d)(2), substitute the following paragraphs (b)(2) and (b)(5) for paragraphs (b)(2) and (b)(5) of the basic clause:

(b)(2) The North American Free Trade Agreement (NAFTA) provides that NAFTA construction materials are exempted from application of the Buy American Act.

(b)(5) The Contractor agrees that only domestic construction materials or NAFTA country construction materials will be used by the Contractor, subcontractors, material men, and suppliers in the performance of this contract, except for other foreign construction materials, if any, listed in paragraph (b)(3) of this clause.

52.225-22 [Amended]

8. Section 52.225-22 is amended by revising the clause date to read "(MAY 1997)"; and in the definition of "Domestic construction material" by removing "25.202(a)(3)" and inserting "25.202(a)(2)".

[FR Doc. 97-6315 Filed 3-14-97; 8:45 am]

BILLING CODE 6820-EP-P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 26 and 52

[FAC 90-46; FAR Case 95-306; Item VII] RIN 9000-AH02

Federal Acquisition Regulation; Collection of Historically Black Colleges and Universities/Minority Institutions Award Data

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 have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to implement Executive Order 12928, which requires agencies to provide periodic reporting on the progress made in award of contracts to Historically Black Colleges and Universities and

Minority Institutions. This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993. This is not a major rule under 5 U.S.C. 804.

DATES: Effective May 16, 1997.

FOR FURTHER INFORMATION CONTACT: Ms. Linda Klein at (202) 501-3775 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 90-46, FAR case 95-306.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule amends FAR Parts 26 and 52 to implement Executive Order 12928, which states that agencies will provide periodic reporting on their progress made in awards to Historically Black Colleges and Universities and Minority Institutions. The rule contains a new FAR subpart and solicitation provision.

A proposed rule was published in the Federal Register at 61 FR 31792, June 20, 1996. Five sources submitted comments in response to the proposed

rule. All comments were considered in the development of the final rule.

B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule primarily pertains to Government reporting requirements and merely requires offerors to provide certain identification information when responding to a solicitation.

C. Paperwork Reduction Act

The Paperwork Reduction Act is deemed to apply because the final rule contains a new information collection requirement. Accordingly, a request for approval of a new information collection requirement has been submitted to the Office of Management and Budget under 44 U.S.C. 3501, *et seq.* Public comments concerning this request were invited through a Federal Register notice published on January 16, 1997.

List of Subjects in 48 CFR Parts 26 and 52

Government procurement.

Dated: March 7, 1997.

Edward C. Loeb,
Director, Federal Acquisition Policy Division.

Therefore, 48 CFR Parts 26 and 52 are amended as set forth below:

1. The authority citation for 48 CFR Parts 26 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 26—OTHER SOCIOECONOMIC PROGRAMS

2. Subpart 26.3, consisting of sections 26.300 through 26.304, is added to read as follows:

Subpart 26.3—Historically Black Colleges and Universities and Minority Institutions

- Sec.
- 26.300 Scope of subpart.
 - 26.301 Definitions.
 - 26.302 General policy.
 - 26.303 Data collection and reporting requirements.
 - 26.304 Solicitation provision.

26.300 Scope of subpart.

(a) This subpart implements Executive Order 12928 of September 16, 1994, which promotes participation of Historically Black Colleges and

Universities (HBCUs) and Minority Institutions (MIs) in Federal procurement.

(b) This subpart does not pertain to contracts performed entirely outside the United States, its possessions, Puerto Rico, and the Trust Territory of the Pacific Islands.

26.301 Definitions.

As used in this subpart—

Historically Black College or University means an institution determined by the Secretary of Education to meet the requirements of 34 CFR 608.2. For DoD, NASA, and the Coast Guard, the term also includes any nonprofit research institution that was an integral part of such a college or university before November 14, 1986.

Minority Institution means an institution of higher education meeting the requirements of Section 1046(3) of the Higher Education Act of 1965 (20 U.S.C. 1135d-5(3)) which, for the purpose of this subpart, includes a Hispanic-serving institution of higher education as defined in Section 316(b)(1) of the Act (20 U.S.C. 1059c(b)(1)).

26.302 General policy.

It is the policy of the Government to promote participation of HBCUs and MIs in Federal procurement.

26.303 Data collection and reporting requirements.

Executive Order 12928 requires periodic reporting to the President on the progress of departments and agencies in complying with the laws and requirements mentioned in the Executive order.

26.304 Solicitation provision.

The contracting officer shall insert the provision at 52.226-2, *Historically Black College or University and Minority Institution Representation*, in solicitations exceeding the micro-purchase threshold, for research, studies, supplies, or services of the type normally acquired from higher educational institutions.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

3. Section 52.226-2 is added to read as follows:

52.226-2 Historically Black College or University and Minority Institution Representation.

As prescribed in 26.304, insert the following provision:

HISTORICALLY BLACK COLLEGE OR UNIVERSITY AND MINORITY INSTITUTION REPRESENTATION (MAY 1997)

(a) *Definitions.* As used in this provision—*Historically Black College or University* means an institution determined by the Secretary of Education to meet the requirements of 34 CFR 608.2. For the Department of Defense, the National Aeronautics and Space Administration, and the Coast Guard, the term also includes any nonprofit research institution that was an integral part of such a college or university before November 14, 1986.

Minority Institution means an institution of higher education meeting the requirements of Section 1046(3) of the Higher Education Act of 1965 (20 U.S.C. 1135d-5(3)) which, for the purpose of this provision, includes a Hispanic-serving institution of higher education as defined in Section 316(b)(1) of the Act (20 U.S.C. 1059c(b)(1)).

(b) *Representation.* The offeror represents that it—

is not a Historically Black College or University;

is not a Minority Institution.

(End of provision)

[FR Doc. 97-6316 Filed 3-14-97; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 31

[FAC 90-46; FAR Case 95-021; Item VIII]

RIN 9000-AH04

Federal Acquisition Regulation; Allowability of Foreign Selling Costs

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 have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to remove the ceiling on allowable foreign selling costs. This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993. This is not a major rule under 5 U.S.C. 804.

DATES: Effective May 16, 1997.

FOR FURTHER INFORMATION CONTACT: Mr. Ralph DeStefano at (202) 501-1758 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 90-46, FAR case 95-021.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule revises FAR 31.205-38(c)(2) by removing the ceiling on allowable foreign selling costs. The rule also revises FAR 31.205-1, Public relations and advertising costs, by deleting reference to the ceiling limitation, and further revises FAR 31.205-38(c)(2) by deleting obsolete language. A proposed rule was published in the Federal Register at 61 FR 31800, June 20, 1996. The proposed rule retained an allowability ceiling but increased the threshold for its application from \$2.5 million to \$5.0 million.

Two sources submitted public comments in response to the proposed rule. All comments were considered in developing the final rule. The final rule removes the ceiling on allowable foreign selling costs in lieu of the proposed rule's doubling of the present threshold for its application, i.e., \$2.5 million to \$5.0 million. The final rule achieves a greater reduction in the administrative burden of contractors than would result from retaining a ceiling but doubling the threshold for its applicability. In addition, elimination of the allowability ceiling further promotes the Government's policy of stimulating the export of U.S. products.

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 use simplified acquisition procedures or are awarded on a competitive, fixed-price basis, and do not require application of the FAR cost principles. In addition, this rule applies to only those entities that incur foreign selling costs.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the 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.*

List of Subjects in 48 CFR Part 31
Government procurement.

Dated: March 7, 1997.
Edward C. Loeb,
Director, Federal Acquisition Policy Division.

Therefore, 48 CFR Part 31 is amended as set forth below:

PART 31—CONTRACT COST PRINCIPLES AND PROCEDURES

1. The authority citation for 48 CFR Part 31 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).

2. Section 31.205-1 is amended in paragraph (d)(2) by revising the second sentence to read as follows:

31.205-1 Public relations and advertising costs.

* * * * *
(d) * * *
(2) * * * Such costs are allowable, notwithstanding paragraphs (f)(1), (f)(3), (f)(4)(ii), and (f)(5) of this subsection.
* * *

3. Section 31.205-38 is amended by revising paragraph (c)(2) to read as follows:

31.205-38 Selling costs.

* * * * *
(2) The costs of broadly targeted and direct selling efforts and market planning other than long-range, that are incurred in connection with a significant effort to promote export sales of products normally sold to the U.S. Government, including the costs of exhibiting and demonstrating such products, are allowable on contracts with the U.S. Government provided the costs are allocable, reasonable, and otherwise allowable under this subpart 31.2.
* * * * *

[FR Doc. 97-6317 Filed 3-14-97; 8:45 am]
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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 31

[FAC 90-46; FAR Case 95-024; Item IX]
RIN 9000-AH03

Federal Acquisition Regulation; Independent Research and Development/Bid and Proposal Costs in Cooperative Arrangements

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 have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to permit contractor contributions of independent research and development (IR&D) costs under NASA cooperative arrangements to be treated as allowable indirect costs. This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993, and is not a major rule under 5 U.S.C. 804.

EFFECTIVE DATES: Effective May 16, 1997.

FOR FURTHER INFORMATION CONTACT: Mr. Jeremy Olson at (202) 501-3221 in reference to this FAR case. For general information, contact the FAR Secretariat, Room 4035, GS Building, Washington, DC 20405 (202) 501-4755. Please cite FAC 90-46, FAR case 95-024.

SUPPLEMENTARY INFORMATION:

A. Background

NASA published a class deviation (final rule) in the Federal Register at 59 FR 46359, September 8, 1994. The class deviation eliminates the prohibition at FAR 31.205-18(e) against treatment of contractor IR&D contributions under NASA cooperative arrangements as allowable indirect costs. This final rule eliminates the need for the NASA class deviation.

A proposed rule was published in the Federal Register at 61 FR 31796, June 20, 1996. Two sources submitted public comments. All comments were considered in developing the final rule.

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 use simplified acquisition procedures or are awarded on a competitive, fixed-price basis, and do not require application of the FAR cost principles. In addition, this rule affects only those entities that perform independent research and development effort under NASA cooperative arrangements.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the 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.*

List of Subjects in 48 CFR Part 31

Government procurement.

Dated: March 7, 1997.

Edward C. Loeb,
Director, Federal Acquisition Policy Division.

Therefore, 48 CFR Part 31 is amended as set forth below:

PART 31—CONTRACT COST PRINCIPLES AND PROCEDURES

1. The authority citation for 48 CFR Part 31 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).

2. Section 31.205–18(e) is revised to read as follows:

31.205–18 Independent research and development and bid and proposal costs.

* * * * *

(e) *Cooperative arrangements.* (1) IR&D costs may be incurred by contractors working jointly with one or more non-Federal entities pursuant to a cooperative arrangement (for example, joint ventures, limited partnerships, teaming arrangements, and collaboration and consortium arrangements). IR&D costs also may include costs contributed by contractors in performing cooperative research and development agreements, or similar arrangements, entered into under—

(i) Section 12 of the Stevenson-Wydler Technology Transfer Act of 1980 (15 U.S.C. 3710(a));

(ii) Sections 203(c) (5) and (6) of the National Aeronautics and Space Act of 1958, as amended (42 U.S.C. 2473(c) (5) and (6));

(iii) 10 U.S.C. 2371 for the Defense Advanced Research Projects Agency; or

(iv) Other equivalent authority.

(2) IR&D costs incurred by a contractor pursuant to these types of cooperative arrangements should be considered as allowable IR&D costs if the work performed would have been allowed as contractor IR&D had there been no cooperative arrangement.

[FR Doc. 97–6318 Filed 3–14–97; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 32 and 52

[FAC 90–46; FAR Case 91–091; Item X]

RIN 9000–AF61

Federal Acquisition Regulation; Prompt Payment

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 have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to incorporate changes required by the Prompt Payment Act Amendments of 1988. This regulatory action was not subject to Office of Management and Budget (OMB) review under Executive Order 12866, dated September 30, 1993, and is not a major rule under 5 U.S.C. 804.

EFFECTIVE DATE: May 16, 1997.

FOR FURTHER INFORMATION CONTACT: Mr. Jeremy Olson at (202) 501–3221 in reference to this FAR case. For general information, contact the FAR Secretariat, Room 4035, GS Building, Washington, DC 20405, (202) 501–4755. Please cite FAC 90–46, FAR case 91–091.

SUPPLEMENTARY INFORMATION:

A. Background

Federal Acquisition Circular (FAC) 84–45 contained a final rule which was published in the Federal Register at 54 FR 13332, March 31, 1989, to incorporate changes required by the Prompt Payment Act Amendments of 1988 (Public Law 100–496). OMB implemented the statutory requirements by revising OMB Circular A–125, Prompt Payment. The OMB Circular was published as a final rule in the Federal Register on December 21, 1989, and became effective 30 days after publication. OMB's final guidance differed somewhat from earlier proposed coverage which served as the basis for the FAR changes published in FAC 84–45. This final rule amends the FAR to reflect the changes in the OMB circular.

A proposed FAR rule to implement the guidance published in OMB Circular

A–125 (Revised) was published in the Federal Register at 59 FR 23776, May 6, 1994. Ten sources submitted public comments. These comments were considered in developing the final rule.

