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Parent topic: Federal Acquisition Regulation

32.000 Scope of part.

This part prescribes policies and procedures for contract financing and other payment matters. This part addresses-

(a) Payment methods, including partial payments and progress payments based on percentage or stage of completion;

- (b) Loan guarantees, advance payments, and progress payments based on costs;
- (c) Administration of debts to the Government arising out of contracts;
- (d) Contract funding, including the use of *contract clauses* limiting costs or funds;
- (e) *Assignment of claims* to aid in private financing;
- (f) Selected payment clauses;
- (g) Financing of purchases of *commercial products* and *commercial services*;
- (h) Performance-based payments; and
- (i) *Electronic funds transfer* payments.

32.001 Definitions.

As used in this part—

Commercial interim payment means any payment that is not a commercial advance payment or a *delivery payment*. These payments are *contract financing payments* for prompt payment purposes (*i.e.*, not subject to the interest penalty provisions of the Prompt Payment Act in accordance with [subpart 32.9](#)). A commercial interim payment is given to the contractor after some work has been done, whereas a commercial advance payment is given to the contractor when no work has been done.

Contract action means an action resulting in a contract, as defined in [subpart 2.1](#), including actions for additional *supplies* or services outside the existing contract scope, but not including actions that are within the scope and under the terms of the existing contract, such as *contract modifications* issued pursuant to the Changes clause, or funding and other administrative changes.

Contract financing payment means an authorized Government disbursement of monies to a contractor prior to acceptance of *supplies* or services by the Government.

(1) *Contract financing payments* include-

- (i) Advance payments;
- (ii) Performance-based payments;
- (iii) Commercial advance and interim payments;
- (iv) Progress payments based on cost under the clause at [52.232-16](#), Progress Payments;
- (v) Progress payments based on a percentage or stage of completion (see [32.102\(e\)](#)), except those 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; and
- (vi) Interim payments under a cost reimbursement contract, except for a cost reimbursement contract for services when *Alternate I* of the clause at [52.232-25](#), Prompt Payment, is used.

(2) *Contract financing payments* do not include-

(i) *Invoice payments*;

(ii) Payments for partial deliveries; or

(iii) Lease and rental payments.

Customary contract financing means that financing deemed by an agency to be available for routine use by *contracting officers*. Most *customary contract financing* arrangements *should* be usable by *contracting officers* without specific reviews or approvals by higher management.

Delivery payment means a payment for accepted *supplies* or services, including payments for accepted partial deliveries. Commercial financing payments are liquidated by deduction from these payments. *Delivery payments* are *invoice payments* for prompt payment purposes.

Designated billing office means the office or person (governmental or nongovernmental) designated in the contract where the contractor first submits *invoices* and contract financing requests. The contract might designate different offices to receive *invoices* and contract financing requests. The *designated billing office* might be-

(1) The Government disbursing office;

(2) The *contract administration office*;

(3) The office accepting the *supplies* delivered or services performed by the contractor;

(4) The contract audit office; or

(5) A nongovernmental agent.

Designated payment office means the office designated in the contract to make *invoice payments* or *contract financing payments*. Normally, this will be the Government disbursing office.

Due date means the date on which payment *should* be made.

Invoice payment means a Government disbursement of monies to a contractor under a contract or other authorization for *supplies* or services accepted by the Government.

Invoice payments include-

Payments for partial deliveries that have been accepted by the Government;

Final cost or fee payments where amounts owed have been settled between the Government and the contractor;

For purposes of [subpart 32.9](#) only, all payments made under the clause at [52.232-5](#), Payments Under Fixed-Price *Construction* Contracts, and the clause at [52.232-10](#), Payments Under Fixed-Price Architect-Engineer Contracts; and

Interim payments under a cost-reimbursement contract for services when *Alternate I* of the clause at [52.232-25](#), Prompt Payment, is used

Invoice payments do not include *contract financing payments*.

Liquidate means to decrease a payment for an accepted supply item or service under a contract for the purpose of recouping financing payments previously paid to the contractor.

Unusual contract financing means any financing not deemed *customary contract financing* by the agency. *Unusual contract financing* is financing that is legal and proper under applicable laws, but that the agency has not authorized *contracting officers* to use without specific reviews or approvals by higher management.

32.002 Applicability of subparts.

(a) The following sections and subparts of this part are applicable to all purchases subject to part 32:

- (1) Sections 32.000 through 32.009.
- (2) subpart 32.3, Loan Guarantees for Defense Production.
- (3) subpart 32.6, Contract Debts.
- (4) subpart 32.7, Contract Funding.
- (5) subpart 32.8, *Assignment of Claims*.
- (6) subpart 32.9, Prompt Payment.
- (7) subpart 32.11, *Electronic Funds Transfer*.

(b) subpart 32.2, *Commercial Product* and *Commercial Service* Purchase Financing, is applicable only to purchases of *commercial products* and *commercial services* under authority of part 12.

(c) The following subparts of this part are applicable to all purchases made under any authority other than part 12:

- (1) subpart 32.1, Financing for Other Than a Commercial Purchase.
- (2) subpart 32.4, Advance Payments for Other Than Commercial *Acquisitions*.
- (3) subpart 32.5, Progress Payments Based on Costs.
- (4) subpart 32.10, Performance-Based Payments.

32.003 Simplified acquisition procedures financing.

Unless agency regulations otherwise permit, contract financing *shall* not be provided for purchases made under the authority of part 13.

32.004 Contract performance in foreign countries.

The enforceability of contract provisions for security of Government financing in a foreign jurisdiction is dependent upon local law and procedure. Prior to providing contract financing where foreign jurisdictions *may* become involved, the *contracting officer shall* ensure the Government's security is enforceable. This *may* require the provision of additional or different security than that normally provided for in the standard *contract clauses*.

32.005 Consideration for contract financing.

(a) *Requirement*. When a contract financing clause is included at the inception of a contract, there *shall* be no separate consideration for the contract financing clause. The value of the contract financing to the contractor is expected to be reflected in either (1) a bid or negotiated price that will be lower than such price would have been in the absence of the contract financing, or (2) contract terms and conditions, other than price, that are more beneficial to the Government than they would have been in the absence of the contract financing. Adequate new consideration is required for changes to, or the addition of, contract financing after award.

(b) *Amount of new consideration*. The contractor *may* provide new consideration by monetary or nonmonetary means, provided the value is adequate. The fair and reasonable consideration *should* approximate the amount by which the price would have been less had the contract financing terms been contained in the initial contract. In the absence of definite information on this point, the *contracting officer should* apply the following criteria in evaluating whether the proposed new consideration is adequate:

(1) The value to the contractor of the anticipated amount and duration of the contract financing at the imputed financial costs of the equivalent working capital.

(2) The estimated profit rate to be earned through contract performance.

(c) *Interest*. Except as provided in [subpart 32.4](#), Advance Payments for Other Than Commercial Acquisitions, the contract *shall* not provide for any other type of specific charges, such as interest, for contract financing.

32.006 Reduction or suspension of contract payments upon finding of fraud.

32.006-1 General.

(a) Under [10 U.S.C. 3806\(j\)](#), the statutory authority implemented by this section is available to the Department of Defense and the National Aeronautics and Space Administration; this statutory authority is not available to the *United States* Coast Guard. Under [41 U.S.C. 4506](#), this statutory authority is available to all agencies subject to Division C of subtitle I of title 41.

(b) [10 U.S.C. 3806\(c\)](#) and [41 U.S.C. 4506](#) provide for a reduction or *suspension* of further payments to a contractor when the *agency head* determines there is *substantial evidence* that the contractor's

request for advance, partial, or progress payments is based on fraud. This authority does not apply to commercial interim payments under [subpart 32.2](#), or performance-based payments under [subpart 32.10](#).

(c) The *agency head* may not delegate his or her responsibilities under these statutes below Level IV of the Executive Schedule.

(d) Authority to reduce or suspend payments under these statutes is in addition to other Government rights, remedies, and procedures.

(e) In accordance with these statutes, *agency head* determinations and decisions under this section may be made for an individual contract or any group of contracts affected by the fraud.

32.006-2 Definition.

Remedy coordination official, as used in this section, means the person or entity in the agency who coordinates within that agency the administration of criminal, civil, administrative, and contractual remedies resulting from investigations of fraud or corruption related to *procurement* activities. (See [10 U.S.C. 3806\(a\)](#) and [41 U.S.C. 4506\(a\)](#).)

32.006-3 Responsibilities.

(a) Agencies *shall* establish appropriate procedures to implement the policies and procedures of this section.

(b) Government personnel *shall* report suspected fraud related to advance, partial, or progress payments in accordance with agency regulations.

32.006-4 Procedures.

(a) In any case in which an agency's *remedy coordination official* finds *substantial evidence* that a contractor's request for advance, partial, or progress payments under a contract awarded by that agency is based on fraud, the *remedy coordination official shall* recommend that the *agency head* reduce or suspend further payments to the contractor. The *remedy coordination official shall* submit to the *agency head* a written report setting forth the *remedy coordination official's* findings that support each recommendation.

(b) Upon receiving a recommendation from the *remedy coordination official* under paragraph (a) of this subsection, the *agency head shall* determine whether *substantial evidence* exists that the request for payment under a contract is based on fraud.

(c) If the *agency head* determines that *substantial evidence* exists, the *agency head may* reduce or suspend further payments to the contractor under the affected contract(s). Such reduction or *suspension shall* be reasonably commensurate with the anticipated loss to the Government resulting from the fraud.

(d) In determining whether to reduce or suspend further payment(s), as a minimum, the *agency head shall* consider-

- (1) A recommendation from investigating officers that disclosure of the allegations of fraud to the contractor *may* compromise an ongoing investigation;
- (2) The anticipated loss to the Government as a result of the fraud;
- (3) The contractor's overall financial condition and ability to continue performance if payments are reduced or suspended;
- (4) The contractor's essentiality to the *national defense*, or to the execution of the agency's official business; and
- (5) Assessment of all documentation concerning the alleged fraud, including documentation submitted by the contractor in its response to the notice required by paragraph (e) of this subsection.