B. Regulatory Flexibility Act

A Final Regulatory Flexibility Analysis (FRFA) has been performed. A copy of the FRFA may be obtained from the FAR Secretariat. The FRFA is summarized as follows:

The need for, and the objectives of, the final rule, are to implement changes made in Office of Management and Budget (OMB) Circular A–125 (Revised), dated December 12, 1989, to comply with the Prompt Payment Act Amendments of 1988 (Public Law 100–496). The Prompt Payment Act, as amended, requires Executive departments and agencies to make payments on time, to pay interest penalties when payments are late, and to take discounts only when payments are made on or before the discount date. We did not receive any public comments in response to the Initial Regulatory Flexibility Analysis. This rule will apply to all small entities that are awarded Government contracts, except contracts with payment terms and late payment penalties established by other Governmental authority (e.g., tariffs). The rule will also apply to all small entities that enter into construction contracts with contractors holding prime Federal construction contracts. To date, no supporting data has been collected; therefore, there is no available estimate of the number of small businesses that will be subject to the rule. The Federal Procurement Data System Federal Procurement Report for Fiscal Year (FY) 1995 states that 203,241 awards and contract modifications valued at more than \$25,000 were placed with small entities in FY 1995. However, information is not available as to the number of small entities that received these awards, the number of small entities that receive awards not subject to this rule, or the number of small entities that enter into construction contracts with contractors holding prime Federal construction contracts. The corresponding information for actions valued at \$25,000 or less is also not available. There are no significant alternatives that could accomplish the objectives of this rule.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the 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.*

List of Subjects in 48 CFR Parts 32 and 52

Government procurement.

Dated: March 7, 1997.
Edward C. Loeb,
Director, Federal Acquisition Policy Division.

Therefore, 48 CFR Parts 32 and 52 are amended as set forth below:

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

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

PART 32—CONTRACT FINANCING

2. Section 32.102 is amended by revising paragraph (d) to read as follows:

32.102 Description of contract financing methods.

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(d) Partial payments for accepted supplies and services that are only a part of the contract requirements are authorized under 41 U.S.C. 255 and 10 U.S.C. 2307. Office of Management and Budget Circular A-125, Prompt Payment, requires agencies to pay for partial delivery of supplies or partial performance of services unless specifically prohibited by the contract. Although partial payments generally are treated as a method of payment and not as a method of contract financing, using partial payments can assist contractors to participate in Government contracts without, or with minimal, contract financing. When appropriate, contract statements of work and pricing arrangements shall be designed to permit acceptance and payment for discrete portions of the work, as soon as accepted (but see 32.903(f)(2)).

* * * * *

3. Section 32.902 is amended by revising the definitions of "Day", "Designated billing office", and "Discount for prompt payment"; and by adding a definition of "Invoice" to read as follows:

32.902 Definitions.

* * * * *

Day, as used in this subpart, means calendar day, including weekends and holidays, unless otherwise indicated. (However, see 32.903(e)(3) concerning payments due on Saturdays, Sundays, and legal holidays.)

Designated billing office, as used in this subpart, means the office or person (governmental or nongovernmental) designated in the contract where the contractor first submits invoices and contract financing requests. This might be the Government disbursing office, contract administration office, office accepting the supplies delivered or services performed by the contractor, contract audit office, or a

nongovernmental agent. In some cases, different offices might be designated to receive invoices and contract financing requests.

* * * * *

Discount for prompt payment means an invoice payment reduction voluntarily offered by the contractor, in conjunction with the clause at 52.232-8, Discounts for Prompt Payment, if payment is made by the Government prior to the due date. The due date is calculated from the date of the contractor's invoice. If the contractor has not placed a date on the invoice, the due date is calculated from the date the designated billing office receives a proper invoice, provided the agency annotates such invoice with the date of receipt at the time of receipt. When the discount date falls on a Saturday, Sunday, or legal holiday when Federal Government offices are closed and Government business is not expected to be conducted, payment may be made on the following business day and a discount may be taken.

* * * * *

Invoice means a contractor's bill or written request for payment under the contract for supplies delivered or services performed.

* * * * *

4. Sections 32.903, 32.904, and 32.905 are revised to read as follows:

32.903 Policy.

(a) All solicitations and contracts subject to this subpart shall specify payment procedures, payment due dates, and interest penalties for late invoice payment.

(b) The Government shall not make invoice and contract financing payments earlier than 7 days prior to the due dates specified in the contract unless the agency head, or designee, determines to make earlier payment on a case-by-case basis (see 32.908 for required clauses).

(c) Payment will be based on receipt of a proper invoice or contract financing request and satisfactory contract performance.

(d) Agency procedures shall ensure that, when specifying due dates, full consideration is given to the time reasonably required by Government officials to fulfill their administrative responsibilities under the contract.

(e)(1) Checks shall be mailed on the same day they are dated.

(2) For payments made by electronic funds transfer, the date specified by the Government (see 32.902 for definition of "specified payment date") for settlement of the payment at a Federal Reserve Bank shall be on or before the established due date.

(3) When the due date falls on a Saturday, Sunday, or legal holiday when Federal Government offices are closed and Government business is not expected to be conducted, payment may be made on the following business day without incurring a late payment interest penalty.

(f)(1) Contracting officers shall, where the nature of the work permits, write contract statements of work and pricing arrangements that allow contractors to deliver, and receive invoice payments for, discrete portions of the work as soon as completed and found acceptable by the Government (see 32.102(d)).

(2) Unless specifically prohibited by the contract, the contractor is entitled to payment for accepted partial deliveries of supplies or partial performance of services that comply with all applicable contract requirements and for which prices can be calculated from the contract terms.

(3) Under some types of contracts, such as many cost-reimbursement contracts, partial payments cannot be made because the invoice price cannot be determined until after settlement of total contract costs and other contract-wide final arrangements. However, interim payments or contract financing payments may be made in accordance with the terms of the contract.

(g) Discounts for prompt payment offered by the contractor shall be taken only when payments are made within the discount period specified by the contractor.

(h) Agencies shall pay an interest penalty, without request from the contractor, for late invoice payments or improperly taken discounts for prompt payment. The temporary unavailability of funds to make a timely payment does not relieve an agency from the obligation to pay interest penalties or the additional interest penalties discussed in paragraph (i) of this section and paragraph (g) of 32.907-1.

(i) For contracts awarded after October 1, 1989, if the interest penalty is not paid within 10 days after it is due and the contractor makes a written demand for payment within 40 days after payment of the principal amount due, agencies shall pay an additional penalty amount, which shall be calculated in accordance with 32.907-1(g).

(j) If the contractor has assigned a contractor identifier (such as an invoice number) to an invoice or financing request, each payment or remittance advice shall use the contractor identifier (in addition to any Government or contract information) in describing any payment made.

(k) For payments made by electronic funds transfer, the specified payment date, included in the Government's order to pay the contractor, is the date of payment for prompt payment purposes, whether or not the Federal Reserve System actually makes the payment by that date, and whether or not the contractor's financial agent credits the contractor's account on that date. However, a specified payment date must be a valid date under the rules of the Federal Reserve System. For example, if the Federal Reserve System requires 2 days' notice before a specified payment date to process a transaction, release of a payment transaction instruction to the Federal Reserve Bank 1 day before the specified payment date could not constitute a valid date under the rules of the Federal Reserve System.

32.904 Responsibilities.

(a) Agency heads—

(1) Shall establish the policies and procedures necessary to implement this subpart;

(2) May prescribe additional standards for establishing due dates on invoice payments (see 32.905) and contract financing payments (see 32.906) necessary to support agency programs and foster prompt payment to contractors;

(3) May adopt different payment procedures in order to accommodate unique circumstances, provided that such procedures are consistent with the policies set forth in this subpart; and

(4) Shall inform contractors of points of contact within their cognizant payment offices to enable contractors to obtain status of invoices.

(b) Contracting officers, in drafting solicitations and contracts, shall identify for each contract line item number, subline item number, or exhibit line item number—

(1) Which of the applicable Prompt Payment clauses applies to each item when the solicitation or contract contains items that will be subject to different payment terms; and

(2) The applicable Prompt Payment food category (e.g., which item numbers are meat or meat food products, which are perishable agricultural commodities), when the solicitation or contract contains multiple payment terms for various classes of foods and edible products.

32.905 Invoice payments.

(a) *General.* Except as prescribed in paragraphs (b), (c), and (d) of this section, the due date for making an invoice payment by the designated payment office shall be as follows:

(1) The 30th day after the designated billing office has received a proper invoice from the contractor (except as provided in paragraph (a)(2) of this section); or the 30th day after Government acceptance of supplies delivered or services performed by the contractor, whichever is later.

(i) On a final invoice where the payment amount is subject to contract settlement actions, acceptance shall be deemed to have occurred on the effective date of the contract settlement.

(ii) For the sole purpose of computing an interest penalty that might be due the contractor, Government acceptance shall be deemed to have occurred constructively on the 7th day after the contractor has delivered supplies or performed services in accordance with the terms and conditions of the contract, unless there is a disagreement over quantity, quality, or contractor compliance with a contract requirement.

In the event that actual acceptance occurs within the constructive acceptance period, the determination of an interest penalty shall be based on the actual date of acceptance. The constructive acceptance requirement does not, however, compel Government officials to accept supplies or services, perform contract administration functions, or make payment prior to fulfilling their responsibilities. Except in the case of a contract for the purchase of a commercial item as defined in 2.101, including a brand-name commercial item for authorized resale (e.g., commissary items), the contracting officer may specify a longer period for constructive acceptance in the solicitation and resulting contract, if required to afford the Government a reasonable opportunity to inspect and test the supplies furnished or to evaluate the services performed. The contract file shall indicate the justification for extending the constructive acceptance period beyond 7 days. Extended acceptance periods shall not be a routine agency practice but shall be used only when necessary to permit proper Government inspection and testing of the supplies delivered or services performed.

(iii) If the contract does not require submission of an invoice for payment (e.g., periodic lease payments), the due date will be as specified in the contract.

(2) If the designated billing office fails to annotate the invoice with the actual date of receipt at the time of receipt, the invoice payment due date shall be the 30th day after the date of the contractor's invoice, provided a proper invoice is received and there is no disagreement over quantity, quality, or contractor compliance with contract requirements.

(b) *Architect-engineer contracts.* The due date for making payments on contracts that contain the clause at 52.232-10, Payments Under Fixed-Price Architect-Engineer Contracts, shall be as follows:

(1) The due date for work or services completed by the contractor shall be the later of the following two events:

(i) The 30th day after the designated billing office has received a proper invoice from the contractor.

(ii) The 30th day after Government acceptance of the work or services completed by the contractor. On a final invoice where the payment amount is subject to contract settlement actions (e.g., release of claims), acceptance shall be deemed to have occurred on the effective date of the settlement. For the sole purpose of computing an interest penalty that might be due the contractor, Government acceptance shall be deemed to have occurred constructively on the 7th day after the contractor has completed the work or services in accordance with the terms and conditions of the contract (see also paragraph (b)(4) of this section). In the event that actual acceptance occurs within the constructive acceptance period, the determination of an interest penalty shall be based on the actual date of acceptance.

(2) The due date for progress payments shall be the 30th day after Government approval of contractor estimates of work or services accomplished. For the sole purpose of computing an interest penalty that might be due the contractor, Government approval shall be deemed to have occurred constructively on the 7th day after contractor estimates have been received by the designated billing office (see also paragraph (b)(4) of this section). In the event that actual approval occurs within the constructive approval period, the determination of an interest penalty shall be based on the actual date of approval.

(3) If the designated billing office fails to annotate the invoice or payment request with the actual date of receipt at the time of receipt, the payment due date shall be the 30th day after the date of the contractor's invoice or payment request, provided a proper invoice or payment request is received and there is no disagreement over quantity, quality, or contractor compliance with contract requirements.

(4) The constructive acceptance and constructive approval requirements described in paragraphs (b)(1) and (b)(2) of this section are conditioned upon receipt of a proper payment request and no disagreement over quantity, quality, contractor compliance with contract

requirements, or the requested progress payment amount. These requirements do not compel Government officials to accept work or services, approve contractor estimates, perform contract administration functions, or make payment prior to fulfilling their responsibilities. The contracting officer may specify a longer period for constructive acceptance or constructive approval, if required to afford the Government a reasonable opportunity to inspect and test the supplies furnished or to evaluate the services performed.

(c) *Construction contracts.* (1) The due date for making payments on construction contracts shall be as follows:

(i) The due date for making progress payments based on contracting officer approval of the estimated amount and value of work or services performed, including payments for reaching milestones in any project, shall be 14 days after receipt of a proper payment request by the designated billing office. If the designated billing office fails to annotate the payment request with the actual date of receipt at the time of receipt, the payment due date shall be deemed to be the 14th day after the date of the contractor's payment request, provided a proper payment request is received and there is no disagreement over quantity, quality, or contractor compliance with contract requirements. The contracting officer may specify a longer period in the solicitation and resulting contract if required to afford the Government a reasonable opportunity to adequately inspect the work and to determine the adequacy of the contractor's performance under the contract. The contract file shall indicate the justification for extending the due date beyond 14 days. The contracting officer or a representative shall not approve progress payment requests unless the certification and substantiation of amounts requested are provided as required by the clause at 52.232-5, Payments Under Fixed-Price Construction Contracts.

(ii) The due date for payment of any amounts retained by the contracting officer in accordance with the clause at 52.232-5, Payments Under Fixed-Price Construction Contracts, shall be as specified in the contract or, if not specified, 30 days after approval by the contracting officer for release to the contractor. This release of retained amounts shall be based on the contracting officer's determination that satisfactory progress has been made.

(iii) The due date for final payments based on completion and acceptance of all work (including any retained amounts), and payments for partial

deliveries that have been accepted by the Government (e.g., each separate building, public work, or other division of the contract for which the price is stated separately in the contract) shall be as follows:

(A) Either the 30th day after receipt by the designated billing office of a proper invoice from the contractor, or the 30th day after Government acceptance of the work or services completed by the contractor, whichever is later. If the designated billing office fails to annotate the invoice with the actual date of receipt at the time of receipt, the invoice payment due date shall be deemed to be the 30th day after the date of the contractor's invoice, provided a proper invoice is received and there is no disagreement over quantity, quality, or contractor compliance with contract requirements.