(e) Before making a decision to reduce or suspend further payments, the *agency head shall*, in accordance with agency procedures-

- (1) Notify the contractor *in writing* of the action proposed by the *remedy coordination official* and the reasons therefor (such notice *must* be sufficiently specific to permit the contractor to collect and present evidence addressing the aforesaid reasons); and
- (2) Provide the contractor an opportunity to submit information within a reasonable time, in response to the action proposed by the *remedy coordination official*.

(f) When more than one agency has contracts affected by the fraud, the agencies *shall* consider designating one agency as the lead agency for making the determination and decision.

(g) The agency *shall* retain in its files the written justification for each-

- (1) Decision of the *agency head* whether to reduce or suspend further payments; and
- (2) Recommendation received by an *agency head* in connection with such decision.

(h) Not later than 180 calendar days after the date of the reduction or *suspension* action, the *remedy coordination official shall*-

- (1) Review the *agency head's* determination on which the reduction or *suspension* decision is based; and
- (2) Transmit a recommendation to the *agency head* as to whether the reduction or *suspension should* continue.

32.006-5 Reporting.

(a) In accordance with 41 U.S.C. 4506(h), the head of an agency, other than the Department of Defense, *shall* prepare a report for each fiscal year in which a recommendation has been received pursuant to 32.006-4(a). Reports within the Department of Defense *shall* be prepared in accordance with 10 U.S.C. 3806(h).

(b) In accordance with 41 U.S.C. 4506(h) and 10 U.S.C. 3806(h), each report *shall* contain-

- (1) Each recommendation made by the *remedy coordination official*;
- (2) The actions taken on the recommendation(s), with reasons for such actions; and
- (3) An assessment of the effects of each action on the Government.

32.007 Contract financing payments.

- (a)
 - (1) Unless otherwise prescribed in agency policies and procedures or otherwise specified in paragraph (b) of this section, the *due date* for making *contract financing payments* by the *designated payment office* is the 30th day after the *designated billing office* receives a proper contract financing request.
 - (2) If 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 specified *due date*.
 - (3) *Agency heads* may prescribe shorter periods for payment based on contract *pricing* or administrative considerations. For example, a shorter period *may* be justified by an agency if the nature and extent of contract financing arrangements are integrated with agency contract *pricing* policies.
 - (4) *Agency heads* must not prescribe a period shorter than 7 days or longer than 30 days.
- (b) For advance payments, loans, or other arrangements that do not involve recurrent submission of contract financing requests, the *designated payment office* will make payment in accordance with the applicable contract financing terms or as directed by the *contracting officer*.
- (c) A proper contract financing request *must* comply with the terms and conditions specified by the contract. The contractor *must* correct any defects in requests submitted in the manner specified in the contract or as directed by the *contracting officer*.
- (d) The *designated billing office* and *designated payment office* *must* annotate each contract financing request with the date their respective offices received the request.
- (e) The Government will not pay an interest penalty to the contractor as a result of delayed *contract financing payments*.

32.008 Notification of overpayment.

If the contractor notifies the *contracting officer* of a duplicate payment or that the Government has otherwise overpaid, the *contracting officer* shall follow the procedures at [32.604](#).

32.009 Providing accelerated payments to small business contractors and to prime contractors that subcontract with a small business concern.

32.009-1 General.

(a)

(1) Pursuant to [31 U.S.C. 3903\(a\)](#), agencies other than the Department of Defense (DoD) *shall* provide accelerated payments, to the fullest extent permitted by law, with a goal of 15 days after receipt of a *proper invoice* and all other required documentation, if a specific payment date is not established by contract, to—

(i) Small business contractors; and

(ii) Prime contractors that subcontract with a small business concern, if the prime contractor agrees to make payments to the *small business subcontractor* within 15 days of receiving the accelerated payment from the Government, after receipt of a *proper invoice* and all other required documentation from the *small business subcontractor*, to the maximum extent practicable, without any further consideration from or fees charged to the subcontractor.

(2) Pursuant to [10 U.S.C. 3801\(b\)](#), DoD *shall* provide accelerated payments, to the fullest extent permitted by law, with a goal of 15 days after receipt of a *proper invoice* and all other required documentation, to—

(i) Small business contractors; and

(ii) Prime contractors that subcontract with a small business concern, if the prime contractor agrees to make payments to the *small business subcontractor* within 15 days of receiving the accelerated payment from the Government, after receipt of a *proper invoice* and all other required documentation from the *small business subcontractor*, to the maximum extent practicable, without any further consideration from or fees charged to the subcontractor.

(b) This acceleration does not provide any new rights under the Prompt Payment Act and does not affect the application of the Prompt Payment Act late payment interest provisions.

(c) Agencies *may* use the Governmentwide commercial purchase card as a method of payment (see [32.1108](#)) to facilitate accelerated payment, to earn refunds, and to reduce *invoice* processing costs.

32.009-2 Contract clause.

Insert clause [52.232-40](#), Providing Accelerated Payments to *Small Business Subcontractors*, in all *solicitations* and contracts.

Subpart 32.1 - Financing for Other Than a Commercial Purchase

32.100 Scope of subpart.

This subpart provides policies and procedures applicable to contract financing and payment for any purchases other than purchases of *commercial products* or *commercial services* in accordance with [part 12](#).

32.101 Authority.

The basic authority for the contract financing described in this part is contained in [41 U.S.C. chapter 45](#), Contract Financing, [10 U.S.C. chapter 277](#), and Title III of the Defense Production Act of 1950 (50 U.S.C. App.2091).

32.102 Description of contract financing methods.

(a) Advance payments are advances of money by the Government to a prime contractor before, in anticipation of, and for the purpose of complete performance under one or more contracts. They are expected to be liquidated from payments due to the contractor incident to performance of the contracts. Since they are not measured by performance, they differ from partial, progress, or other payments based on the performance or partial performance of a contract. Advance payments *may* be made to prime contractors for the purpose of making advances to subcontractors.

(b) Progress payments based on costs are made on the basis of costs incurred by the contractor as work progresses under the contract. This form of contract financing does not include-

- (1) Payments based on the percentage or stage of completion accomplished;
- (2) Payments for partial deliveries accepted by the Government;
- (3) Partial payments for a contract termination proposal; or
- (4) Performance-based payments.

(c) Loan guarantees are made by Federal Reserve banks, on behalf of designated guaranteeing agencies, to enable contractors to obtain financing from private sources under contracts for the *acquisition of supplies* or services for the *national defense*.

(d) Payments for accepted *supplies* and services that are only a part of the contract requirements (*i.e.*, partial deliveries) are authorized under [41 U.S.C. chapter 45](#) and [10 U.S.C. chapter 277](#). In accordance with 5 CFR 1315.4(k), agencies *must* pay for partial delivery of *supplies* or partial performance of services unless specifically prohibited by the contract. Although payments for partial deliveries generally are treated as a method of payment and not as a method of contract financing, using partial *delivery payments* can assist contractors to participate in contracts without, or with minimal, contract financing. When appropriate, contract statements of work and *pricing* arrangements *must* permit acceptance and payment for discrete portions of the work, as soon as

accepted (see [32.906\(c\)](#)).

(e)

(1) Progress payments based on a percentage or stage of completion are authorized by the statutes cited in [32.101](#).

(2) This type of progress payment *may* be used as a payment method under agency procedures. Agency procedures *must* ensure that payments are commensurate with work accomplished, which meets the quality standards established under the contract. Furthermore, progress payments *may* not exceed 80 percent of the eligible costs of work accomplished on undefinitized *contract actions*.

(f) Performance-based payments are *contract financing payments* made on the basis of-

(1) Performance measured by objective, quantifiable methods;

(2) Accomplishment of defined events; or

(3) Other quantifiable measures of results.

32.103 Progress payments under construction contracts.

When satisfactory progress has not been achieved by a contractor during any period for which a progress payment is to be made, a percentage of the progress payment *may* be retained. Retainage *should* not be used as a substitute for good contract management, and the *contracting officer should* not withhold funds without cause. Determinations to retain and the specific amount to be withheld *shall* be made by the *contracting officers* on a case-by-case basis. Such decisions will be based on the *contracting officer's* assessment of *past performance* and the likelihood that such performance will continue. The amount of retainage withheld *shall* not exceed 10 percent of the approved estimated amount in accordance with the terms of the contract and *may* be adjusted as the contract approaches completion to recognize better than expected performance, the ability to rely on alternative safeguards, and other factors. Upon completion of all contract requirements, retained amounts *shall* be paid promptly.

32.104 Providing contract financing.

(a) Prudent contract financing can be a useful working tool in Government *acquisition* by expediting the performance of essential contracts. *Contracting officers must* consider the criteria in this part in determining whether to include contract financing in *solicitations* and contracts. Resolve reasonable doubts by including contract financing in the *solicitation*. The *contracting officer must-*

(1) Provide Government financing only to the extent actually needed for prompt and efficient performance, considering the availability of private financing and the probable impact on working capital of the predelivery expenditures and production lead-times associated with the contract, or groups of contracts or orders (*e.g.*, issued under indefinite-delivery contracts, basic ordering agreements, or their equivalent);

(2) Administer contract financing so as to aid, not impede, the *acquisition*;

(3) Avoid any undue risk of monetary loss to the Government through the financing;

(4) Include the form of contract financing deemed to be in the Government's best interest in the *solicitation* (see [32.106](#) and [32.113](#)); and

(5) Monitor the contractor's use of the contract financing provided and the contractor's financial status.

(b) If the contractor is a small business concern, the *contracting officer must* give special attention to meeting the contractor's contract financing need. However, a contractor's receipt of a certificate of competency from the Small Business Administration has no bearing on the contractor's need for or entitlement to contract financing.

(c) Subject to specific agency regulations and paragraph (d) of this section, the *contracting officer-*

(1) *May* provide *customary contract financing* in accordance with [32.113](#); and

(2) *Must not* provide *unusual contract financing* except as authorized in [32.114](#).

(d) Unless otherwise authorized by agency procedures, the *contracting officer may* provide contract financing in the form of performance-based payments (see [subpart 32.10](#)) or customary progress payments (see [subpart 32.5](#)) if the following conditions are met:

(1) The contractor-

(i) Will not be able to bill for the first delivery of *products* for a substantial time after work *must* begin (normally 4 months or more for small business concerns, and 6 months or more for others), and will make expenditures for contract performance during the predelivery period that have a significant impact on the contractor's working capital; or

(ii) Demonstrates actual financial need or the unavailability of private financing.

(2) If the contractor is not a small business concern-

(i) For an individual contract, the contract price is \$3 million or more; or

(ii) For an indefinite-delivery contract, a basic ordering agreement or a similar ordering instrument, the *contracting officer* expects the aggregate value of orders or contracts that individually exceed the *simplified acquisition threshold* to have a total value of \$3 million or more. The *contracting officer must* limit financing to those orders or contracts that exceed the *simplified acquisition threshold*.

(3) If the contractor is a small business concern-

(i) For an individual contract, the contract price exceeds the *simplified acquisition threshold*; or

(ii) For an indefinite-delivery contract, a basic ordering agreement or a similar ordering instrument, the *contracting officer* expects the aggregate value of orders or contracts to exceed the *simplified acquisition threshold*.

32.105 Uses of contract financing.

(a) Contract financing methods covered in this part are intended to be self-liquidating through contract performance. Consequently, agencies *shall* only use the methods for financing of contractor working capital, not for the expansion of contractor-owned facilities or the *acquisition* of fixed assets. However, under loan guarantees, exceptions *may* be made for-

(1) Facilities expansion of a minor or incidental nature, if a relatively small part of the guaranteed loan is used for the expansion and the contractor's repayment would not be delayed or impaired; or

(2) Other instances of facilities expansion for which contract financing is appropriate under agency procedures.

(b) The limitations in this section do not apply to contracts under which facilities are being acquired for Government ownership.

32.106 Order of preference.

The *contracting officer* must consider the following order of preference when a contractor requests contract financing, unless an exception would be in the Government's best interest in a specific case:

(a) Private financing without Government guarantee. It is not intended, however, that the *contracting officer* require the contractor to obtain private financing-

(1) At unreasonable terms; or

(2) From other agencies.

(b) *Customary contract financing* other than loan guarantees and certain advance payments (see [32.113](#)).

(c) Loan guarantees.

(d) *Unusual contract financing* (see [32.114](#)).

(e) Advance payments (see exceptions in [32.402\(b\)](#)).

32.107 Need for contract financing not a deterrent.

(a) If the contractor or *offeror* meets the standards prescribed for *responsible prospective contractors* at [9.104](#), the *contracting officer* shall not treat the contractor's need for contract financing as a handicap for a contract award; *e.g.*, as a responsibility factor or evaluation criterion.

(b) The contractor *should* not be disqualified from contract financing solely because the contractor failed to indicate a need for contract financing before the contract was awarded.

32.108 Financial consultation.

Each *contracting office* should have available and use the services of contract financing personnel competent to evaluate credit and financial problems. In resolving any questions concerning-

- (a) The financial capability of an *offeror* or contractor to perform a contract, or
- (b) What form of contract financing is appropriate in a given case, the *contracting officer should* consult the appropriate contract financing office.

32.109 Termination financing.

To encourage contractors to invest their own funds in performance despite the susceptibility of the contract to termination for the convenience of the Government, the contract financing procedures under this part *may* be applied to the financing of terminations either in connection with or independently of financing for contract performance (see [49.112-1](#)).

32.110 Payment of subcontractors under cost-reimbursement prime contracts.

If the contractor makes financing payments to a subcontractor under a cost-reimbursement prime contract, the *contracting officer should* accept the financing payments as reimbursable costs of the prime contract only under the following conditions:

- (a) The payments are made under the criteria in [subpart 32.5](#) for customary progress payments based on costs, [32.202-1](#) for *commercial product* or *commercial service* purchase financing, or [32.1003](#) for performance-based payments, as applicable.
- (b) If customary progress payments are made, the payments do not exceed the progress payment rate in [32.501-1](#), unless unusual progress payments to the subcontractor have been approved in accordance with [32.501-2](#).
- (c) If customary progress payments are made, the subcontractor complies with the liquidation principles of [32.503-8](#), [32.503-9](#), and [32.503-10](#).
- (d) If performance-based payments are made, the subcontractor complies with the liquidation principles of [32.1004](#)(d).
- (e) The subcontract contains financing payments terms as prescribed in this part.

32.111 Contract clauses for non-commercial purchases.

(a) The *contracting officer shall* insert the following clauses, appropriately modified with respect to payment *due dates*, in accordance with agency regulations-

- (1) The clause at [52.232-1](#), Payments, in *solicitations* and contracts when a fixed-price supply contract, a fixed-price service contract, or a contract for nonregulated communication services is contemplated;
- (2) The clause at [52.232-2](#), Payment under Fixed-Price Research and Development Contracts, in *solicitations* and contracts when a fixed-price research and development contract is contemplated;
- (3) The clause at [52.232-3](#), Payments under *Personal Services Contracts*, in *solicitations* and

contracts for personal services;

(4) The clause at 52.232-4, Payments under Transportation Contracts and Transportation-Related Services Contracts, in *solicitations* and contracts for transportation or transportation-related services;

(5) The clause at 52.232-5, Payments under Fixed-Price *Construction* Contracts, in *solicitations* and contracts for *construction* when a fixed-price contract is contemplated;

(6) The clause at 52.232-6, Payments under Communication Service Contracts with Common Carriers, in *solicitations* and contracts for regulated communication services by common carriers; and

(7) The clause at 52.232-7, Payments under Time-and-Materials and Labor-Hour Contracts, in *solicitations* and contracts when a time-and-materials or labor-hour contract is contemplated. If the *contracting officer* determines that it is necessary to withhold payment to protect the Government's interests, paragraph (a)(7) of the clause permits the *contracting officer* to unilaterally issue a modification requiring the contractor to withhold 5 percent of amounts due, up to a maximum of \$50,000 under the contract. The *contracting officer shall* ensure that the modification specifies the percentage and total amount of the withhold payment. Normally, there *should* be no need to withhold payment for a contractor with a record of timely submittal of the release discharging the Government from all liabilities, obligations, and *claims*, as required by paragraph (g) of the clause.

(b) The *contracting officer shall* insert the following clauses, appropriately modified with respect to payment *due dates* in accordance with agency regulations:

(1) The clause at 52.232-8, Discounts for Prompt Payment, in *solicitations* and contracts when a fixed-price supply contract or fixed-price service contract is contemplated.

(2) A clause, substantially the same as the clause at 52.232-9, Limitation on Withholding of Payments, in *solicitations* and contracts when a supply contract, research and development contract, service contract, time-and-materials contract, or labor-hour contract is contemplated that includes two or more terms authorizing the temporary withholding of amounts otherwise payable to the contractor for *supplies* delivered or services performed.

(c) The *contracting officer shall* insert the following clauses, appropriately modified with respect to payments *due dates* in accordance with agency regulations:

(1) The clause at 52.232-10, Payments under Fixed-Price Architect-Engineer Contracts, in fixed-price architect-engineer contracts.

(2) The clause at 52.232-11, Extras, in *solicitations* and contracts when a fixed-price supply contract, fixed-price service contract, or a transportation contract is contemplated.

32.112 Nonpayment of subcontractors under contracts other than for commercial products and commercial services.

32.112-1 Subcontractor assertions of nonpayment.

(a) In accordance with Section 806(a)(4) of Pub.L.102-190, as amended by Sections 2091 and 8105 of

Pub.L.103-355 (10 U.S.C. 4601 note prec.), upon the assertion by a subcontractor or supplier of a Federal contractor that the subcontractor or supplier has not been paid in accordance with the payment terms of the subcontract, *purchase order*, or other agreement with the prime contractor, the *contracting officer* may determine-

(1) For a *construction* contract, whether the contractor has made-

(i) Progress payments to the subcontractor or supplier in compliance with Chapter 39 of Title 31, *United States Code* (Prompt Payment Act); or

(ii) Final payment to the subcontractor or supplier in compliance with the terms of the subcontract, *purchase order*, or other agreement with the prime contractor;

(2) For a contract other than *construction*, whether the contractor has made progress payments, final payments, or other payments to the subcontractor or supplier in compliance with the terms of the subcontract, *purchase order*, or other agreement with the prime contractor; or

(3) For any contract, whether the contractor's certification of payment of a subcontractor or supplier accompanying its payment request to the Government is accurate.

(b) If, in making the determination in paragraphs (a)(1) and (2) of this subsection, the *contracting officer* finds the prime contractor is not in compliance, the *contracting officer* may-

(1) Encourage the contractor to make timely payment to the subcontractor or supplier; or

(2) If authorized by the applicable payment clauses, reduce or suspend progress payments to the contractor.

(c) If the *contracting officer* determines that a certification referred to in paragraph (a)(3) of this subsection is inaccurate in any material respect, the *contracting officer* shall initiate administrative or other remedial action.

32.112-2 Subcontractor requests for information.

(a) In accordance with section 806(a)(1) of Public Law 102-190, as amended by sections 2091 and 8105 of Public Law 103-355 (10 U.S.C. 4601 note prec.), upon the request of a subcontractor or supplier under a Federal contract other than for a *commercial product* or *commercial service*, the *contracting officer* shall promptly advise the subcontractor or supplier as to—

(1) Whether the prime contractor has submitted requests for progress payments or other payments to the Federal Government under the contract; and

(2) Whether final payment under the contract has been made by the Federal Government to the prime contractor.

(b) In accordance with 5 U.S.C. 552(b)(1), this subsection does not apply to matters that are-

(1) Specifically authorized under criteria established by an Executive order to be kept classified in the interest of *national defense* or foreign policy; and

(2) Properly classified pursuant to such Executive order.