(B) On a final invoice where the payment amount is subject to contract settlement actions (e.g., release of contractor claims), acceptance shall be deemed to have occurred on the effective date of the contract settlement.

(iv) For the sole purpose of computing an interest penalty that might be due the contractor for payments described in paragraph (c)(1)(iii)(A) of this section, Government acceptance or approval shall be deemed to have occurred constructively on the 7th day after the contractor has completed the work or services in accordance with the terms and conditions of the contract (see also paragraph (c)(1)(v) of this section). In the event that actual acceptance occurs within the constructive acceptance period, the determination of an interest penalty shall be based on the actual date of acceptance.

(v) The constructive acceptance and constructive approval requirements described in paragraph (c)(1)(iv) of this section are conditioned upon receipt of a proper payment request and no disagreement over quantity, quality, contractor compliance with contract requirements, or the requested amount. These requirements do not compel Government officials to accept work or services, approve contractor estimates, perform contract administration functions, or make payment prior to fulfilling their responsibilities. The contracting officer may specify a longer period for constructive acceptance or constructive approval in the solicitation and resulting contract, if required to afford the Government a reasonable opportunity to adequately inspect the work and to determine the adequacy of the contractor's performance under the contract.

(2) Construction contracts contain special provisions concerning contractor

payments to subcontractors, along with special contractor certification requirements. The Office of Management and Budget has determined that these certifications are not to be construed as final acceptance of the subcontractor's performance. The certification in 52.232-5(c) implements this determination; however, certificates are still acceptable if the contractor deletes paragraph (c)(4) of 52.232-5 from the certificate.

(3)(i) Paragraph (d) of the clause at 52.232-5, Payments under Fixed-Price Construction Contracts, and paragraph (e)(6) of the clause at 52.232-27, Prompt Payment for Construction Contracts, provide for the contractor to pay interest on unearned amounts in certain circumstances. This interest shall be recovered from subsequent payments to the contractor. Therefore, normally no demand for payment shall be made. Contracting officers shall—

(A) Compute the amount in accordance with the clause;

(B) Provide the contractor with a final decision; and

(C) Notify the payment office of the amount to be withheld.

(ii) The payment office shall be responsible for making the deduction of interest. Amounts collected in accordance with these provisions shall revert to the Treasury of the United States.

(d) *Food and specified items.* Due dates for payments of contractor invoices for meat, meat food products, or fish; perishable agricultural commodities; and dairy products, edible fats or oils, and food products prepared from edible fats or oils are as follows:

(1) For meat or meat food products, as defined in section 2(a)(3) of the Packers and Stockyard Act of 1921 (7 U.S.C. 182(3)), and as further defined in Public Law 98-181, including any edible fresh or frozen poultry meat, any perishable poultry meat food product, fresh eggs, and any perishable egg product, as close as possible to, but not later than, the 7th day after product delivery.

(2) For fresh or frozen fish, as defined in section 204(3) of the Fish and Seafood Promotion Act of 1986 (16 U.S.C. 4003(3)), as close as possible to, but not later than, the 7th day after product delivery.

(3) For perishable agricultural commodities, as defined in section 1(4) of the Perishable Agricultural Commodities Act of 1930 (7 U.S.C. 499a(4)), as close as possible to, but not later than, the 10th day after product delivery, unless another date is specified in the contract.

(4) For dairy products (as defined in section 111(e) of the Dairy Production

Stabilization Act of 1983 (7 U.S.C. 4502(e)), edible fats or oils, and food products prepared from edible fats or oils, as close as possible to, but not later than, the 10th day after the date on which a proper invoice has been received. Liquid milk, cheese, certain processed cheese products, butter, yogurt, ice cream, mayonnaise, salad dressings, and other similar products, fall within this classification. Nothing in the Act limits this classification to refrigerated products. When questions arise regarding the proper classification of a specific product, prevailing industry practices should be followed in specifying a contract payment due date. The burden of proof that a classification of a specific product is, in fact, prevailing industry practice is upon the contractor making the representation.

(e) *Content of invoices.* A proper invoice must include the items listed in paragraphs (e)(1) through (e)(8) of this section. If the invoice does not comply with these requirements, it shall be returned within 7 days after the date the designated billing office received the invoice (3 days on contracts for meat, meat food products, or fish; 5 days on contracts for perishable agricultural commodities, dairy products, edible fats or oils, and food products prepared from edible fats or oils), with a statement of the reasons why it is not a proper invoice. If such notice is not timely, then an adjusted due date for the purpose of determining an interest penalty, if any, will be established in accordance with 32.907-1(b):

(1) Name and address of the contractor.

(2) Invoice date. (Contractors are encouraged to date invoices as close as possible to the date of mailing or transmission.)

(3) Contract number or other authorization for supplies delivered or services performed (including order number and contract line item number).

(4) Description, quantity, unit of measure, unit price, and extended price of supplies delivered or services performed.

(5) Shipping and payment terms (e.g., shipment number and date of shipment, prompt payment discount terms). Bill of lading number and weight of shipment will be shown for shipments on Government bills of lading.

(6) Name and address of contractor official to whom payment is to be sent (must be the same as that in the contract or in a proper notice of assignment).

(7) Name (where practicable), title, phone number, and mailing address of person to be notified in the event of a defective invoice.

(8) Any other information or documentation required by the contract (such as evidence of shipment).

(9) While not required, contractors are strongly encouraged to assign an identification number to each invoice.

(f) *Authorization to pay.* All invoice payments shall be supported by a receiving report or any other Government documentation authorizing payment. The agency receiving official should forward the receiving report or other Government documentation to the designated payment office by the 5th working day after Government acceptance or approval, unless other arrangements have been made. This period of time does not extend the due dates prescribed in this section. Acceptance should be completed as expeditiously as possible. The receiving report or other Government documentation authorizing payment shall, as a minimum, include the following:

(1) Contract number or other authorization for supplies delivered or services performed.

(2) Description of supplies delivered or services performed.

(3) Quantities of supplies received and accepted or services performed, if applicable.

(4) Date supplies delivered or services performed.

(5) Date supplies or services were accepted by the designated Government official (or progress payment request was approved if being made under the clause at 52.232-5, Payments Under Fixed-Price Construction Contracts, or the clause at 52.232-10, Payments Under Fixed-Price Architect-Engineer Contracts).

(6) Signature, or when permitted by agency regulations, electronic equivalent, printed name, title, mailing address, and telephone number of the designated Government official responsible for acceptance or approval functions.

(7) If the contract provides for the use of Government certified invoices in lieu of a separate receiving report, the Government certified invoice also must contain the information described in paragraphs (f)(1) through (f)(6) of this section.

(g) *Discounts.* When a discount for prompt payment is to be taken, payment will be made as close as possible to, but not later than, the end of the discount period. Payment terms are specified in the clause at 52.232-8, Discounts for Prompt Payment.

(h) *Billing office.* The designated billing office shall immediately annotate each invoice with the actual date it receives the invoice.

(i) *Payment office.* The designated payment office shall annotate each invoice and receiving report with the date a proper invoice or receiving report was received by the designated payment office.

(j) *Multiple payment rates.*

Contractors may be encouraged, but cannot be required, to submit separate invoices for products with different payment due dates under the same contract or order. When an invoice is received that contains items with different payment periods (a mixed invoice), the payment office shall comply with all contractual and statutory payment provisions. In dealing with mixed invoices the payment office may, subject to agency policy—

(1) Pay all items at the later of the due dates, provided applicable interest penalties also are paid;

(2) Pay all items at the earlier of the due dates; or

(3) Split invoice payments, making payment by the due date applicable to each payment class.

5. Section 32.906 is amended by revising the first sentence of paragraph (a) to read as follows:

32.906 Contract financing payments.

(a) Unless otherwise prescribed in policies and procedures issued by the agency head, or designee, the due date for making contract financing payments by the designated payment office will be the 30th day after the designated billing office has received a proper request.

* * *

6. Section 32.907-1 is amended by revising paragraphs (a), (b), (d), and (g) to read as follows:

32.907-1 Late invoice payment.

(a) An interest penalty shall be paid automatically by the designated payment office, without request from the contractor, when all of the following conditions, if applicable, have been met:

(1) A proper invoice was received by the designated billing office.

(2) A receiving report or other Government documentation authorizing payment was processed, and there was no disagreement over quantity, quality, or contractor compliance with any contract requirement.

(3) In the case of a final invoice, the payment amount is not subject to further contract settlement actions between the Government and the contractor.

(4) The designated payment office paid the contractor after the due date.

(b) The interest penalty computation shall not include—

(1) The time taken by the Government to notify the contractor of a defective

invoice, unless it exceeds the periods prescribed in 32.905(e);

(2) The time taken by the contractor to correct the invoice. If the designated billing office failed to notify the contractor of a defective invoice within the periods prescribed in 32.905(e), the due date on the corrected invoice will be adjusted by subtracting from such date the number of days taken beyond the prescribed notification of defects period. Any interest penalty owed the contractor will be based on this adjusted due date; and

(3) The period between the date of an attempted electronic funds transfer and the date the contractor furnishes correct electronic funds transfer data; provided the Government notifies the contractor of the defective data within 7 days after the Government receives notice that the transfer could not be completed because of defective data.

* * * * *

(d) The interest penalty shall be at the rate established by the Secretary of the Treasury under section 12 of the Contract Disputes Act of 1978 (41 U.S.C. 611) that is in effect on the day after the due date, except where the interest penalty is prescribed by other governmental authority (e.g., tariffs). The rate in effect on the day after the due date shall remain fixed during the period for which an interest penalty is calculated. This rate is referred to as the "Renegotiation Board Interest Rate," and it is published in the Federal Register semiannually on or about January 1 and July 1. Information concerning this interest rate can be obtained from the Department of the Treasury, Financial Management Service, Washington, DC 20227, telephone (202) 874-6995. Interest calculations shall be based upon a 360-day year. The interest penalty shall accrue daily on the invoice principal payment amount approved by the Government until the payment date of such approved principal amount; and will be compounded in 30-day increments inclusive from the first day after the due date through the payment date. That is, interest accrued at the end of any 30-day period will be added to the approved invoice principal payment amount and will be subject to interest penalties if not paid in the succeeding 30-day period. The interest penalty amount, the interest rate, and the period for which the interest penalty was computed, will be stated separately by the designated payment office on the check, in accompanying remittance advice, or, for an electronic funds transfer, by an appropriate electronic or other remittance advice. Adjustments

will be made by the designated payment office for errors in calculating interest penalties.

* * * * *

(g)(1) For contracts awarded on or after October 1, 1989, a penalty amount (calculated in accordance with subparagraph (g)(3) of this section) shall be paid, in addition to the interest penalty amount, only if the contractor—

(i) Is owed an interest penalty of \$1 or more;

(ii) Is not paid the interest penalty within 10 days after the date the invoice amount is paid; and

(iii) Makes a written demand to the designated payment office for additional penalty payment in accordance with paragraph (g)(2) of this section, postmarked not later than 40 days after the date the invoice amount is paid.

(2)(i) Contractors shall support written demands for additional penalty payments with the following data. No additional data shall be required. Contractors shall—

(A) Specifically assert that late payment interest is due under a specific invoice, and request payment of all overdue late payment interest penalty and such additional penalty as may be required;

(B) Attach a copy of the invoice on which the unpaid late payment interest was due; and

(C) State that payment of the principal has been received, including the date of receipt.

(ii) Demands must be postmarked on or before the 40th day after payment was made, except that—

(A) If the postmark is illegible or nonexistent, the demand must have been received and annotated with the date of receipt by the designated payment office on or before the 40th day after payment was made; or

(B) If the postmark is illegible or nonexistent and the designated payment office fails to make the required annotation, the demand's validity will be determined by the date the contractor has placed on the demand; provided such date is no later than the 40th day after payment was made.

(3)(i) The additional penalty shall be equal to 100 percent of any original late payment interest penalty that is due on or after January 22, 1990, except—

(A) For additional penalties due on or before January 22, 1992, such penalties shall not exceed \$2,500;

(B) After January 22, 1992, the additional penalty shall not exceed \$5,000;

(C) The additional penalty shall never be less than \$25; and

(D) No additional penalty is owed if the amount of the underlying interest penalty is less than \$1.

(ii) If the interest penalty ceases to accrue in accordance with the limits stated in paragraphs (e)(1) and (e)(2) of this section, the amount of the additional penalty shall be calculated on the amount of interest penalty that would have accrued in the absence of these limits, but shall not exceed the limits specified in paragraph (g)(3)(i) of this subsection.

(iii) For determining the maximum and minimum additional penalties, the test shall be the interest penalty due on each separate payment made for each separate contract. The maximum and minimum additional penalty shall not be based upon individual invoices unless the invoices are paid separately. Where payments are consolidated for disbursing purposes, the maximum and minimum additional penalty determination shall be made separately for each contract therein.

(iv) The additional penalty does not apply to payments regulated by other Government regulations (e.g., payments under utility contracts subject to tariffs and regulation).

7. Section 32.908 is revised to read as follows:

§ 32.908 Contract clauses.

(a) The contracting officer shall insert the clause at 52.232-26, Prompt Payment for Fixed-Price Architect-Engineer Contracts, in solicitations and contracts that contain the clause at 52.232-10, Payments Under Fixed-Price Architect-Engineer Contracts.