32.113 Customary contract financing.

The *solicitation* must specify the *customary contract financing* offerors may propose. The following are *customary contract financing* when provided in accordance with this part and agency regulations:

- (a) Financing of shipbuilding, or ship conversion, alteration, or repair, when agency regulations provide for progress payments based on a percentage or stage of completion.
- (b) Financing of *construction* or *architect-engineer services* purchased under the authority of part 36.
- (c) Financing of contracts for *supplies* or services awarded under the sealed bid method of *procurement* in accordance with part 14 through progress payments based on costs in accordance with subpart 32.5.
- (d) Financing of contracts for *supplies* or services awarded under the competitive negotiation method of *procurement* in accordance with part 15, through either progress payments based on costs in accordance with subpart 32.5, or performance-based payments in accordance with subpart 32.10 (but not both).
- (e) Financing of contracts for *supplies* or services awarded under a sole-source *acquisition* as defined in 2.101 and using the procedures of part 15, through either progress payments based on costs in accordance with subpart 32.5, or performance-based payments in accordance with subpart 32.10 (but not both).
- (f) Financing of contracts for *supplies* or services through advance payments in accordance with subpart 32.4.
- (g) Financing of contracts for *supplies* or services through guaranteed loans in accordance with subpart 32.3.
- (h) Financing of contracts for *supplies* or services through any appropriate combination of advance payments, guaranteed loans, and either performance-based payments or progress payments (but not both) in accordance with their respective subparts.

32.114 Unusual contract financing.

Any contract financing arrangement that deviates from this part is *unusual contract financing*. *Unusual contract financing* shall be authorized only after approval by the *head of the agency* or as provided for in agency regulations.

Subpart 32.2 - Commercial Product and Commercial Service Purchase Financing

32.200 Scope of subpart.

This subpart provides policies and procedures for commercial financing arrangements under commercial purchases pursuant to [part 12](#).

32.201 Statutory authority.

[10 U.S.C. 3805](#) and [41 U.S.C.4505](#) provide that payment for *commercial products* or *commercial services* may be made under such terms and conditions as the *head of the agency* determines are appropriate or customary in the commercial marketplace and are in the best interest of the *United States*.

32.202 General.

32.202-1 Policy.

(a) *Use of financing in contracts.* It is the responsibility of the contractor to provide all resources needed for performance of the contract. Thus, for purchases of *commercial products* or *commercial services*, financing of the contract is normally the contractor's responsibility. However, in some markets the provision of financing by the buyer is a commercial practice. In these circumstances, the *contracting officer* may include appropriate financing terms in contracts for commercial purchases when doing so will be in the best interest of the Government.

(b) *Authorization.* *Commercial interim payments* and commercial advance payments may be made under the following circumstances-

(1) The contract item financed is a commercial supply or service;

(2) The contract price exceeds the *simplified acquisition threshold*;

(3) The *contracting officer* determines that it is appropriate or customary in the commercial marketplace to make financing payments for the item;

(4) Authorizing this form of contract financing is in the best interest of the Government (see paragraph (e) of this sub-section);

(5) Adequate security is obtained (see [32.202-4](#));

(6) Prior to any performance of work under the contract, the aggregate of commercial advance payments *shall* not exceed 15 percent of the contract price;

(7) The contract is awarded on the basis of competitive procedures or, if only one *offer* is solicited, adequate consideration is obtained (based on the time value of the additional financing to be provided) if the financing is expected to be substantially more advantageous to the *offeror* than the *offeror's* normal method of customer financing; and

(8) The *contracting officer* obtains concurrence from the payment office concerning liquidation provisions when required by [32.206\(e\)](#).

(c) *Difference from other than commercial financing.* Government financing of commercial purchases under this subpart is expected to be different from that used for other than commercial

purchases under [subpart 32.1](#) and its related subparts. While the *contracting officer* may adapt techniques and procedures from the other than commercial subparts for use in implementing commercial contract financing arrangements, the *contracting officer* must have a full understanding of effects of the differing contract environments and of what is needed to protect the interests of the Government in commercial contract financing.

(d) *Unusual contract financing*. Any contract financing arrangement not in accord with the requirements of agency regulations or this part is *unusual contract financing* and requires advance approval in accordance with agency procedures. If not otherwise specified, such *unusual contract financing* shall be approved by the *head of the contracting activity*.

(e) *Best interest of the Government*. The statutes cited in [32.201](#) do not allow contract financing by the Government unless it is in the best interest of the *United States*. Agencies may establish standards to determine whether contract financing is in the best interest of the Government. These standards may be for certain types of *procurements*, certain types of items, or certain dollar levels of *procurements*.

32.202-2 Types of payments for commercial product and commercial service purchases.

These definitions incorporate the requirements of the statutory commercial financing authority and the implementation of the Prompt Payment Act.

Commercial advance payment, as used in this section, means a payment made before any performance of work under the contract. The aggregate of these payments shall not exceed 15 percent of the contract price. These payments are *contract financing payments* for prompt payment purposes (*i.e.*, not subject to the interest penalty provisions of the Prompt Payment Act in accordance with [subpart 32.9](#)). These payments are not subject to [subpart 32.4](#), Advance Payments for Other Than Commercial Acquisitions.

Commercial interim payment (see [32.001](#)).

Delivery payment (see [32.001](#)).

32.202-3 Conducting market research about financing terms.

Contract financing may be a subject included in the *market research* conducted in accordance with [part 10](#). If *market research* for contract financing is conducted, the *contracting officer* should consider-

- (a) The extent to which other buyers provide contract financing for purchases in that market;
- (b) The overall level of financing normally provided;
- (c) The amount or percentages of any payments equivalent to commercial advance payments (see [32.202-2](#));
- (d) The basis for any payments equivalent to *commercial interim payments* (see [32.001](#)), as well as the frequency, and amounts or percentages; and
- (e) Methods of liquidation of *contract financing payments* and any special or unusual payment terms

applicable to *delivery payments* (see [32.001](#)).

32.202-4 Security for Government financing.

(a) Policy.

(1) [10 U.S.C. 3805](#) and [41 U.S.C.4505](#) require the Government to obtain adequate security for Government financing. The *contracting officer shall* specify in the *solicitation* the type of security the Government will accept. If the Government is willing to accept more than one form of security, the *offeror shall* be required to specify the form of security it will provide. If acceptable to the *contracting officer*, the resulting contract *shall* specify the security (see [32.206\(b\)\(1\)\(iv\)](#)).

(2) Subject to agency regulations, the *contracting officer may* determine the *offeror's* financial condition to be adequate security, provided the *offeror* agrees to provide additional security *should* that financial condition become inadequate as security (see paragraph (c) of the clause at [52.232-29](#), Terms for Financing of Purchases of *Commercial Products* and *Commercial Services*). Assessment of the contractor's financial condition *shall* consider both net worth and liquidity. If the *contracting officer* finds the *offeror's* financial condition is not adequate security, the *contracting officer shall* require other adequate security. Paragraphs (b), (c), and (d) of this subsection list other (but not all) forms of security that the *contracting officer may* find acceptable.

(3) The value of the security *must* be at least equal to the maximum unliquidated amount of *contract financing payments* to be made to the contractor. The value of security *may* be adjusted periodically during contract performance, as long as it is always equal to or greater than the amount of unliquidated financing.

(b) Paramount lien.

(1) The statutes cited in [32.201](#) provide that if the Government's security is in the form of a lien, such lien is paramount to all other liens and is effective immediately upon the first payment, without filing, notice, or other action by the *United States*.

(2) When the Government's security is in the form of a lien, the contract *shall* specify what the lien is upon, *e.g.*, the work in process, the contractor's plant, or the contractor's inventory. *Contracting officers may* be flexible in the choice of assets. The contract *must* also give the Government a right to verify the existence and value of the assets.

(3) Provision of Government financing *shall* be conditioned upon a contractor certification that the assets subject to the lien are free from any prior encumbrances. Prior liens *may* result from such things as capital equipment loans, installment purchases, working capital loans, various lines of credit, and revolving credit arrangements.

(c) *Other assets as security.* *Contracting officers may* consider the guidance at [28.203](#) and [28.204](#) in determining which types of assets *may* be acceptable as security. For the purpose of applying the guidance in [part 28](#) to this subsection, the term "surety" and/or "individual surety" *should* be interpreted to mean "offeror" and/or "contractor."

(d) *Other forms of security.* Other acceptable forms of security include-

- (1) An *irrevocable letter of credit* from a federally insured financial institution;
 - (2) A bond from a *surety*, acceptable in accordance with [part 28](#) (note that the bond *must* guarantee repayment of the unliquidated contract financing);
 - (3) A guarantee of repayment from a person or corporation of demonstrated liquid net worth, connected by significant ownership to the contractor; or
 - (4) Title to identified contractor assets of adequate worth.
- (e) *Management of risk and security.* In establishing contract financing terms, the *contracting officer must* be aware of certain risks. For example, very high amounts of financing early in the contract (front-end loading) *may* unduly increase the risk to the Government. The security and the amounts and timing of financing payments *must* be analyzed as a whole to determine whether the arrangement will be in the best interest of the Government.

32.203 Determining contract financing terms.

When the criteria in [32.202-1\(b\)](#) are met, the *contracting officer may* either specify the financing terms in the *solicitation* (see [32.204](#)) or permit each *offeror* to propose its own customary financing terms (see [32.205](#)). When the *contracting officer* has sufficient information on financing terms that are customary in the commercial marketplace for the item, those terms *may* be specified in the *solicitation*.

32.204 Procedures for contracting officer-specified commercial contract financing.

The financing terms *shall* be included in the *solicitation*. Contract financing *shall* not be a factor in the evaluation of resulting proposals, and proposals of alternative financing terms *shall* not be accepted (but see [14.208](#) and [15.206](#) concerning amendments of *solicitations*). However, an *offer* stating that the *contracting officer*-specified contract financing terms will not be used by the *offeror* does not alter the evaluation of the *offer*, nor does it render the *offer* nonresponsive or otherwise unacceptable. In the event of award to an *offeror* who declined the proposed contract financing, the contract financing provisions *shall* not be included in the resulting contract. Contract financing *shall* not be a basis for adjusting *offerors'* proposed prices, because the effect of contract financing is reflected in each *offeror's* proposed prices.

32.205 Procedures for offeror-proposed commercial contract financing.

- (a) Under this procedure, each *offeror may* propose financing terms. The *contracting officer must* then determine which *offer* is in the best interests of the *United States*.
- (b) *Solicitations.* The *contracting officer must* include in the *solicitation* the provision at [52.232-31](#), invitation to Propose Financing Terms. The *contracting officer must* also-
 - (1) Specify the *delivery payment (invoice)* dates that will be used in the evaluation of financing proposals; and

(2) Specify the interest rate to be used in the evaluation of financing proposals (see paragraph (c)(4) of this section).

(c) Evaluation of proposals.

(1) When contract financing terms vary among *offerors*, the *contracting officer must* adjust each proposed price for evaluation purposes to reflect the cost of providing the proposed financing in order to determine the total cost to the Government of that particular combination of price and financing.

(2) Contract financing results in the Government making payments earlier than it otherwise would. In order to determine the cost to the Government of making payments earlier, the *contracting officer must* compute the imputed cost of those financing payments and add it to the proposed price to determine the evaluated price for each *offeror*.

(3) The imputed cost of a single financing payment is the amount of the payment multiplied by the annual interest rate, multiplied by the number of years, or fraction thereof, between the date of the financing payment and the date the amount would have been paid as a *delivery payment*. The imputed cost of financing is the sum of the imputed costs of each of the financing payments.

(4) The *contracting officer must* calculate the time value of proposal-specified contract financing arrangements using as the interest rate the nominal discount rate specified in AppendixC of the Office of Management and Budget (OMB) CircularA-94, "Guidelines and Discount Rates for Benefit-Cost Analysis of Federal Programs," appropriate to the period of contract financing. Where the period of proposed financing does not match the periods in the OMB Circular, the interest rate for the period closest to the finance period *shall* be used. AppendixC is updated yearly, and is available from the Office of Economic Policy in the Office of Management and Budget (OMB).

32.206 Solicitation provisions and contract clauses.

(a) The contract *shall* contain the paragraph entitled "Payment" of the clause at [52.212-4](#), Contract Terms and Conditions-*Commercial Products and Commercial Services*. If the contract will provide for contract financing, the *contracting officer shall* construct a *solicitation* provision and *contract clause*. This *solicitation* provision *shall* be constructed in accordance with [32.204](#) or [32.205](#). If the procedure at [32.205](#) is used, the *solicitation* provision at [52.232-31](#), invitation to Propose Financing Terms, *shall* be included. The *contract clause shall* be constructed in accordance with the requirements of this subpart and any agency regulations.

(b) Each contract financing clause *shall* include:

(1) A description of the-

(i) Computation of the financing payment amounts (see paragraph (c) of this section);

(ii) Specific conditions of contractor entitlement to those financing payments (see paragraph (c) of this section);

(iii) Liquidation of those financing payments by *delivery payments* (see paragraph (e) of this section);

(iv) Security the contractor will provide for financing payments and any terms or conditions specifically applicable thereto (see [32.202-4](#)); and

(v) Frequency, form, and any additional content of the contractor's request for financing payment (in addition to the requirements of the clause at 52.232-29, Terms for Financing of Purchases of *Commercial Products* and *Commercial Services*; and

(2) Unless agency regulations authorize alterations, the unaltered text of the clause at 52.232-29, Terms for Financing of Purchases of *Commercial Products* and *Commercial Services*.

(c) Computation of amounts, and contractor entitlement provisions.

(1) Contracts *shall* provide that *delivery payments shall* be made only for completed *supplies* and services accepted by the Government in accordance with the terms of the contract. Contracts *may* provide for commercial advance and commercial interim payments based upon a wide variety of bases, including (but not limited to) achievement or occurrence of specified events, the passage of time, or specified times prior to the delivery date(s). The basis for payment *must* be objectively determinable. The clause written by the *contracting officer shall* specify, to the extent access is necessary, the information and/or facilities to which the Government *shall* have access for the purpose of verifying the contractor's entitlement to payment of contract financing.

(2) If the contract is awarded using the *offeror-proposed* procedure at 32.205, the clause constructed by the *contracting officer* under paragraph (b)(1) of this section *shall* contain the following:

(i) A statement that the *offeror's* proposed listing of earliest times and greatest amounts of projected financing payments submitted in accordance with paragraph (d)(2) of the provision at 52.232-31, invitation to Propose Financing Terms, is incorporated into the contract, and

(ii) A statement that financing payments *shall* be made in the lesser amount and on the later of the date due in accordance with the financing terms of the contract, or in the amount and on the date projected in the listing of earliest times and greatest amounts incorporated in the contract.

(3) If the security accepted by the *contracting officer* is the contractor's financial condition, the *contracting officer shall* incorporate in the clause constructed under paragraph (b)(1) of this section the following-

(i) A statement that the contractor's financial condition has been accepted as adequate security for commercial financing payments; and

(ii) A statement that the *contracting officer may* exercise the Government's rights to require other security under paragraph (c), Security for Government Financing, of the clause at 52.232-29, Terms for Financing of Purchases of *Commercial Products* and *Commercial Services*, in the event the contractor's financial condition changes and is found not to be adequate security.

(d) *Instructions for multiple appropriations*. If contract financing is to be computed for the contract as a whole, and if there is more than one appropriation account (or subaccount) funding payments under the contract, the *contracting officer shall* include, in the contract, instructions for distribution of financing payments to the respective funds accounts. Distribution instructions and contract liquidation instructions *must* be mutually consistent.

(e) *Liquidation*. Liquidation of *contract financing payments shall* be on the same basis as the computation of *contract financing payments*; that is, financing payments computed on a whole contract basis *shall* be liquidated on a whole contract basis; and a payment computed on a *line item* basis *shall* be liquidated against that *line item*. If liquidation is on a whole contract basis, the

contracting officer shall use a uniform liquidation percentage as the liquidation method, unless the *contracting officer* obtains the concurrence of the cognizant payment office that the proposed liquidation provisions can be executed by that office, or unless agency regulations provide alternative liquidation methods.

(f) *Prompt payment for commercial purchase payments.* The provisions of subpart 32.9, Prompt Payment, apply to contract financing and *invoice payments* for commercial purchases in the same manner they apply to other than commercial purchases. The *contracting officer* is responsible for including in the contract all the information necessary to implement prompt payment. In particular, *contracting officers must* be careful to clearly differentiate in the contract between contract financing and *invoice payments* and between items having different prompt payment times.

(g) *Installment payment financing for commercial products and commercial services.* *Contracting officers may* insert the clause at 52.232-30, Installment Payments for Commercial Products and Commercial Services, in *solicitations* and contracts in lieu of constructing a specific clause in accordance with paragraphs (b) through (e) of this section, if the *contract action* qualifies under the criteria at 32.202-1(b) and installment payments for the item are either customary or are authorized in accordance with agency procedures.

(1) *Description.* Installment payment financing is payment by the Government to a contractor of a fixed number of equal interim financing payments prior to delivery and acceptance of a contract item. The installment payment arrangement is designed to reduce administrative costs. However, if a contract will have a large number of deliveries, the administrative costs *may* increase to the point where installment payments are not in the best interests of the Government.

(2) *Authorized types of installment payment financing and rates.* Installment payments *may* be made using the clause at 52.232-30, Installment Payments for Commercial Products and Commercial Services, either at the 70 percent financing rate cited in the clause or at a lower rate in accordance with agency procedures.

(3) *Calculating the amount of installment financing payments.* The *contracting officer shall* identify in the contract schedule those items for which installment payment financing is authorized. Monthly installment payment amounts are to be calculated by the contractor pursuant to the instructions in the *contract clause* only for items authorized to receive installment payment financing.

(4) *Liquidating installment payments.* If installment payments have been made for an item, the amount paid to the contractor upon acceptance of the item by the Government *shall* be reduced by the amount of installment payments made for the item. The contractor's request for final payment for each item is required to show this calculation.

32.207 Administration and payment of commercial financing payments.

(a) *Responsibility.* The *contracting officer* responsible for administration of the contract *shall* be responsible for review and approval of contract financing requests.

(b) *Approval of financing requests.* Unless otherwise provided in agency regulations, or by agreement with the appropriate payment official-

(1) The *contracting officer shall* be responsible for receiving, approving, and transmitting all contract financing requests to the appropriate payment office; and

(2) Each approval *shall* specify the amount to be paid, necessary contractual information, and the account(s) (see [32.206\(d\)](#)) to be charged for the payment.

(c) *Management of security.* After contract award, the *contracting officer* responsible for approving requests for financing payments *shall* be responsible for determining that the security continues to be adequate. If the contractor's financial condition is the Government's security, this *contracting officer* is also responsible for monitoring the contractor's financial condition.

Subpart 32.3 - Loan Guarantees for Defense Production

32.300 Scope of subpart.

This subpart prescribes policies and procedures for designated agencies' guarantees of loans made by private financial institutions to *borrowers* performing contracts related to *national defense* (see [30.102](#)).

32.301 Definitions.

As used in this subpart-

Borrower means a contractor, subcontractor (at any tier), or other supplier who receives a *guaranteed loan*.

Federal Reserve Board means the Board of Governors of the Federal Reserve System.

Guaranteed loan or "V loan" means a loan, revolving credit fund, or other financial arrangement made pursuant to Regulation V of the *Federal Reserve Board*, under which the *guaranteeing agency* is obligated, on demand of the lender, to purchase a stated percentage of the loan and to share any losses in the amount of the guaranteed percentage.

Guaranteeing agency means any agency that the President has authorized to guarantee loans, through Federal Reserve Banks, for expediting *national defense* production.

32.302 Authority.

Congress has authorized Federal Reserve Banks to act, on behalf of *guaranteeing agencies*, as fiscal agents of the *United States* in the making of loan guarantees for defense production (Section 301, Defense Production Act of 1950 (50 U.S.C. App. 2091)). By Executive Order 10480, August 14, 1953 (3 CFR 1949-53), as amended, the President has designated the following agencies as *guaranteeing agencies*:

- (a) Department of Defense.
- (b) Department of Energy.
- (c) Department of Commerce.

- (d) Department of the Interior.
- (e) Department of Agriculture.
- (f) General Services Administration.
- (g) National Aeronautics and Space Administration.

32.303 General.

(a) Section 301 of the Defense Production Act authorizes loan guarantees for contract performance or other operations related to *national defense*, subject to amounts annually authorized by Congress on the maximum obligation of any *guaranteeing agency* under any loan, discount, advance, or commitment in connection therewith, entered into under section 301. (See 50 U.S.C. App.2091 for statutory limitations and exceptions concerning the authorization of loan guarantee amounts and the use of loan guarantees for the prevention of insolvency or bankruptcy.)