(1) As authorized in 32.905(b)(4), the contracting officer may modify the date in paragraph (a)(4)(i) of the clause to specify a period longer than 7 days for constructive acceptance or constructive approval, if required to afford the Government a practicable opportunity to inspect and test the supplies furnished or evaluate the services performed.

(2) If applicable, as authorized in 32.906(a) and only as permitted by agency policies and procedures, the contracting officer may insert in paragraph (b) of the clause a period shorter than 30 days (but not less than 7 days) for making contract financing payments.

(b) The contracting officer shall insert the clause at 52.232-27, Prompt Payment for Construction Contracts, in all solicitations and contracts for construction (see part 36).

(1) As authorized in 32.905(c)(1)(i), the contracting officer may modify the date in paragraph (a)(1)(i)(A) of the clause to specify a period longer than 14

days if required to afford the Government a reasonable opportunity to adequately inspect the work and to determine the adequacy of the Contractor's performance under the contract.

(2) As authorized in 32.905(c)(1)(v), the contracting officer may modify the date in paragraph (a)(4)(i) of the clause to specify a period longer than 7 days for constructive acceptance or constructive approval if required to afford the Government a reasonable opportunity to inspect and test the supplies furnished or evaluate the services performed.

(3) If applicable, as authorized in 32.906(a) and only as permitted by agency policies and procedures, the contracting officer may insert in paragraph (b) of the clause a period shorter than 30 days (but not less than 7 days) for making contract financing payments.

(c) The contracting officer shall insert the clause at 52.232-25, Prompt Payment, in all other solicitations and contracts (including contracts at or below the simplified acquisition threshold), except where the clause at 52.212-4, Contract Terms and Conditions—Commercial Items, applies, and except as indicated in 32.901.

(1) As authorized in 32.905(a)(1)(ii), the contracting officer may modify the date in paragraph (a)(5)(i) of the clause to specify a period longer than 7 days for constructive acceptance, if required to afford the Government a reasonable opportunity to inspect and test the supplies furnished or to evaluate the services performed, except in the case of a contract for the purchase of a commercial item as defined in 2.101, including a brand-name commercial item for authorized resale (e.g., commissary items).

(2) As authorized in 32.906(a) and only as permitted by agency policies and procedures, the contracting officer may insert in paragraph (b) of the clause a period shorter than 30 days (but not less than 7 days) for making contract financing payments.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

8. Section 52.212-4 is amended by revising the clause date and the undesignated paragraph following paragraph (g)(8) to read as follows:

52.212-4 Contract Terms and Conditions—Commercial Items.

* * * * *

CONTRACT TERMS AND CONDITIONS—COMMERCIAL ITEMS (MAY 1997)

* * * * *

(g) * * *
Invoices will be handled in accordance with the Prompt Payment Act (31 U.S.C. 3903) and Office of Management and Budget (OMB) Circular A-125, Prompt Payment. Contractors are encouraged to assign an identification number to each invoice.

* * * * *

9. Section 52.232-5 is amended by—
(a) Revising the clause date, and paragraphs (a), (b), and (c);

(b) By adding a paragraph heading at the beginning of the introductory text of paragraph (d) and revising paragraph (d)(2);

(c) Adding paragraph headings to paragraph (e), the introductory text of paragraph (f), paragraph (g), and the introductory text of paragraph (h) and paragraph (i); and

(d) Adding paragraph (j).

The revised and added text reads as follows:

52.232-5 Payments under Fixed-Price Construction Contracts.

* * * * *

PAYMENTS UNDER FIXED-PRICE CONSTRUCTION CONTRACTS (MAY 1997)

(a) *Payment of price.* The Government shall pay the Contractor the contract price as provided in this contract.

(b) *Progress payments.* The Government shall make progress payments monthly as the work proceeds, or at more frequent intervals as determined by the Contracting Officer, on estimates of work accomplished which meets the standards of quality established under the contract, as approved by the Contracting Officer.

(1) The Contractor's request for progress payments shall include the following substantiation:

(i) An itemization of the amounts requested, related to the various elements of work required by the contract covered by the payment requested.

(ii) A listing of the amount included for work performed by each subcontractor under the contract.

(iii) A listing of the total amount of each subcontract under the contract.

(iv) A listing of the amounts previously paid to each such subcontractor under the contract.

(v) Additional supporting data in a form and detail required by the Contracting Officer.

(2) In the preparation of estimates, the Contracting Officer may authorize material delivered on the site and preparatory work done to be taken into consideration. Material delivered to the Contractor at locations other than the site also may be taken into consideration if—

(i) Consideration is specifically authorized by this contract; and

(ii) The Contractor furnishes satisfactory evidence that it has acquired title to such material and that the material will be used to perform this contract.

(c) *Contractor certification.* Along with each request for progress payments, the

Contractor shall furnish the following certification, or payment shall not be made: (However, if the Contractor elects to delete paragraph (c)(4) from the certification, the certification is still acceptable.)

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

(1) The amounts requested are only for performance in accordance with the specifications, terms, and conditions of the contract;

(2) Payments to subcontractors and suppliers have been made from previous payments received under the contract, and timely payments will be made from the proceeds of the payment covered by this certification, in accordance with subcontract agreements and the requirements of chapter 39 of Title 31, United States Code;

(3) This request for progress payments does not include any amounts which the prime contractor intends to withhold or retain from a subcontractor or supplier in accordance with the terms and conditions of the subcontract; and

(4) This certification is not to be construed as final acceptance of a subcontractor's performance.

(Name)

(Title)

(Date)

(d) *Refund of unearned amounts.* * * *
* * * * *

(2) Be obligated to pay the Government an amount (computed by the Contracting Officer in the manner provided in paragraph (j) of this clause) equal to interest on the unearned amount from the 8th day after the date of receipt of the unearned amount until—

(e) *Retainage.* * * *
* * * * *

(f) *Title, liability, and reservation of rights.*
* * *

(g) *Reimbursement for bond premiums.*
* * *

(h) *Final payment.* * * *
* * * * *

(i) *Limitation because of undefinitized work.* * * *
* * * * *

(j) *Interest computation on unearned amounts.* In accordance with 31 U.S.C. 3903(c)(1), the amount payable under subparagraph (d)(2) of this clause shall be—

(1) Computed at the rate of average bond equivalent rates of 91-day Treasury bills auctioned at the most recent auction of such bills prior to the date the Contractor receives the unearned amount; and

(2) Deducted from the next available payment to the Contractor.

(End of clause)

11. Section 52.232-8 is amended by revising the clause date and paragraph (b) to read as follows:

52.232-8 Discounts for Prompt Payment.

* * * * *

DISCOUNTS FOR PROMPT PAYMENT
(MAY 1997)

* * * * *

(b) In connection with any discount offered for prompt payment, time shall be computed from the date of the invoice. If the Contractor has not placed a date on the invoice, the due date shall be calculated from the date the designated billing office receives a proper invoice, provided the agency annotates such invoice with the date of receipt at the time of receipt. For the purpose of computing the discount earned, payment shall be considered to have been made on the date that appears on the payment check or, for an electronic funds transfer, the specified payment date. When the discount date falls on a Saturday, Sunday, or legal holiday when Federal Government offices are closed and Government business is not expected to be conducted, payment may be made on the following business day.

(End of clause)

12. Sections 52.232-25, 52.232-26, and 52.232-27 are revised to read as follows:

52.232-25 Prompt Payment.

As prescribed in 32.908(c), insert the following clause:

PROMPT PAYMENT (MAY 1997)

Notwithstanding any other payment clause in this contract, the Government will make invoice payments and contract financing payments under the terms and conditions specified in this clause. Payment shall be considered as being made on the day a check is dated or the date of an electronic funds transfer. Definitions of pertinent terms are set forth in section 32.902 of the Federal Acquisition Regulation. All days referred to in this clause are calendar days, unless otherwise specified. (However, see subparagraph (a)(4) of this clause concerning payments due on Saturdays, Sundays, and legal holidays.)

(a) *Invoice payments* (1) *Due Date.* (i) Except as indicated in subparagraph (a)(2) and paragraph (c) of this clause, the due date for making invoice payments by the designated payment office shall be the later of the following two events:

(A) The 30th day after the designated billing office has received a proper invoice from the Contractor (except as provided in subdivision (a)(1)(ii) of this clause).

(B) The 30th day after Government acceptance of supplies delivered or services performed by the Contractor. On a final invoice where the payment amount is subject to contract settlement actions, acceptance shall be deemed to have occurred on the effective date of the contract settlement.

(ii) If the designated billing office fails to annotate the invoice with the actual date of receipt at the time of receipt, the invoice payment due date shall be the 30th day after the date of the Contractor's invoice; provided a proper invoice is received and there is no disagreement over quantity, quality, or Contractor compliance with contract requirements.

(2) *Certain food products and other payments.* (i) Due dates on Contractor invoices for meat, meat food products, or fish; perishable agricultural commodities; and dairy products, edible fats or oils, and food products prepared from edible fats or oils are—

(A) For meat or meat food products, as defined in section 2(a)(3) of the Packers and Stockyard Act of 1921 (7 U.S.C. 182(3)), and as further defined in Pub. L. 98-181, including any edible fresh or frozen poultry meat, any perishable poultry meat food product, fresh eggs, and any perishable egg product, as close as possible to, but not later than, the 7th day after product delivery.

(B) For fresh or frozen fish, as defined in section 204(3) of the Fish and Seafood Promotion Act of 1986 (16 U.S.C. 4003(3)), as close as possible to, but not later than, the 7th day after product delivery.

(C) For perishable agricultural commodities, as defined in section 1(4) of the Perishable Agricultural Commodities Act of 1930 (7 U.S.C. 499a(4)), as close as possible to, but not later than, the 10th day after product delivery, unless another date is specified in the contract.

(D) For dairy products, as defined in section 111(e) of the Dairy Production Stabilization Act of 1983 (7 U.S.C. 4502(e)), edible fats or oils, and food products prepared from edible fats or oils, as close as possible to, but not later than, the 10th day after the date on which a proper invoice has been received. Liquid milk, cheese, certain processed cheese products, butter, yogurt, ice cream, mayonnaise, salad dressings, and other similar products, fall within this classification. Nothing in the Act limits this classification to refrigerated products. When questions arise regarding the proper classification of a specific product, prevailing industry practices will be followed in specifying a contract payment due date. The burden of proof that a classification of a specific product is, in fact, prevailing industry practice is upon the Contractor making the representation.

(ii) If the contract does not require submission of an invoice for payment (e.g., periodic lease payments), the due date will be as specified in the contract.

(3) *Contractor's invoice.* The Contractor shall prepare and submit invoices to the designated billing office specified in the contract. A proper invoice must include the items listed in paragraph (a)(3)(i) through (a)(3)(viii) of this clause. If the invoice does not comply with these requirements, it shall be returned within 7 days after the date the designated billing office received the invoice (3 days for meat, meat food products, or fish; 5 days for perishable agricultural commodities, edible fats or oils, and food products prepared from edible fats or oils), with a statement of the reasons why it is not a proper invoice. Untimely notification will be taken into account in computing any interest penalty owed the Contractor in the manner described in subparagraph (a)(5) of this clause.

(i) Name and address of the Contractor.

(ii) Invoice date. (The Contractor is encouraged to date invoices as close as possible to the date of the mailing or transmission.)

(iii) Contract number or other authorization for supplies delivered or services performed (including order number and contract line item number).

(iv) Description, quantity, unit of measure, unit price, and extended price of supplies delivered or services performed.

(v) Shipping and payment terms (e.g., shipment number and date of shipment, prompt payment discount terms). Bill of lading number and weight of shipment will be shown for shipments on Government bills of lading.

(vi) Name and address of Contractor official to whom payment is to be sent (must be the same as that in the contract or in a proper notice of assignment).

(vii) Name (where practicable), title, phone number, and mailing address of person to be notified in the event of a defective invoice.

(viii) Any other information or documentation required by the contract (such as evidence of shipment).

(ix) While not required, the Contractor is strongly encouraged to assign an identification number to each invoice.

(4) *Interest penalty.* An interest penalty shall be paid automatically by the designated payment office, without request from the Contractor, if payment is not made by the due date and the conditions listed in paragraphs (a)(4)(i) through (a)(4)(iii) of this clause are met, if applicable. However, when the due date falls on a Saturday, Sunday, or legal holiday when Federal Government offices are closed and Government business is not expected to be conducted, payment may be made on the following business day without incurring a late payment interest penalty.

(i) A proper invoice was received by the designated billing office.

(ii) A receiving report or other Government documentation authorizing payment was processed, and there was no disagreement over quantity, quality, or Contractor compliance with any contract term or condition.

(iii) In the case of a final invoice for any balance of funds due the Contractor for supplies delivered or services performed, the amount was not subject to further contract settlement actions between the Government and the Contractor.

(5) *Computing penalty amount.* The interest penalty shall be at the rate established by the Secretary of the Treasury under section 12 of the Contract Disputes Act of 1978 (41 U.S.C. 611) that is in effect on the day after the due date, except where the interest penalty is prescribed by other governmental authority (e.g., tariffs). This rate is referred to as the "Renegotiation Board Interest Rate," and it is published in the Federal Register semiannually on or about January 1 and July 1. The interest penalty shall accrue daily on the invoice principal payment amount approved by the Government until the payment date of such approved principal amount; and will be compounded in 30-day increments inclusive from the first day after the due date through the payment date. That is, interest accrued at the end of any 30-day period will be added to the approved invoice principal payment amount and will be subject to interest

penalties if not paid in the succeeding 30-day period. If the designated billing office failed to notify the Contractor of a defective invoice within the periods prescribed in subparagraph (a)(3) of this clause, the due date on the corrected invoice will be adjusted by subtracting from such date the number of days taken beyond the prescribed notification of defects period. Any interest penalty owed the Contractor will be based on this adjusted due date. Adjustments will be made by the designated payment office for errors in calculating interest penalties.

(i) For the sole purpose of computing an interest penalty that might be due the Contractor, Government acceptance shall be deemed to have occurred constructively on the 7th day (unless otherwise specified in this contract) after the Contractor delivered the supplies or performed the services in accordance with the terms and conditions of the contract, unless there is a disagreement over quantity, quality, or Contractor compliance with a contract provision. In the event that actual acceptance occurs within the constructive acceptance period, the determination of an interest penalty shall be based on the actual date of acceptance. The constructive acceptance requirement does not, however, compel Government officials to accept supplies or services, perform contract administration functions, or make payment prior to fulfilling their responsibilities.

(ii) The following periods of time will not be included in the determination of an interest penalty:

(A) The period taken to notify the Contractor of defects in invoices submitted to the Government, but this may not exceed 7 days (3 days for meat, meat food products, or fish; 5 days for perishable agricultural commodities, dairy products, edible fats or oils, and food products prepared from edible fats or oils).

(B) The period between the defects notice and resubmission of the corrected invoice by the Contractor.

(C) For incorrect electronic funds transfer (EFT) information, in accordance with the EFT clause of this contract.

(iii) Interest penalties will not continue to accrue after the filing of a claim for such penalties under the clause at 52.233-1, Disputes, or for more than 1 year. Interest penalties of less than \$1 need not be paid.

(iv) Interest penalties are not required on payment delays due to disagreement between the Government and the Contractor over the payment amount or other issues involving contract compliance or on amounts temporarily withheld or retained in accordance with the terms of the contract. Claims involving disputes, and any interest that may be payable, will be resolved in accordance with the clause at 52.233-1, Disputes.

(6) *Prompt payment discounts.* An interest penalty also shall be paid automatically by the designated payment office, without request from the Contractor, if a discount for prompt payment is taken improperly. The interest penalty will be calculated as described in subparagraph (a)(5) of this clause on the amount of discount taken for the period beginning with the first day after the end of the discount period through the date when the Contractor is paid.

(7) *Additional interest penalty.* (i) If this contract was awarded on or after October 1, 1989, a penalty amount, calculated in accordance with paragraph (a)(7)(iii) of this clause, shall be paid in addition to the interest penalty amount if the Contractor—

(A) Is owed an interest penalty of \$1 or more;

(B) Is not paid the interest penalty within 10 days after the date the invoice amount is paid; and

(C) Makes a written demand to the designated payment office for additional penalty payment, in accordance with paragraph (a)(7)(ii) of this clause, postmarked not later than 40 days after the invoice amount is paid.

(ii)(A) Contractors shall support written demands for additional penalty payments with the following data. No additional data shall be required. Contractors shall—

(1) Specifically assert that late payment interest is due under a specific invoice, and request payment of all overdue late payment interest penalty and such additional penalty as may be required;

(2) Attach a copy of the invoice on which the unpaid late payment interest was due; and

(3) State that payment of the principal has been received, including the date of receipt.

(B) Demands must be postmarked on or before the 40th day after payment was made, except that—

(1) If the postmark is illegible or nonexistent, the demand must have been received and annotated with the date of receipt by the designated payment office on or before the 40th day after payment was made; or

(2) If the postmark is illegible or nonexistent and the designated payment office fails to make the required annotation, the demand's validity will be determined by the date the Contractor has placed on the demand; provided such date is no later than the 40th day after payment was made.

(iii)(A) The additional penalty shall be equal to 100 percent of any original late payment interest penalty that is due on or after January 22, 1990, except—

(1) For additional penalties due on or before January 22, 1992, such penalties shall not exceed \$2,500;

(2) After January 22, 1992, the additional penalty shall not exceed \$5,000;

(3) The additional penalty shall never be less than \$25; and

(4) No additional penalty is owed if the amount of the underlying interest penalty is less than \$1.

(B) If the interest penalty ceases to accrue in accordance with the limits stated in paragraph (a)(5)(iii) of this clause, the amount of the additional penalty shall be calculated on the amount of interest penalty that would have accrued in the absence of these limits, subject to the overall limits on the additional penalty specified in paragraph (a)(7)(iii)(A) of this clause.

(C) For determining the maximum and minimum additional penalties, the test shall be the interest penalty due on each separate payment made for each separate contract. The maximum and minimum additional penalty shall not be based upon individual

invoices unless the invoices are paid separately. Where payments are consolidated for disbursing purposes, the maximum and minimum additional penalty determination shall be made separately for each contract therein.

(D) The additional penalty does not apply to payments regulated by other Government regulations (e.g., payments under utility contracts subject to tariffs and regulation).

(b) *Contract financing payments*—(1) *Due dates for recurring financing payments.* If this contract provides for contract financing, requests for payment shall be submitted to the designated billing office as specified in this contract or as directed by the Contracting Officer. Contract financing payments shall be made on the (*insert day as prescribed by Agency head; if not prescribed, insert 30th day*) day after receipt of a proper contract financing request by the designated billing office. In the event that an audit or other review of a specific financing request is required to ensure compliance with the terms and conditions of the contract, the designated payment office is not compelled to make payment by the due date specified.

(2) *Due dates for other contract financing.* For advance payments, loans, or other arrangements that do not involve recurring submissions of contract financing requests, payment shall be made in accordance with the corresponding contract terms or as directed by the Contracting Officer.

(3) *Interest penalty not applicable.* Contract financing payments shall not be assessed an interest penalty for payment delays.

(c) *Fast payment procedure due dates.* If this contract contains the clause at 52.213-1, Fast Payment Procedure, payments will be made within 15 days after the date of receipt of the invoice.

(End of clause)

52.232-26 Prompt Payment for Fixed-Price Architect-Engineer Contracts.

As prescribed in 32.908(a), insert the following clause:

PROMPT PAYMENT FOR FIXED-PRICE ARCHITECT-ENGINEER CONTRACTS (MAY 1997)

Notwithstanding any other payment terms in this contract, the Government will make invoice payments and contract financing payments under the terms and conditions specified in this clause. Payment shall be considered as being made on the day a check is dated or the date of an electronic funds transfer. Definitions of pertinent terms are set forth in section 32.902 of the Federal Acquisition Regulation. All days referred to in this clause are calendar days, unless otherwise specified. (However, see subparagraph (a)(3) of this clause concerning payments due on Saturdays, Sundays, and legal holidays.)

(a) *Invoice payments.*—(1) *Due date.* The due date for making invoice payments shall be—

(i) For work or services completed by the Contractor, the later of the following two events:

(A) The 30th day after the designated billing office has received a proper invoice from the Contractor (except as provided in paragraph (a)(1)(iii) of this clause).

(B) The 30th day after Government acceptance of the work or services completed by the Contractor. On a final invoice where the payment amount is subject to contract settlement actions (e.g., release of claims), acceptance shall be deemed to have occurred on the effective date of the contract settlement.

(ii) The due date for progress payments shall be the 30th day after Government approval of Contractor estimates of work or services accomplished.

(iii) If the designated billing office fails to annotate the invoice or payment request with the actual date of receipt at the time of receipt, the payment due date shall be the 30th day after the date of the Contractor's invoice or payment request, provided a proper invoice or payment request is received and there is no disagreement over quantity, quality, or Contractor compliance with contract requirements.

(2) Contractor's invoice. The Contractor shall prepare and submit invoices to the designated billing office specified in the contract. A proper invoice must include the items listed in paragraphs (a)(2)(i) through (a)(2)(viii) of this clause. If the invoice does not comply with these requirements, it shall be returned within 7 days after the date the designated billing office received the invoice, with a statement of the reasons why it is not a proper invoice. Untimely notification will be taken into account in computing any interest penalty owed the Contractor in the manner described in subparagraph (a)(4) of this clause:

(i) Name and address of the Contractor.

(ii) Invoice date. (The Contractor is encouraged to date invoices as close as possible to the date of mailing or transmission.)

(iii) Contract number or other authorization for work or services performed (including order number and contract line item number).

(iv) Description of work or services performed.

(v) Delivery and payment terms (e.g., prompt payment discount terms).

(vi) Name and address of Contractor official to whom payment is to be sent (must be the same as that in the contract or in a proper notice of assignment).

(vii) Name (where practicable), title, phone number, and mailing address of person to be notified in the event of a defective invoice.

(viii) Any other information or documentation required by the contract.

(ix) While not required, the Contractor is strongly encouraged to assign an identification number to each invoice.

(3) *Interest penalty.* An interest penalty shall be paid automatically by the designated payment office, without request from the Contractor, if payment is not made by the due date and the conditions listed in paragraphs (a)(3)(i) through (a)(3)(iii) of this clause are met, if applicable. However, when the due date falls on a Saturday, Sunday, or legal holiday when Federal Government offices are closed and Government business is not expected to be conducted, payment may be made on the following business day without incurring a late payment interest penalty.

(i) A proper invoice was received by the designated billing office.

(ii) A receiving report or other Government documentation authorizing payment was processed and there was no disagreement over quantity, quality, Contractor compliance with any contract term or condition, or requested progress payment amount.

(iii) In the case of a final invoice for any balance of funds due the Contractor for work or services performed, the amount was not subject to further contract settlement actions between the Government and the Contractor.

(4) *Computing penalty amount.* The interest penalty shall be at the rate established by the Secretary of the Treasury under section 12 of the Contract Disputes Act of 1978 (41 U.S.C. 611) that is in effect on the day after the due date, except where the interest penalty is prescribed by other governmental authority (e.g., tariffs). This rate is referred to as the "Renegotiation Board Interest Rate," and it is published in the Federal Register semiannually on or about January 1 and July 1. The interest penalty shall accrue daily on the invoice principal payment amount approved by the Government until the payment date of such approved principal amount; and will be compounded in 30-day increments inclusive from the first day after the due date through the payment date. That is, interest accrued at the end of any 30-day period will be added to the approved invoice principal payment amount and will be subject to interest penalties if not paid in the succeeding 30-day period. If the designated billing office failed to notify the Contractor of a defective invoice within the periods prescribed in subparagraph (a)(2) of this clause, the due date on the corrected invoice will be adjusted by subtracting from such date the number of days taken beyond the prescribed notification of defects period. Any interest penalty owed the Contractor will be based on this adjusted due date. Adjustments will be made by the designated payment office for errors in calculating interest penalties.

(i) For the sole purpose of computing an interest penalty that might be due the Contractor, Government acceptance or approval shall be deemed to have occurred constructively as shown in paragraphs (a)(4)(i) (A) and (B) of this clause. In the event that actual acceptance or approval occurs within the constructive acceptance or approval period, the determination of an interest penalty shall be based on the actual date of acceptance or approval. Constructive acceptance or constructive approval requirements do not apply if there is a disagreement over quantity, quality, Contractor compliance with a contract provision, or requested progress payment amounts. These requirements also do not compel Government officials to accept work or services, approve Contractor estimates, perform contract administration functions, or make payment prior to fulfilling their responsibilities.

(A) For work or services completed by the Contractor, Government acceptance shall be deemed to have occurred constructively on the 7th day after the Contractor has completed the work or services in accordance with the terms and conditions of the contract.

(B) For progress payments, Government approval shall be deemed to have occurred on the 7th day after Contractor estimates have been received by the designated billing office.

(ii) The following periods of time will not be included in the determination of an interest penalty:

(A) The period taken to notify the Contractor of defects in invoices submitted to the Government, but this may not exceed 7 days.

(B) The period between the defects notice and resubmission of the corrected invoice by the Contractor.

(C) For incorrect electronic funds transfer (EFT) information, in accordance with the EFT clause of this contract.

(iii) Interest penalties will not continue to accrue after the filing of a claim for such penalties under the clause at 52.233-1, Disputes, or for more than 1 year. Interest penalties of less than \$1 need not be paid.

(iv) Interest penalties are not required on payment delays due to disagreement between the Government and the Contractor over the payment amount or other issues involving contract compliance, or on amounts temporarily withheld or retained in accordance with the terms of the contract. Claims involving disputes, and any interest that may be payable will be resolved in accordance with the clause at 52.233-1, Disputes.

(5) *Prompt payment discounts.* An interest penalty also shall be paid automatically by the designated payment office, without request from the Contractor, if a discount for prompt payment is taken improperly. The interest penalty will be calculated on the amount of discount taken for the period beginning with the first day after the end of the discount period through the date when the Contractor is paid.

(6) *Additional interest penalty.* (i) If this contract was awarded on or after October 1, 1989, a penalty amount, calculated in accordance with paragraph (a)(6)(iii) of this clause, shall be paid in addition to the interest penalty amount if the Contractor—

(A) Is owed an interest penalty of \$1 or more;

(B) Is not paid the interest penalty within 10 days after the date the invoice amount is paid; and

(C) Makes a written demand to the designated payment office for additional penalty payment, in accordance with paragraph (a)(6)(ii) of this clause, postmarked not later than 40 days after the date the invoice amount is paid.

(ii)(A) Contractors shall support written demands for additional penalty payments with the following data. No additional data shall be required. Contractors shall—

(1) Specifically assert that late payment interest is due under a specific invoice, and request payment of all overdue late payment interest penalty and such additional penalty as may be required;

(2) Attach a copy of the invoice on which the unpaid late payment interest was due; and

(3) State that payment of the principal has been received, including the date of receipt.