(b) The guarantee *shall* be for less than 100 percent of the loan unless the agency determines that-

- (1) The circumstances are exceptional;
- (2) The operations of the contractor are vital to the *national defense*; and
- (3) No other suitable means of financing are available.

(c) Loan guarantees are not issued to other agencies of the Government.

(d) *Guaranteed loans* are essentially the same as conventional loans made by private financial institutions, except that the *guaranteeing agency* is obligated, on demand of the lender, to purchase a stated percentage of the loan and to share any losses in the amount of guaranteed percentage. It is the responsibility of the private financial institution to disburse and collect funds and to administer the loan. Under Regulation V of the *Federal Reserve Board* (12 CFR245), any private financing institution *may* submit an application to the Federal Reserve Bank of its district for guarantee of a loan or credit.

(e) Federal Reserve Banks will make the loan guarantee agreements on behalf of the *guaranteeing agencies*.

(f) Under Section 302(c) of Executive Order10480, August 14,1953 (3 CFR1949-53), as amended, all actions and operations of Federal Reserve Banks, as fiscal agents, are subject to the supervision of the *Federal Reserve Board*. The *Federal Reserve Board* is authorized to prescribe the following, after consultation with the heads of *guaranteeing agencies*:

- (1) Regulations governing the actions and operations of fiscal agents.
- (2) Rates of interest, guarantee and commitment fees, and other charges that *may* be made for loans, discounts, advances, or commitments guaranteed by the *guaranteeing agencies* through the Federal Reserve Banks. These prescriptions *may* be in the form of specific rates or limits, or in other forms.
- (3) Uniform forms and procedures to be used in connection with the guarantees.

(g) The *guaranteeing agency* is responsible for certifying eligibility for the guarantee and fixing the maximum dollar amount and maturity date of the *guaranteed loan* to meet the contractor's requirement for financing performance of the defense production contract on hand at the time the guarantee application is submitted.

32.304 Procedures.

32.304-1 Application for guarantee.

(a) A contractor, subcontractor, or supplier that needs operating funds to perform a contract related to *national defense* may apply to a financing institution for a loan. If the financing institution is willing to extend credit, but considers a Government guarantee necessary, the institution may apply to the Federal Reserve Bank of its district for the guarantee. Application forms and guidance are available at all Federal Reserve Banks.

(b) The Federal Reserve Bank will promptly send a copy of the application, including a list of the relevant defense contracts held by the contractor, to the *Federal Reserve Board*. The Board will transmit the application and the list of contracts to the interested *guaranteeing agency*, so that the agency can determine the eligibility of the contractor.

(c) To expedite the process, the Federal Reserve Bank may, pursuant to instructions of a *guaranteeing agency*, submit lists of the defense contracts to the interested *contracting officers*.

(d) While eligibility is being determined, the Federal Reserve Bank will make any necessary credit investigations to supplement the information furnished by the applicant financing institution in order to-

- (1) Expedite necessary defense financing; and
- (2) Protect the Government against monetary loss.

(e) The Federal Reserve Bank will send its report and recommendation to the *Federal Reserve Board*. The Board will transmit them to the interested *guaranteeing agency*.

32.304-2 Certificate of eligibility.

(a) The *contracting officer* shall prepare the certificate of eligibility for a contract that the *contracting officer* deems to be of material consequence, when-

- (1) The contract financing office requests it;
- (2) Another interested agency requests it; or
- (3) The application for a loan guarantee relates to a contract or subcontract within the cognizance of the *contracting officer*.

(b) The agency shall evaluate the relevant data, including the certificate of eligibility, the accompanying data, and any other relevant information on the contractor's financial status and performance, to determine whether authorization of a loan guarantee would be in the Government's

interest.

(c) If the contractor has several major *national defense* contracts, it is normally not necessary to evaluate the eligibility of relatively minor contracts. The determination of eligibility *should* be processed, without delay, based on the preponderance of the amount of the contracts.

(d) The certificate of eligibility *shall* include the following determinations:

(1) The *supplies* or services to be acquired are essential to the *national defense*.

(2) The contractor has the facilities and the technical and management ability required for contract performance.

(3) There is no practicable *alternate* source for the *acquisition* without prejudice to the *national defense*. (This statement *shall* not be included if the contractor is a small business concern.)

(e) The *contracting officer* *shall* consider the following factors in determining if a practicable *alternate* source exists:

(1) Prejudice to the *national defense*, because reletting of a contract with another source would conflict with a major policy on defense *acquisition*; *e.g.*, policies relating to the mobilization base.

(2) The urgency of contract performance schedules.

(3) The technical ability and facilities of other potential sources.

(4) The extent to which other sources would need contract financing to perform.

(5) The willingness of other sources to enter into contracts.

(6) The time and expense involved in repurchasing for contracts or parts of contracts. This *may* include potential *claims* under a *termination for convenience* or delays incident to default at a later date.

(7) The comparative prices available from other sources.

(8) The disruption of established subcontracting arrangements.

(9) Other pertinent factors.

(f) The *contracting officer* *shall* attach sufficient data to the certificate of eligibility to support the determinations made. Available pertinent information *shall* be included on-

(1) The contractor's *past performance*;

(2) The relationship of the contractor's operations to performance schedules; and

(3) Other factors listed in paragraph (e) of this section, if relevant to the case under consideration.

(g) If the *contracting officer* determines that a certificate of eligibility is not justified, the facts and reasons supporting that conclusion *shall* be documented and furnished to the agency contract finance office.

(h) The *guaranteeing agency* *shall* review the proposed guarantee terms and conditions. If they are

considered appropriate, the *guaranteeing agency shall* complete a standard form of authorization as prescribed by the *Federal Reserve Board*. The agency *shall* transmit the authorization through the *Federal Reserve Board* to the Federal Reserve Bank. The Bank is authorized to execute and deliver to the financing institution a standard form of guarantee agreement, with the terms and conditions approved for the particular case. The financing institution will then make the loan.

(i) Substantially the same procedure *may* be followed for the application of an *offeror* who is actively negotiating or bidding for a defense contract, except that the guarantee *shall* not be authorized until the contract has been executed.

(j) The *contracting officer shall* report to the agency contract finance office any information about the contractor that would have a potentially adverse impact on a pending guarantee application. The *contracting officer* is not required, however, to initiate any special investigation for this purpose.

(k) With regard to existing contracts, the agency *shall* not consider the percentage of guarantee requested by the financing institution in determining the contractor's eligibility.

32.304-3 Asset formula.

(a) Under *guaranteed loans* made primarily for working capital purposes, the agency *shall* normally limit the guarantee, by use of an asset formula, to an amount that does not exceed a specified percentage (90 percent or less) of the contractor's investment (*e.g.*, payrolls and inventories) in defense production contracts. The asset formula *may* include all items under defense contracts for which the contractor would be entitled to payment on performance or termination. The formula *shall* exclude-

(1) Amounts for which the contractor has not done any work or made any expenditure;

(2) Amounts that would become due as the result of later performance under the contracts; and

(3) Cash collateral or bank deposit balances.

(b) Progress payments are deducted from the asset formula.

(c) The agency *may* relax the asset formula to an appropriate extent for the time actually necessary for contract performance, if the contractor's working capital and credit are inadequate.

32.304-4 Guarantee amount and maturity.

The agency *may* change the guarantee amount or maturity date, within the limitations at [32.304-3](#), as follows:

(a) If the contractor enters into additional defense production contracts after the application for, but before authorization of, a guarantee, the agency *may* adjust the loan guarantee amount or maturity date to meet any significant increase in financing need.

(b) If the contractor enters into defense production contracts during the term of the *guaranteed loan*, the parties *may* adjust the existing guarantee agreement to provide for financing the new contracts. Pertinent information and the Federal Reserve Bank reports will be submitted to the *guaranteeing agency* under the procedures for the original guarantee application, described in

32.304-1. Normally, a new certificate of eligibility is required.

32.304-5 Assignment of claims under contracts.

(a) The agency *shall* generally require a contractor that is provided a *guaranteed loan* to execute an *assignment of claims* under defense production contracts (including any contracts entered into during the term of the *guaranteed loan* that are eligible for financing under the loan); however, the agency need not require assignment if any of the following conditions are present:

(1) The contractor's financial condition is so strong that the protection to the Government provided by an *assignment of claims* is unnecessary.

(2) In connection with the *assignment of claims* under a major contract, the increased protection of the loan that would be provided by the assignments under additional, relatively smaller contracts is not considered necessary by the agency.

(3) The *assignment of claims* would create an administrative burden disproportionate to the protection required; *e.g.*, if the contractor has a large number of contracts with individually small dollar amounts.

(b) The contractor *shall* also execute an *assignment of claims* if requested to do so by the guarantor or the financing institution.

(c) A subcontract or *purchase order* issued to a subcontractor *shall* not be considered eligible for financing under *guaranteed loans* when the issuer of the subcontract or *purchase order* reserves-

(1) The privilege of making payments directly to the assignor or to the assignor and assignee jointly, after notice of the assignment, or

(2) The right to reduce or set off assigned proceeds under defense production contracts by reason of *claims* against the *borrower* arising after notice of assignment and independently of defense production contracts under which the *borrower* is the seller.

32.304-6 Other collateral security.

The following are examples of other forms of security that, although seldom invoked under *guaranteed loans*, may be required when considered necessary for protection of the Government interest:

(a) Mortgages on fixed assets.

(b) Liens against inventories.

(c) Endorsements.

(d) Guarantees.

(e) Subordinations or standbys of other indebtedness.

32.304-7 Contract surety bonds and loan guarantees.

(a) Contract *surety* bonds are incompatible with the Government's interests under *guaranteed loans*, unless the interests of the *surety* are subordinated to the *guaranteed loan*.

(b) If a substantial share of the contractor's defense contracts are covered by *surety* bonds, or the amount of the bond is substantial in relation to the contractor's net worth, the agency *shall* not authorize the guarantee of a loan on a bonded contract unless the *surety* enters into an agreement with the financing institution to subordinate the *surety's* rights and *claims* in favor of the *guaranteed loan*.