(B) Demands must be postmarked on or before the 40th day after payment was made, except that—

(1) If the postmark is illegible or nonexistent, the demand must have been received and annotated with the date of receipt by the designated payment office on or before the 40th day after payment was made; or

(2) If the postmark is illegible or nonexistent and the designated payment office fails to make the required annotation, the demand's validity will be determined by the date the Contractor has placed on the demand; provided such date is no later than the 40th day after payment was made.

(iii)(A) The additional penalty shall be equal to 100 percent of any original late payment interest penalty that is due on or after January 22, 1990, except—

(1) For additional penalties due on or before January 22, 1992, such penalties shall not exceed \$2,500;

(2) After January 22, 1992, the additional penalty shall not exceed \$5,000;

(3) The additional penalty shall never be less than \$25; and

(4) No additional penalty is owed if the amount of the underlying interest penalty is less than \$1.

(B) If the interest penalty ceases to accrue in accordance with the limits stated in paragraph (a)(4)(iii) of this clause, the amount of the additional penalty shall be calculated on the amount of interest penalty that would have accrued in the absence of these limits, subject to the overall limits on the additional penalty specified in paragraph (a)(6)(iii)(A) of this clause.

(C) For determining the maximum and minimum additional penalties, the test shall be the interest penalty due on each separate payment made for each separate contract. The maximum and minimum additional penalty shall not be based upon individual invoices unless the invoices are paid separately. Where payments are consolidated for disbursing purposes, the maximum and minimum additional penalty determination shall be made separately for each contract therein.

(D) The additional penalty does not apply to payments regulated by other Government regulations (e.g., payments under utility contracts subject to tariffs and regulation).

(b) *Contract financing payments—(1) Due dates for recurring financing payments.* If this contract provides for contract financing, requests for payment shall be submitted to the designated billing office as specified in this contract or as directed by the Contracting Officer. Contract financing payments shall be made on the (insert day as prescribed by Agency head; if not prescribed, insert 30th day) day after receipt of a proper contract financing request by the designated billing office. In the event that an audit or other review of a specific financing request is required to ensure compliance with the terms and conditions of the contract, the designated payment office is not compelled to make payment by the due date specified.

(2) *Due dates for other contract financing.* For advance payments, loans, or other arrangements that do not involve recurring submissions of contract financing requests,

payment shall be made in accordance with the corresponding contract terms or as directed by the Contracting Officer.

(3) *Interest penalty not applicable.* Contract financing payments shall not be assessed an interest penalty for payment delays.

(End of clause)

52.232–27 Prompt Payment for Construction Contracts.

As prescribed in 32.908(b), insert the following clause:

PROMPT PAYMENT FOR CONSTRUCTION CONTRACTS (MAY 1997)

Notwithstanding any other payment terms in this contract, the Government will make invoice payments and contract financing payments under the terms and conditions specified in this clause. Payment shall be considered as being made on the day a check is dated or the date of an electronic funds transfer. Definitions of pertinent terms are set forth in section 32.902 of the Federal Acquisition Regulation. All days referred to in this clause are calendar days, unless otherwise specified. (However, see subparagraph (a)(3) concerning payments due on Saturdays, Sundays, and legal holidays.)

(a) *Invoice payments—(1) Types of invoice payments.* For purposes of this clause, there are several types of invoice payments that may occur under this contract, as follows:

(i) Progress payments, if provided for elsewhere in this contract, based on Contracting Officer approval of the estimated amount and value of work or services performed, including payments for reaching milestones in any project:

(A) The due date for making such payments shall be 14 days after receipt of the payment request by the designated billing office. If the designated billing office fails to annotate the payment request with the actual date of receipt at the time of receipt, the payment due date shall be the 14th day after the date of the Contractor's payment request, provided a proper payment request is received and there is no disagreement over quantity, quality, or Contractor compliance with contract requirements.

(B) The due date for payment of any amounts retained by the Contracting Officer in accordance with the clause at 52.232–5, Payments Under Fixed-Price Construction Contracts, shall be as specified in the contract or, if not specified, 30 days after approval for release to the Contractor by the Contracting Officer.

(ii) Final payments based on completion and acceptance of all work and presentation of release of all claims against the Government arising by virtue of the contract, and payments for partial deliveries that have been accepted by the Government (e.g., each separate building, public work, or other division of the contract for which the price is stated separately in the contract):

(A) The due date for making such payments shall be either the 30th day after receipt by the designated billing office of a proper invoice from the Contractor, or the 30th day after Government acceptance of the work or services completed by the Contractor, whichever is later. If the designated billing office fails to annotate the

invoice with the date of actual receipt at the time of receipt, the invoice payment due date shall be the 30th day after the date of the Contractor's invoice, provided a proper invoice is received and there is no disagreement over quantity, quality, or Contractor compliance with contract requirements.

(B) On a final invoice where the payment amount is subject to contract settlement actions (e.g., release of claims), acceptance shall be deemed to have occurred on the effective date of the contract settlement.

(2) *Contractor's invoice.* The Contractor shall prepare and submit invoices to the designated billing office specified in the contract. A proper invoice must include the items listed in paragraphs (a)(2)(i) through (a)(2)(ix) of this clause. If the invoice does not comply with these requirements, it shall be returned within 7 days after the date the designated billing office received the invoice, with a statement of the reasons why it is not a proper invoice. Untimely notification will be taken into account in computing any interest penalty owed the Contractor in the manner described in subparagraph (a)(4) of this clause.

(i) Name and address of the Contractor.

(ii) Invoice date. (The Contractor is encouraged to date invoices as close as possible to the date of mailing or transmission.)

(iii) Contract number or other authorization for work or services performed (including order number and contract line item number).

(iv) Description of work or services performed.

(v) Delivery and payment terms (e.g., prompt payment discount terms).

(vi) Name and address of Contractor official to whom payment is to be sent (must be the same as that in the contract or in a proper notice of assignment).

(vii) Name (where practicable), title, phone number, and mailing address of person to be notified in the event of a defective invoice.

(viii) For payments described in paragraph (a)(1)(i) of this clause, substantiation of the amounts requested and certification in accordance with the requirements of the clause at 52.232–5, Payments Under Fixed-Price Construction Contracts.

(ix) Any other information or documentation required by the contract.

(x) While not required, the Contractor is strongly encouraged to assign an identification number to each invoice.

(3) *Interest penalty.* An interest penalty shall be paid automatically by the designated payment office, without request from the Contractor, if payment is not made by the due date and the conditions listed in paragraphs (a)(3)(i) through (a)(3)(iii) of this clause are met, if applicable. However, when the due date falls on a Saturday, Sunday, or legal holiday when Federal Government offices are closed and Government business is not expected to be conducted, payment may be made on the following business day without incurring a late payment interest penalty.

(i) A proper invoice was received by the designated billing office.

(ii) A receiving report or other Government documentation authorizing payment was

processed and there was no disagreement over quantity, quality, Contractor compliance with any contract term or condition, or requested progress payment amount.

(iii) In the case of a final invoice for any balance of funds due the Contractor for work or services performed, the amount was not subject to further contract settlement actions between the Government and the Contractor.

(4) *Computing penalty amount.* The interest penalty shall be at the rate established by the Secretary of the Treasury under section 12 of the Contract Disputes Act of 1978 (41 U.S.C. 611) that is in effect on the day after the due date, except where the interest penalty is prescribed by other governmental authority (e.g., tariffs). This rate is referred to as the "Renegotiation Board Interest Rate," and it is published in the Federal Register semiannually on or about January 1 and July 1. The interest penalty shall accrue daily on the invoice principal payment amount approved by the Government until the payment date of such approved principal amount; and will be compounded in 30-day increments inclusive from the first day after the due date through the payment date. That is, interest accrued at the end of any 30-day period will be added to the approved invoice principal payment amount and will be subject to interest penalties if not paid in the succeeding 30-day period. If the designated billing office failed to notify the Contractor of a defective invoice within the periods prescribed in subparagraph (a)(2) of this clause, the due date on the corrected invoice will be adjusted by subtracting from such date the number of days taken beyond the prescribed notification of defects period. Any interest penalty owed the Contractor will be based on this adjusted due date. Adjustments will be made by the designated payment office for errors in calculating interest penalties.

(i) For the sole purpose of computing an interest penalty that might be due the Contractor for payments described in paragraph (a)(1)(ii) of this clause, Government acceptance or approval shall be deemed to have occurred constructively on the 7th day after the Contractor has completed the work or services in accordance with the terms and conditions of the contract. In the event that actual acceptance or approval occurs within the constructive acceptance or approval period, the determination of an interest penalty shall be based on the actual date of acceptance or approval. Constructive acceptance or constructive approval requirements do not apply if there is a disagreement over quantity, quality, or Contractor compliance with a contract provision. These requirements also do not compel Government officials to accept work or services, approve Contractor estimates, perform contract administration functions, or make payment prior to fulfilling their responsibilities.

(ii) The following periods of time will not be included in the determination of an interest penalty:

(A) The period taken to notify the Contractor of defects in invoices submitted to the Government, but this may not exceed 7 days.

(B) The period between the defects notice and resubmission of the corrected invoice by the Contractor.

(C) For incorrect electronic funds transfer (EFT) information, in accordance with the EFT clause of this contract.

(iii) Interest penalties will not continue to accrue after the filing of a claim for such penalties under the clause at 52.233-1, Disputes, or for more than 1 year. Interest penalties of less than \$1 need not be paid.

(iv) Interest penalties are not required on payment delays due to disagreement between the Government and the Contractor over the payment amount or other issues involving contract compliance, or on amounts temporarily withheld or retained in accordance with the terms of the contract. Claims involving disputes, and any interest that may be payable, will be resolved in accordance with the clause at 52.233-1, Disputes.

(5) *Prompt payment discounts.* An interest penalty also shall be paid automatically by the designated payment office, without request from the Contractor, if a discount for prompt payment is taken improperly. The interest penalty will be calculated on the amount of discount taken for the period beginning with the first day after the end of the discount period through the date when the Contractor is paid.

(6) *Additional interest penalty.* (i) If this contract was awarded on or after October 1, 1989, a penalty amount, calculated in accordance with subdivision (a)(6)(iii) of this clause, shall be paid in addition to the interest penalty amount if the Contractor—

(A) Is owed an interest penalty of \$1 or more;

(B) Is not paid the interest penalty within 10 days after the date the invoice amount is paid; and

(C) Makes a written demand to the designated payment office for additional penalty payment, in accordance with subdivision (a)(6)(ii) of this clause, postmarked not later than 40 days after the date the invoice amount is paid.

(ii)(A) Contractors shall support written demands for additional penalty payments with the following data. No additional data shall be required. Contractors shall—

(1) Specifically assert that late payment interest is due under a specific invoice, and request payment of all overdue late payment interest penalty and such additional penalty as may be required;

(2) Attach a copy of the invoice on which the unpaid late payment interest was due; and

(3) State that payment of the principal has been received, including the date of receipt.

(B) Demands must be postmarked on or before the 40th day after payment was made, except that—

(1) If the postmark is illegible or nonexistent, the demand must have been received and annotated with the date of receipt by the designated payment office on or before the 40th day after payment was made; or

(2) If the postmark is illegible or nonexistent and the designated payment office fails to make the required annotation, the demand's validity will be determined by

the date the Contractor has placed on the demand; provided such date is no later than the 40th day after payment was made.

(iii)(A) The additional penalty shall be equal to 100 percent of any original late payment interest penalty that is due on or after January 22, 1990, except—

(1) For additional penalties due on or before January 22, 1992, such penalties shall not exceed \$2,500;

(2) After January 22, 1992, the additional penalty shall not exceed \$5,000;

(3) The additional penalty shall never be less than \$25; and

(4) No additional penalty is owed if the amount of the underlying interest penalty is less than \$1.

(B) If the interest penalty ceases to accrue in accordance with the limits stated in subdivision (a)(4)(iii) of this clause, the amount of the additional penalty shall be calculated on the amount of interest penalty that would have accrued in the absence of these limits, subject to the overall limits on the additional penalty specified in subdivision (a)(6)(iii)(A) of this clause.

(C) For determining the maximum and minimum additional penalties, the test shall be the interest penalty due on each separate payment made for each separate contract. The maximum and minimum additional penalty shall not be based upon individual invoices unless the invoices are paid separately. Where payments are consolidated for disbursing purposes, the maximum and minimum additional penalty determination shall be made separately for each contract therein.

(D) The additional penalty does not apply to payments regulated by other Government regulations (e.g., payments under utility contracts subject to tariffs and regulation).

(b) *Contract financing payments—(1) Due dates for recurring financing payments.* If this contract provides for contract financing, requests for payment shall be submitted to the designated billing office as specified in this contract or as directed by the Contracting Officer. Contract financing payments shall be made on the (*insert day as prescribed by Agency head; if not prescribed, insert 30th day*) day after receipt of a proper contract financing request by the designated billing office. In the event that an audit or other review of a specific financing request is required to ensure compliance with the terms and conditions of the contract, the designated payment office is not compelled to make payment by the due date specified.

(2) *Due dates for other contract financing.* For advance payments, loans, or other arrangements that do not involve recurring submissions of contract financing requests, payment shall be made in accordance with the corresponding contract terms or as directed by the Contracting Officer.

(3) *Interest penalty not applicable.* Contract financing payments shall not be assessed an interest penalty for payment delays.

(c) *Subcontract clause requirements.* The Contractor shall include in each subcontract for property or services (including a material supplier) for the purpose of performing this contract the following:

(1) *Prompt payment for subcontractors.* A payment clause that obligates the Contractor

to pay the subcontractor for satisfactory performance under its subcontract not later than 7 days from receipt of payment out of such amounts as are paid to the Contractor under this contract.