(c) The agency approval of a guarantee for a loan involving relatively substantial subcontracts covered by *surety* bonds *shall* also depend on the establishment of a reasonable allocation agreement between the *sureties* and the financing institution. The agreement *should* give the financing institution the benefit, with regard to payments to be made on the contract, of the portion of its loans fairly attributable to expenditures made under the bonded subcontracts before notice of default.

32.304-8 Other borrowing.

(a) Because of the limitations under *guaranteed loans*, some contractors seek to supplement the loan by other borrowing (outside the guarantee) from the financing institution or other sources. It has been recognized in practice that, while prohibition of borrowings outside the *guaranteed loan* is preferable when practicable in a given V-loan case, such other borrowings *should* be permitted when necessary.

(b) If the agency consents to the contractor obtaining other borrowing during the *guaranteed loan* period, the agency *shall* apply the following restrictions:

(1) A reasonable limit on the amount of other borrowing.

(2) If guaranteed and unguaranteed loans are made by the same financing institution, a requirement that any collateral security requested by the institution under the unguaranteed loan is also to be secondary collateral for the *guaranteed loan*.

(3) A requirement that the contractor provide appropriate documentation to the *guaranteeing agency*, at intervals not longer than 30 days, to disclose outstanding unguaranteed borrowings.

32.305 Loan guarantees for terminated contracts.

(a) The purpose of *guaranteed loans*; *i.e.*, to provide for financing based on the *borrower's* recoverable investment in defense production contracts, *may* also apply to contracts that have been terminated (partially or totally) for the convenience of the Government. *Guaranteed loans* also *may* be made before such termination if it is known that termination of particular contracts for the convenience of the Government is about to occur. These loans are expected to provide necessary financing pending termination settlements and payments. They *may* also finance continuing performance of defense production contracts that are eligible for *guaranteed loans*.

(b) The procedure for such guarantees is substantially the same as that outlined in [32.304](#), except

that certificates of eligibility are not required for (1) contracts that have been totally terminated or (2) the terminated portion of contracts that have been partially terminated. The agency *shall* take precautions necessary to avoid Government losses and to ensure the loans will be self-liquidating from the proceeds of defense production contracts.

(c) Loan guarantees for contract termination financing *shall* not be provided before specific contract terminations are certain.

32.306 Loan guarantees for subcontracts.

If the request for a loan guarantee concerns a subcontractor that is financially weak in comparison with its contractor, the Government's interests *may* be fostered by the contractor making progress payments to the subcontractor. If so, the agency *shall* try to arrange for the contractor to provide the progress payments. As a result, the need for the loan guarantee *may* be reduced or eliminated and the contractor would bear part or all of the risk of loss arising from the selection of the subcontractor.

Subpart 32.4 - Advance Payments for Other Than Commercial Acquisitions

32.400 Scope of subpart.

This subpart provides policies and procedures for advance payments on prime contracts and subcontracts. It does not include policies and procedures for advance payments for the types of transactions listed in [32.404](#). This subpart does not apply to commercial advance payments, which are subject to [subpart 32.2](#).

32.401 Statutory authority.

The agency *may* authorize advance payments in negotiated and sealed bid contracts if the action is appropriate under-

(a) [41 U.S.C. chapter 45](#);

(b) [10 U.S.C. chapter 277](#); or

(c) Pub.L.85-804 ([50 U.S.C. 1431-1435](#)) and Executive Order 10789, November 14, 1958 (3 CFR 1958 Supp. pp. 72-74) (see [subpart 50.1](#) for other applications of this statute).

32.402 General.

(a) A limitation on authority to grant advance payments under Pub.L.85-804 ([50 U.S.C. 1431-1435](#)) is described at [50.102-3\(b\)\(4\)](#).

(b) Advance payments *may* be provided on any type of contract; however, the agency *shall* authorize

advance payments sparingly. Except for the contracts described in [32.403\(a\)](#) and (b), advance payment is the least preferred method of contract financing (see [32.106](#)) and generally they *should* not be authorized if other types of financing are reasonably available to the contractor in adequate amounts. Loans and credit at excessive interest rates or other exorbitant charges, or loans from other Government agencies, are not considered reasonably available financing.

(c) If statutory requirements and standards for advance payment determinations are met, the *contracting officer shall* generally recommend that the agency authorize advance payments.

(1) The statutory requirements are that-

(i) The contractor gives adequate security;

(ii) The advance payments will not exceed the unpaid contract price (see [32.410\(b\)](#), paragraph (a)(2)); and

(iii) The *agency head* or designee determines, based on written findings, that the advance payment-

(A) Is in the public interest (under [32.401\(a\)](#) or (b)); or

(B) Facilitates the *national defense* (under [32.401\(c\)](#)).

(2) The standards for advance payment determinations are that-

(i) The advance payments will not exceed the contractor's interim cash needs based on-

(A) Analysis of the cash flow required for contract performance;

(B) Consideration of the reimbursement or other payment cycle; and

(C) To the extent possible, employment of the contractor's own working capital;

(ii) The advance payments are necessary to supplement other funds or credit available to a contractor;

(iii) The recipient is otherwise qualified as a responsible contractor;

(iv) The Government will benefit from performance prospects or there are other practical advantages; and

(v) The case fits one or more of the categories described in [32.403](#).

(d) If necessary, the agency *may* authorize advance payments in addition to progress or partial payments on the same contract (see [32.501-1\(c\)](#)).

(e) Each agency that provides advance payments *shall*-

(1) Place the responsibility for making findings and determinations, and for approval of contract terms concerning advance payments (see [32.410](#)), at an organizational level high enough to ensure uniform application of this subpart (see the limitation at [50.102-1\(b\)](#) which also applies to advance payments authorized under Pub.L.85-804 ([50 U.S.C. 1431-1435](#))); and

(2) Establish procedures for coordination, before advance payment authorization, with the activity that provides contract financing support.

(f) If the contract provides for advance payments under Pub.L.85-804, the *contracting officer shall* ensure conformance with the requirements of 50.103-7.

32.403 Applicability.

Advance payments *may* be considered useful and appropriate for the following:

(a) Contracts for experimental, research, or development work with nonprofit educational or research institutions.

(b) Contracts solely for the management and operation of Government-owned plants.

(c) Contracts for *acquisition*, at cost, of property for Government ownership.

(d) Contracts of such a highly classified nature that the agency considers it undesirable for national security to permit *assignment of claims* under the contract.

(e) Contracts entered into with financially weak contractors whose technical ability is considered essential to the agency. In these cases, the agency *shall* closely monitor the contractor's performance and financial controls to reduce the Government's financial risk.

(f) Contracts for which a loan by a private financial institution is not practicable, whether or not a loan guarantee under this part is issued; for example, if-

(1) Financing institutions will not assume a reasonable portion of the risk under a guaranteed loan;

(2) Loans with reasonable interest rates or finance charges are not available to the contractor; or

(3) Contracts involve operations so remote from a financial institution that the institution could not be expected to suitably administer a guaranteed loan.

(g) Contracts with small business concerns, under which circumstances that make advance payments appropriate often occur (but see 32.104(b)).

(h) Contracts under which exceptional circumstances make advance payments the most advantageous contract financing method for both the Government and the contractor.

32.404 Exclusions.

(a) This subpart does not apply to advance payments authorized by law for-

(1) Rent;

(2) Tuition;

(3) *Insurance* premiums;

(4) Expenses of investigations in foreign countries;

(5) Extension or connection of public utilities for Government buildings or installations;

(6) Subscriptions to publications;

(7) Purchases of *supplies* or services in foreign countries, if-

(i) The purchase price does not exceed \$15,000 (or equivalent amount of the applicable foreign currency); and

(ii) The advance payment is required by the laws or government regulations of the foreign country concerned;

(8) Enforcement of the customs or narcotics laws; or

(9) Other types of transactions excluded by agency procedures under statutory authority.

(b) Agencies *may* issue their own instructions to deal with advance payment items in paragraph (a) of this section authorized under statutes relevant to their agencies.

32.405 Applying Pub.L.85-804 to advance payments under sealed bid contracts.

(a) Actions that designated agencies *may* take to facilitate the *national defense* without regard to other provisions of law relating to contracts, as explained in 50.101-1(a), also include making advance payments. These advance payments *may* be made at or after award of sealed bid contracts, as well as negotiated contracts.

(b) Bidders *may* request advance payments before or after award, even if the invitation for bids does not contain an advance payment provision. However, the *contracting officer shall* reject any bid requiring that advance payments be provided as a basis for acceptance.

(c) When advance payments are requested, the agency *may*-

(1) Enter into the contract and provide for advance payments conforming to this part 32;

(2) Enter into the contract without providing for advance payments if the contractor does not actually need advance payments; or

(3) Deny award of the contract if the request for advance payments has been disapproved under 32.409-2 and funds adequate for performance are not otherwise available to the *offeror*.

32.406 Letters of credit.

(a) The Department of the Treasury (Treasury) prescribes regulations and instructions covering the use of letters of credit for advance payments under contracts. See Treasury Department Circular 1075 (31 CFR Part 205), and the implementing instructions in the Treasury Financial Manual, available in offices providing financial advice and assistance.

(b) If agencies provide advance payments to contractors, use of the following methods is required unless the agency has obtained a waiver from the Treasury Department:

(1) By letter of credit if the *contracting* agency expects to have a continuing relationship with the

contractor for a year or more, with advances totaling at least \$120,000 a year.

(2) By direct Treasury check if the circumstances do not meet the criteria in paragraph (b)(1) of this section.

(c) If the agency has entered into multiple contracts (or a combination of contract(s) and assistance agreement(s)) involving eligibility of a contractor for more than one letter of credit, the agency *shall* follow arrangements made under Treasury procedures for-

(1) Consolidating funding to the same contractor under one letter of credit or

(2) Replacing multiple letters of credit with a single letter of credit.

(d) The letter of credit enables the contractor to withdraw Government funds in amounts needed to cover its own disbursements of cash for contract performance. Whenever feasible, the agency *shall*, under the direction and approval of the Department of the Treasury, use a letter of credit method that requires the contractor not to withdraw the Government funds until the contractor's checks have been-

(1) Forwarded to the payees (delay of drawdown technique), or

(2) Presented to the contractor's bank for payment (checks paid technique) (see 31 CFR205.3 and 205.4(d)).