(2) *Interest for subcontractors.* An interest penalty clause that obligates the Contractor to pay to the subcontractor an interest penalty for each payment not made in accordance with the payment clause—

(i) For the period beginning on the day after the required payment date and ending on the date on which payment of the amount due is made; and

(ii) Computed at the rate of interest established by the Secretary of the Treasury, and published in the Federal Register, for interest payments under section 12 of the Contract Disputes Act of 1978 (41 U.S.C. 611) in effect at the time the Contractor accrues the obligation to pay an interest penalty.

(3) *Subcontractor clause flowdown.* A clause requiring each subcontractor to include a payment clause and an interest penalty clause conforming to the standards set forth in subparagraphs (c)(1) and (c)(2) of this clause in each of its subcontracts, and to require each of its subcontractors to include such clauses in their subcontracts with each lower-tier subcontractor or supplier.

(d) *Subcontract clause interpretation.* The clauses required by paragraph (c) of this clause shall not be construed to impair the right of the Contractor or a subcontractor at any tier to negotiate, and to include in their subcontract, provisions that—

(1) *Retainage permitted.* Permit the Contractor or a subcontractor to retain (without cause) a specified percentage of each progress payment otherwise due to a subcontractor for satisfactory performance under the subcontract without incurring any obligation to pay a late payment interest penalty, in accordance with terms and conditions agreed to by the parties to the subcontract, giving such recognition as the parties deem appropriate to the ability of a subcontractor to furnish a performance bond and a payment bond;

(2) *Withholding permitted.* Permit the Contractor or subcontractor to make a determination that part or all of the subcontractor's request for payment may be withheld in accordance with the subcontract agreement; and

(3) *Withholding requirements.* Permit such withholding without incurring any obligation to pay a late payment penalty if—

(i) A notice conforming to the standards of paragraph (g) of this clause previously has been furnished to the subcontractor; and

(ii) A copy of any notice issued by a Contractor pursuant to subdivision (d)(3)(i) of this clause has been furnished to the Contracting Officer.

(e) *Subcontractor withholding procedures.* If a Contractor, after making a request for payment to the Government but before making a payment to a subcontractor for the subcontractor's performance covered by the payment request, discovers that all or a portion of the payment otherwise due such subcontractor is subject to withholding from the subcontractor in accordance with the subcontract agreement, then the Contractor shall—

(1) *Subcontractor notice.* Furnish to the subcontractor a notice conforming to the standards of paragraph (g) of this clause as soon as practicable upon ascertaining the cause giving rise to a withholding, but prior to the due date for subcontractor payment;

(2) *Contracting Officer notice.* Furnish to the Contracting Officer, as soon as practicable, a copy of the notice furnished to the subcontractor pursuant to subparagraph (e)(1) of this clause;

(3) *Subcontractor progress payment reduction.* Reduce the subcontractor's progress payment by an amount not to exceed the amount specified in the notice of withholding furnished under subparagraph (e)(1) of this clause;

(4) *Subsequent subcontractor payment.* Pay the subcontractor as soon as practicable after the correction of the identified subcontract performance deficiency, and—

(i) Make such payment within—

(A) Seven days after correction of the identified subcontract performance deficiency (unless the funds therefor must be recovered from the Government because of a reduction under paragraph (e)(5)(i)) of this clause; or

(B) Seven days after the Contractor recovers such funds from the Government; or

(ii) Incur an obligation to pay a late payment interest penalty computed at the rate of interest established by the Secretary of the Treasury, and published in the Federal Register, for interest payments under section 12 of the Contract Disputes Act of 1978 (41 U.S.C. 611) in effect at the time the Contractor accrues the obligation to pay an interest penalty;

(5) *Notice to Contracting Officer.* Notify the Contracting Officer upon—

(i) Reduction of the amount of any subsequent certified application for payment; or

(ii) Payment to the subcontractor of any withheld amounts of a progress payment, specifying—

(A) The amounts withheld under subparagraph (e)(1) of this clause; and

(B) The dates that such withholding began and ended; and

(6) *Interest to Government.* Be obligated to pay to the Government an amount equal to interest on the withheld payments (computed in the manner provided in 31 U.S.C. 3903(c)(1)), from the 8th day after receipt of the withheld amounts from the Government until—

(i) The day the identified subcontractor performance deficiency is corrected; or

(ii) The date that any subsequent payment is reduced under subdivision (e)(5)(i) of this clause.

(f) *Third-party deficiency reports—(1)*

Withholding from subcontractor. If a Contractor, after making payment to a first-tier subcontractor, receives from a supplier or subcontractor of the first-tier subcontractor (hereafter referred to as a "second-tier subcontractor") a written notice in accordance with section 2 of the Act of August 24, 1935 (40 U.S.C. 270b, Miller Act), asserting a deficiency in such first-tier subcontractor's performance under the contract for which the Contractor may be ultimately liable, and the Contractor

determines that all or a portion of future payments otherwise due such first-tier subcontractor is subject to withholding in accordance with the subcontract agreement, the Contractor may, without incurring an obligation to pay an interest penalty under subparagraph (e)(6) of this clause—

(i) Furnish to the first-tier subcontractor a notice conforming to the standards of paragraph (g) of this clause as soon as practicable upon making such determination; and

(ii) Withhold from the first-tier subcontractor's next available progress payment or payments an amount not to exceed the amount specified in the notice of withholding furnished under paragraph (f)(1)(i) of this clause.

(2) *Subsequent payment or interest charge.* As soon as practicable, but not later than 7 days after receipt of satisfactory written notification that the identified subcontract performance deficiency has been corrected, the Contractor shall—

(i) Pay the amount withheld under paragraph (f)(1)(ii) of this clause to such first-tier subcontractor; or

(ii) Incur an obligation to pay a late payment interest penalty to such first-tier subcontractor computed at the rate of interest established by the Secretary of the Treasury, and published in the Federal Register, for interest payments under section 12 of the Contract Disputes Act of 1978 (41 U.S.C. 611) in effect at the time the Contractor accrues the obligation to pay an interest penalty.

(g) *Written notice of subcontractor withholding.* A written notice of any withholding shall be issued to a subcontractor (with a copy to the Contracting Officer of any such notice issued by the Contractor), specifying—

(1) The amount to be withheld;

(2) The specific causes for the withholding under the terms of the subcontract; and

(3) The remedial actions to be taken by the subcontractor in order to receive payment of the amounts withheld.

(h) *Subcontractor payment entitlement.*

The Contractor may not request payment from the Government of any amount withheld or retained in accordance with paragraph (d) of this clause until such time as the Contractor has determined and certified to the Contracting Officer that the subcontractor is entitled to the payment of such amount.

(i) *Prime-subcontractor disputes.* A dispute between the Contractor and subcontractor relating to the amount or entitlement of a subcontractor to a payment or a late payment interest penalty under a clause included in the subcontract pursuant to paragraph (c) of this clause does not constitute a dispute to which the United States is a party. The United States may not be interpleaded in any judicial or administrative proceeding involving such a dispute.

(j) *Preservation of prime-subcontractor rights.* Except as provided in paragraph (i) of this clause, this clause shall not limit or impair any contractual, administrative, or judicial remedies otherwise available to the Contractor or a subcontractor in the event of a dispute involving late payment or

nonpayment by the Contractor or deficient subcontract performance or nonperformance by a subcontractor.

(k) *Non-recourse for prime contractor interest penalty.* The Contractor's obligation to pay an interest penalty to a subcontractor pursuant to the clauses included in a subcontract under paragraph (c) of this clause shall not be construed to be an obligation of the United States for such interest penalty. A cost-reimbursement claim may not include any amount for reimbursement of such interest penalty.
(End of clause)

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 33

[FAC 90-46; FAR Case 96-016; Item XI]

RIN 9000-AH38

Federal Acquisition Regulation; Attorneys' Fees in GAO Protests

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 have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to clarify the effective date of the \$150.00 hourly cap on attorneys' fees imposed by Section 1403(b)(2) of the Federal Acquisition Streamlining Act (FASA) of 1994 (Public Law 103-355). The hourly cap on attorneys' fees applies only to those protests filed on or after October 1, 1995. This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993. This is not a major rule under 5 U.S.C. 804.

EFFECTIVE DATE: May 16, 1997.

FOR FURTHER INFORMATION CONTACT: Mr. Jack O'Neill at (202) 501-3856 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 90-46, FAR case 96-016.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule amends FAR 33.104 to clarify that the \$150.00 hourly cap on

attorneys' fees applies only to those protests filed on or after the effective date of FASA. Protests filed with the General Accounting Office prior to October 1, 1995, are not subject to the hourly cap on attorneys' fees.

B. Regulatory Flexibility Act

The final rule does not constitute a significant FAR revision within the meaning of FAR 1.501 and Public Law 98-577, and publication for public comments is not required. However, comments from small entities concerning the affected FAR subpart will be considered in accordance with 5 U.S.C. 610. Such comments must be submitted separately and cite 5 U.S.C. 601, *et seq.* (FAC 90-46, FAR case 96-016), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the 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.*

List of Subjects in 48 CFR Part 33

Government procurement.

Dated: March 7, 1997.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.

Therefore, 48 CFR Part 33 is amended as set forth below:

PART 33—PROTESTS, DISPUTES, AND APPEALS

1. The authority citation for 48 CFR Part 33 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).

2. Section 33.104 is amended by revising the introductory text of paragraph (h)(3) to read as follows:

33.104 Protests to GAO.

* * * * *

(h) * * *

(3) For protests filed on or after October 1, 1995, no agency shall pay a party, other than a small business concern within the meaning of section 3(a) of the Small Business Act (see 19.001, Small business concern), costs under paragraph (h)(2) of this section—

* * * * *

[FR Doc. 97-6320 Filed 3-14-97; 8:45 am]
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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 44

[FAC 90-46; FAR Case 94-605; Item XII]

RIN 9000-AG75

Federal Acquisition Regulation; Contractors' Purchasing Systems Reviews

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 have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to revise the requirements relating to Contractors' Purchasing Systems Reviews (CPSRs). This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993. This is not a major rule under 5 U.S.C. 804.

EFFECTIVE DATE: May 16, 1997.

FOR FURTHER INFORMATION CONTACT: Ms. Linda Klein at (202) 501-3775 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 90-46, FAR case 94-605.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule amends FAR section 44.302, to (1) add a requirement for the cognizant contract administration agency to determine the need for a CPSR based on, but not limited to, the past performance of the contractor; and volume, complexity, and dollar value of the subcontracting activity, and (2) delete the requirement for a CPSR to be performed initially and at least every 3 years thereafter, for contractors over a certain sales level. In addition, sections 44.303 through 44.307 are amended to conform to the revisions at 44.302.

A proposed rule was published in the Federal Register at 60 FR 66472, December 21, 1995. Three sources submitted public comments. The public comments were considered in the development of the final rule.

B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule applies to only those contractors whose sales (excluding sales under sealed bid procedures and sales of commercial items) are expected to exceed \$25 million during the subsequent year.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the 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.*

List of Subjects in 48 CFR Part 44

Government procurement.

Dated: March 7, 1997.

Edward C. Loeb

Director, Federal Acquisition Policy Division.

Therefore, 48 CFR Part 44 is amended as set forth below:

PART 44—SUBCONTRACTING POLICIES AND PROCEDURES

1. The authority citation for 48 CFR Part 44 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).

2. Section 44.302 is revised to read as follows:

44.302 Requirements.

(a) Determine the need for a CPSR based on, but not limited to, the past performance of the contractor, and volume, complexity and dollar value of the subcontracting activity. If a contractor's sales to the Government (excluding sales under sealed bid procedures and sales of commercial items pursuant to part 12) are expected to exceed \$25 million during the next year, perform a review to determine if a CPSR is needed. Such sales include those represented by prime contracts, subcontracts under Government prime contracts, and modifications. Generally, a CPSR is not performed for a specific contract. The head of the agency responsible for contract administration may raise or lower the \$25 million review level if such action is considered to be in the Government's best interest.

(b) Once an initial determination has been made under paragraph (a) of this section, at least every 3 years the cognizant contract administration activity will determine whether a purchasing system review is necessary. If necessary, the cognizant contract administration activity will conduct a purchasing system review.

3. Section 44.303 is amended by revising the introductory text to read as follows:

44.303 Extent of review.

A CPSR requires an evaluation of the contractor's purchasing system. This evaluation shall not include subcontracts awarded by the contractor exclusively in support of Government contracts awarded to the contractor that used sealed bid procedures or that are for commercial items pursuant to part 12. The considerations listed in 44.202-2 for consent evaluation of particular subcontracts also shall be used to evaluate the contractor's purchasing system, including the contractor's policies, procedures, and performance under that system. Special attention shall be given to—

* * * * *

4. Section 44.304 is amended by revising paragraph (a) to read as follows:

44.304 Surveillance.

(a) The ACO shall maintain a sufficient level of surveillance to ensure that the contractor is effectively managing its purchasing program.

* * * * *

5. Section 44.305-1 is revised to read as follows:

44.305-1 Responsibilities.

The cognizant ACO is responsible for granting, withholding, or withdrawing approval of a contractor's purchasing system. The ACO shall—

(a) Approve a purchasing system only after determining that the contractor's purchasing policies and practices are efficient and provide adequate protection of the Government's interests; and

(b) Promptly notify the contractor in writing of the granting, withholding, or withdrawal of approval.

6. Section 44.305-2 is amended by revising paragraph (a) to read as follows:

44.305-2 Notification.

(a) The notification granting system approval shall include—

(1) Identification of the plant or plants covered by the approval;

(2) The effective date of approval; and

(3) A statement that system approval—

(i) Applies to all Federal Government contracts at that plant to the extent that cross-servicing arrangements exist;

(ii) Waives the contractual requirement for advance notification in fixed-price contracts, but not for cost-reimbursement contracts;

(iii) Waives the contractual requirement for consent to subcontracts in fixed-price contracts and for specified subcontracts in cost-reimbursement contracts but not for those subcontracts, if any, selected for special surveillance and identified in the contract Schedule; and

(iv) May be withdrawn at any time at the ACO's discretion.

* * * * *

7. Sections 44.306 and 44.307 are revised to read as follows:

44.306 Disclosure of approval status.

Upon request, the ACO may inform a contractor that the purchasing system of a proposed subcontractor has been approved or disapproved, but shall caution that the Government will not keep the contractor advised of any changes in the approval status. If the proposed subcontractor's purchasing system has not been reviewed, the contractor shall be so advised.

44.307 Reports.

The ACO shall distribute copies of CPSR reports; notifications granting, withholding, or withdrawing system approval; and Government

recommendations for improvement of an approved system, including the contractor's response, to at least—

(a) The cognizant contract audit office;

(b) Activities prescribed by the cognizant agency; and

(c) The contractor (except that furnishing copies of the contractor's response is optional).

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 52

[FAC 90-46; FAR Case 96-005; Item XIII]

RIN 9000-AH22

Federal Acquisition Regulation; Performance-Based Payments

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

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to address title to residual material and certain liability provisions concerning performance-based payments. This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993, and is not a major rule under 5 U.S.C. 804.

EFFECTIVE DATE: May 16, 1997.

FOR FURTHER INFORMATION CONTACT: Mr. Jeremy Olson at (202) 501-3221 in reference to this FAR case. For general information, contact the FAR Secretariat, Room 4035, GS Building, Washington, DC 20405, (202) 501-4755. Please cite FAC 90-46, FAR case 96-005.

SUPPLEMENTARY INFORMATION:

A. Background

The clause at 52.232-32, Performance-Based Payments, addresses a method of contract financing, and was printed in Federal Acquisition Circular 90-33, and published in the Federal Register at 60 FR 49707, September 26, 1995. Paragraph (f), Title, of the clause was intended to be functionally equivalent to paragraph (d) of FAR clause 52.232-16, Progress Payments, which addresses another type of contract financing. However, the topics of title to residual material and liability for Government-furnished property acquired under the contract, addressed in paragraphs (d) (6) and (7) of the Progress Payments clause, were inadvertently omitted from the Performance-Based Payments clause. This rule amends FAR 52.232-32 by adding paragraphs (f) (6) and (7) to address these topics.

A proposed rule was published in the Federal Register at 61 FR 47798, September 10, 1996. Two sources submitted public comments. All comments were considered in developing the final rule.

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 use simplified acquisition procedures or are

awarded on a competitive basis, and, therefore, do not use the performance-based method of contract financing.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the 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.*

List of Subjects in 48 CFR Part 52

Government procurement.

Dated: March 7, 1997.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.

Therefore, 48 CFR Part 52 amended as set forth below:

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

1. The authority citation for 48 CFR Part 42 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).

2. Section 52.232-32 is amended by revising the clause date; redesignating the heading of paragraph (f)(1) as the heading of paragraph (f), and adding new paragraphs (f) (6) and (7) to read as follows:

52.232-32 Performance-Based Payments.

* * * * *

PERFORMANCE-BASED PAYMENTS (MAY 1997)

* * * * *

(f) *Title.* * * *

* * * * *

(6) When the Contractor completes all of the obligations under this contract, including liquidation of all performance-based payments, title shall vest in the Contractor for all property (or the proceeds thereof) not—

(i) Delivered to, and accepted by, the Government under this contract; or

(ii) Incorporated in supplies delivered to, and accepted by, the Government under this contract and to which title is vested in the Government under this clause.

(7) The terms of this contract concerning liability for Government-furnished property shall not apply to property to which the Government acquired title solely under this clause.

* * * * *

[FR Doc. 97-6322 Filed 3-14-97; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 13 and 52

[FAC 90-46; Item XIV]

Federal Acquisition Regulation; Technical Corrections

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

ACTION: Corrections.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council are issuing corrections to documents previously published in the Federal Register.

EFFECTIVE DATE: May 16, 1997.

FOR FURTHER INFORMATION CONTACT: FAR Secretariat, Room 4037, GS Building, Washington, DC 20405, (202) 501-4755. Please cite FAC 90-46, Technical Corrections.

Corrections

PART 13—SIMPLIFIED ACQUISITION PROCEDURES

13.602 [Corrected]

1. At 62 FR 266, January 2, 1997, in the third column, 13.602 is corrected in the introductory text of paragraph (a) by removing from the parenthetical "section 4202 of the Clinger-Cohen Act" and inserting "10 U.S.C. 2304 or 41 U.S.C. 253".

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

2. At 61 FR 67408, December 20, 1996, in the first column of page 67422, amendatory instruction 15 is corrected to read as follows:

52.219-18 [Amended]

15. 52.219-18 is amended by removing Alternate II and redesignating Alternate III as Alternate II; and by revising the date of the newly designated Alternate II to read as follows:

52.219-18 Notification of Competition Limited to Eligible 8(a) Concerns.

* * * * *

Alternate II (DEC 1996). * * *

* * * * *

52.214-5, 52.214-7, 52.214-23, 52.214-32, 52.214-33, 52.215-9, 52.215-10, 52.215-36, 52.216-7, 52.216-8, 52.216-9, 52.216-10, and 52.216-13 [Corrected]

3. At 61 FR 69286, December 31, 1996, remove the clause date "(FEB 1997)" and insert "(MAR 1997)" in the following sections:

(a) On page 69293, in the middle and third columns, sections 52.214-5, 52.214-7, 52.214-23, 52.214-32, and 52.214-33;

(b) On page 69294, in the first and second columns, sections 52.215-9, 52.215-10, and 52.215-36;

(c) On page 69296, in all three columns, sections 52.216-7, 52.216-8, 52.216-9, 52.216-10, and 52.216-13; and

(d) On page 69297, in the first column, Alternate I.

Dated: March 7, 1997.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.

[FR Doc. 97-6323 Filed 3-14-97; 8:45 am]

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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 notice.

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 as the Federal Acquisition Regulation (FAR) Council. 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 rules appearing in Federal Acquisition Circular (FAC) 90-46 which amend the FAR. The rules marked with an asterisk (*) are those for which a regulatory flexibility analysis has been prepared in accordance with 5 U.S.C. 604. Further information regarding these rules may be obtained by referring to FAC 90-46 which precedes this notice. This document may be obtained from the Internet at <http://www.gsa.gov/far/SECG>.

FOR FURTHER INFORMATION CONTACT: Beverly Fayson, FAR Secretariat, (202) 501-4755.

LIST OF RULES IN FAC 90-46

Item	Subject	FAR Case	Analyst
I	Gratuities	96-300	Linfield.
II	* Electronic Contracting	91-104	DeStefano.
III	* Office of Federal Procurement Policy Letter 93-1, Management Oversight of Service Contracting	94-008	O'Neill
IV	Performance Incentives for Fixed-Price Contracts	93-603	DeStefano.
V	* Environmentally Preferable Products (Interim)	92-054B	Linfield.
VI	Buy American Act—Construction (Grimberg Decision)	91-119	Linfield.
VII	Collection of Historically Black Colleges and Universities/Minority Institutions Award Data	95-306	Klein.
VIII	Allowability of Foreign Selling Costs	95-021	DeStefano.
IX	Independent Research and Development/Bid and Proposal Costs in Cooperative Agreements	95-024	Olson.
X	* Prompt Payment	91-091	Olson.
XI	Attorneys' Fees in GAO Protests	96-016	O'Neill.
XII	Contractors' Purchasing Systems Reviews	94-605	Klein.
XIII	Performance-Based Payments	96-005	Olson.

Item I—Gratuities (FAR Case 96-300)

The interim rule published as Item III of Federal Acquisition Circular (FAC) 90-40 is converted to a final rule without change. The rule amended FAR 3.202 and 52.203-3 to exempt solicitations and contracts which do not exceed the simplified acquisition threshold from the prescribed use of the "Gratuities" clause.

Item II—Electronic Contracting (FAR Case 91-104)

The interim rule published as Item II of FAC 90-29 is converted to a final rule with amendments in Parts 5, 14, 15, and 52. The rule facilitates the use of electronic data interchange in Government contracting and complements the rule published as Item II of FAC 90-40 pertaining to the Federal Acquisition Computer Network.

Item III—Office of Federal Procurement Policy Letter 93-1, Management Oversight of Service Contracting (FAR Case 94-008)

This final rule amends FAR 37.000 and 37.102, and adds a new Subpart 37.5, to implement OFPP Policy Letter 93-1, Management Oversight of Service Contracting. The policy letter provides Governmentwide guiding principles which are intended to improve the acquisition, management, and administration of service contracts. This rule also amends FAR 9.505-3 and 35.017-2 to remove references to OMB Circular A-120, Guidelines for the Use of Advisory and Assistance Services, which was rescinded by OMB on November 19, 1993.

Item IV—Performance Incentives for Fixed-Price Contracts (FAR Case 93-603)

This final rule amends FAR Parts 16 and 52 to permit the use of award-fee provisions as performance incentives in fixed-price contracts.

Item V—Federal Compliance With Right-To-Know Laws and Pollution Prevention Requirements (FAR Case 92-054B)

This interim rule adds a new FAR Subpart 23.10, and a new clause at 52.223-5 to implement Executive Order (E.O.) 12856 of August 3, 1993, Federal Compliance with Right-To-Know Laws and Pollution Prevention Requirements. The E.O. requires that a contract performed on a Federal facility shall provide that the contractor supply information on its use of certain hazardous or toxic substances in the

performance of the contract. This information is required to enable Federal facilities to comply with the reporting and emergency planning requirements of the Pollution Prevention Act of 1990 and the Emergency Planning and Community Right-To-Know Act of 1986.

Item VI—Buy American Act—Construction (Grimberg Decision) (FAR Case 91-119)

This final rule amends FAR Subpart 25.2 and the associated clauses at 52.225-5 and 52.225-15 to add guidance on exceptions to the Buy American Act, both pre-award and post-award. The rule adds two new solicitation provisions at 52.225-12 and 52.225-13 for use in solicitations for construction in the United States. These solicitation provisions set forth procedures by which offerors may request determinations regarding the inapplicability of the Buy American Act. The rule also adds a new section at 25.206, which provides guidance regarding instances of noncompliance with the Buy American Act.

Item VII—Collection of Historically Black Colleges and Universities/ Minority Institutions Award Data (FAR Case 95-306)

This final rule adds a new FAR Subpart 26.3 and a new solicitation provision at 52.226-2 to implement Executive Order 12928, which requires agencies to provide periodic reporting on the progress made in award of contracts to Historically Black Colleges and Universities and Minority Institutions.

Item VIII—Allowability of Foreign Selling Costs (FAR Case 95-021)

This final rule revises FAR 31.205-38(c)(2) by removing the ceiling on allowable foreign selling costs. The rule also amends 31.205-1, Public relations and advertising costs, by deleting reference to the ceiling limitation, and further revises 31.205-38(c)(2) by deleting obsolete language.

Item IX—Independent Research and Development/Bid and Proposal Costs in Cooperative Agreements (FAR Case 95-024)

This final rule amends the cost principle at FAR 31.205-18, Independent research and development (IR&D) and bid and proposal costs, by removing from paragraph (e) the prohibition against treatment of contractor IR&D contributions under NASA cooperative arrangements as allowable indirect costs.

Item X—Prompt Payment (FAR Case 91-091)

This final rule amends FAR 32.102, Subpart 32.9, and related clauses at 52.212-4, 52.232-5, 52.232-8, 52.232-25, 52.232-26, and 52.232-27 in order to implement changes made in OMB Circular A-125 (Revised), dated December 12, 1989, to comply with the Prompt Payment Act Amendments of 1988 (Public Law 100-496). The rule also contains amendments to clarify and simplify the FAR text and clauses.

Item XI—Attorneys' Fees in GAO Protests (FAR Case 96-016)

This final rule amends FAR 33.104 to clarify that the \$150 hourly cap on attorneys' fees applies only to those

protests filed on or after October 1, 1995. Protests filed with the General Accounting Office prior to October 1, 1995, are not subject to the hourly cap on attorneys' fees, in accordance with Sections 10001 and 10002 of the Federal Acquisition Streamlining Act of 1994 (Public Law 103-355).

Item XII—Contractors' Purchasing Systems Reviews (FAR Case 94-605)

This final rule amends FAR 44.302 to (1) add a requirement for the cognizant contract administration agency to determine the need for a contractor purchasing system review (CPSR) based on, but not limited to, the past performance of the contractor and volume, complexity, and dollar value of the contractor's subcontracting activity; and (2) delete the requirement for a CPSR to be performed initially and at least every 3 years thereafter, for contractors exceeding a certain sales level. Also, FAR sections 44.303 through 44.307 are amended to conform to amendments at 44.302.

Item XIII—Performance-Based Payments (FAR Case 96-005)

This final rule amends FAR 52.232-32, Performance-Based Payments, by adding paragraphs (f) (6) and (7) to address title to residual material and liability for Government-furnished property, for consistency with paragraphs (d) (6) and (7) of FAR 52.232-16, Progress Payments.

Dated: March 7, 1997.
Edward C. Loeb,
Director, Federal Acquisition Policy Division.
[FR Doc. 97-6324 Filed 3-14-97; 8:45 am]

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