(e) The Treasury regulations provide for terminating the advance financing arrangement if the contractor is unwilling or unable to minimize the elapsed time between receipt of the advance and disbursement of the funds. In such cases, if reversion to normal payment methods is not feasible, the Treasury regulation provides for use of a working capital method of advance; *i.e.*, for limiting advances to-

(1) Only the estimated disbursements for a given initial period; and

(2) Subsequently, for only actual cash disbursements (31 CFR205.3(k) and 205.7).

32.407 Interest.

(a) Except as provided in paragraph (d) of this section, the *contracting officer shall* charge interest on the daily unliquidated balance of all advance payments at the higher of-

(1) The published prime rate of the financial institution (depository) in which the special account (see [32.409-3](#)) is established; or

(2) The rate established by the Secretary of the Treasury under 50 U.S.C. App.1215(b)(2).

(b) The interest rate for advance payments *shall* be adjusted for changes in the prime rate of the depository and the semiannual determination by the Secretary of the Treasury under 50 U.S.C. App.1215(b)(2). The *contracting officer shall* obtain data from the depository on changes in the interest rate during the month. Interest *shall* be computed at the end of each month on the daily unliquidated balance of advance payments at the applicable daily interest rate.

(c) Interest *shall* be required on contracts that are for *acquisition*, at cost, of property for Government ownership, if the contracts are awarded in combination with, or in contemplation of,

supply contracts or subcontracts.

(d) The *agency head* or designee *may* authorize advance payments without interest under the following types of contracts, if in the Government's interest:

(1) Contracts for experimental, research, or development work (including studies, surveys, and demonstrations in socio-economic areas) with nonprofit education or research institutions.

(2) Contracts solely for the management and operation of Government-owned plants.

(3) Cost-reimbursement contracts with governments, including State or local governments, or their instrumentalities.

(4) Other classes of contracts, or unusual cases, for which the exclusion of interest on advances is specifically authorized by agency procedures.

(e) If a contract provides for interest-free advance payments, the *contracting officer may* require the contractor to charge interest on advances or downpayments to subcontractors and credit the Government for the proceeds from the interest charges. Interest rates *shall* be determined as described in paragraphs (a) and (b) of this section. The *contracting officer* need not require the contractor to charge interest on an advance to a subcontractor that is an institution of the kind described in paragraph (d)(1) of this section.

(f) The *contracting officer shall* not allow interest charges, required by this [32.407](#), as reimbursable costs under cost-reimbursement contracts, whether the interest charge was incurred by the prime contractor or a subcontractor.

32.408 Application for advance payments.

(a) A contractor *may* apply for advance payments before or after the award of a contract.

(b) The contractor *shall* submit any advance payment request *in writing* to the *contracting officer* and provide the following information:

(1) A reference to the contract if the request concerns an existing contract, or a reference to the *solicitation* if the request concerns a proposed contract.

(2) A cash flow forecast showing estimated disbursements and receipts for the period of contract performance. If the application pertains to a type of contract described in [32.403\(a\)](#) or (b), the contractor *shall* limit the forecast to the contract to be financed by advance payments.

(3) The proposed total amount of advance payments.

(4) The name and address of the financial institution at which the contractor expects to establish a special account as depository for the advance payments. If advance payments in the form of a letter of credit are anticipated, the contractor *shall* identify the specific account at the financial institution to be used. This paragraph (b)(4) is not applicable if an *alternate* method is used under agency procedures.

(5) A description of the contractor's efforts to obtain unguaranteed private financing or a V-loan (see [32.301](#)) under eligible contracts. This requirement is not applicable to the contract types described in [32.403\(a\)](#) or (b).

(6) Other information appropriate to an understanding of (i) the contractor's financial condition and need, (ii) the contractor's ability to perform the contract without loss to the Government, and (iii) financial safeguards needed to protect the Government's interest. Ordinarily, if the contract is a type described in [32.403\(a\)](#) or (b), the contractor *may* limit the response to this paragraph (b)(6) to information on the contractor's reliability, technical ability, and accounting system and controls.

32.409 Contracting officer action.

After analysis of the contractor's application and any appropriate investigation, the *contracting officer shall* recommend approval or disapproval and transmit the request and recommendation to the approving authority designated under [32.402\(e\)](#).

32.409-1 Recommendation for approval.

If recommending approval, the *contracting officer shall* transmit the following, under agency procedures, to the approving authority:

(a) Contract data, including-

(1) Identification and date of the award;

(2) Citation of the appropriation;

(3) Type and dollar amount of the contract;

(4) Items to be supplied, schedule of deliveries or performance, and status of any deliveries or performance;

(5) The contract fee or profit contemplated; and

(6) A copy of the contract, if available.

(b) The contractor's request and supporting information.

(c) A report on the contractor's *past performance*, responsibility, technical ability, and plant capacity.

(d) Comments on-

(1) The contractor's need for advance payments; and

(2) Potential Government benefits from the contract performance.

(e) Proposed advance payment contract terms, including proposed security requirements.

(f) The findings, determination, and authorization (see [32.410](#)).

(g) The recommendation for approval of the advance payment request.

(h) Justification of any proposal for waiver of interest charges (see [32.407](#)).

32.409-2 Recommendation for disapproval.

If recommending disapproval, the *contracting officer shall*, under agency procedures, transmit-

- (a) The items prescribed in 32.409-1(a), (b), and (c); and
- (b) The recommendation for disapproval and the reasons.

32.409-3 Security, supervision, and covenants.

(a) If advance payments are approved, the *contracting officer shall* enter into an agreement with the contractor covering special accounts and suitable covenants protecting the Government's interest (see 32.411). This requirement generally applies under all statutory authorities, but modified requirements applicable to certain specific cases are prescribed in paragraphs (e) through (g) of this section.

(b) The agency *shall*-

(1) Ensure that the amount of advance payments does not exceed the contractor's financial needs, and

(2) Closely supervise the contractor's withdrawal of funds from special accounts in which the advance payments are deposited.

(c) In the terms of the agreement, the *contracting officer should* provide for a paramount lien in favor of the Government. This lien *may* supplement or replace other security requirements. The lien *should* cover-

(1) *Supplies* being acquired;

(2) Any credit balance in the special account in which advance payments are deposited; and

(3) All property that the contractor acquires for performing the contract, except to the extent to which the Government otherwise has valid title to the property.

(d) Security requirements vary to fit the circumstances of different cases. Minimum security requirements are covered by the clauses prescribed in the contract. The *contracting officer may* supplement these as necessary in each case for protection of the Government's interest. Examples of additional security terms are-

(1) Personal or corporate endorsements or guarantees;

(2) Pledges of collateral;

(3) Subordination or standby of other indebtedness;

(4) Controls or limitations on profit distributions, salaries, bonuses or commissions, rentals and royalties, capital expenditures, creation of liens, retirement of stock or debt, and creation of additional obligations; and

(5) Advance payment bonds (rarely required).

(e) In an advance payment agreement with an instrumentality of the Government, a State, a local government, or an agency or instrumentality of a State or local government, the *contracting officer* may omit the requirement for deposit of the advances in a special account, if the official approving the advance determines that other adequate security exists to protect the Government's interest.

(f) The requirements of this 32.409-3 do not apply when using letters of credit if an agency's procedures provide for-

(1) The use under a cost-reimbursement contract of Federal funds deposited in the contractor's account at a financial institution (without the contractor acquiring title to the funds); and

(2) The security of such deposit of public moneys in accordance with governing regulations of the Treasury Department.

(g) If a separate special account is not required; *e.g.*, advance payment by a letter of credit, an agency *may* require a special account for an individual case, or classes of cases, if the circumstances warrant.

32.410 Findings, determination, and authorization.

(a) Each determination concerning advance payments *shall* be supported by written findings (see 32.402(c)(1)(iii)).

(b) The following is an example of the format and text of findings, determination, and authorization with alternative words, phrases, and paragraphs to be selected to conform to the circumstances involved:

Findings, Determination, and Authorization for Advance Payments

Findings

(a) The undersigned hereby finds that:

(1) The _____ [*Insert the name of the contracting activity*] and _____ [*Insert the name of the contractor*] (have entered) (propose to enter) into (negotiated) (sealed bid) Contract No. _____, dated _____. [*Summarize the specific facts and significant circumstances concerning the contract and the contractor, that, together with the other findings, will clearly support the determination below.*]

(2) Advance payments (in an amount not to exceed \$ _____ at any time outstanding) (in an aggregate amount not exceeding \$ _____, less the aggregate amounts repaid, or withdrawn by the Government) are required by the Contractor to perform under the contract. The amount does not exceed the unpaid contract price or the estimated interim cash needs arising during the reimbursement cycle.

(3) The advance payments are necessary for prompt, efficient contract performance that will benefit the Government.

(4) The proposed advance payment clause provides for security for the protection of the Government. The clause requires that all payments will be deposited in a special account at the Contractor's financial institution and that the Government will have a paramount lien on (i) the credit balance in the special account, (ii) any *supplies* contracted for, and (iii) any material or other

property acquired for performance of the contract. [*Insert the following, if applicable: (The Contractor's financial management system provides for effective control over and accountability for all Federal funds under governing regulations of the Treasury Department.) (An advance payment bond is required.)*] This security is considered adequate.

(5) Advance payments are the only adequate means of financing available to the Contractor, and the amount designated in (2) of this section is based, to the extent possible, on the use of the Contractor's own working capital in performing the contract. [*Insert paragraph(6), (7), or (8), as applicable.*]

(6) The Contractor is a nonprofit (educational) (and) (research) institution, and the contract is for (experimental) (.) (research and development) work.

(7) The contract is solely for the management and operation of a Government-owned plant.

(8) The following unusual facts and circumstances favor making advance payments to the Contractor without interest: [*List the pertinent facts and circumstances.*]

Determination

(b) Based on the findings in paragraph (a) of this section, the undersigned determined that the making of the proposed advance payments, (with interest at the rate of _____ [*Insert the interest rate computed in accordance with 32.407*] percent on the daily unliquidated balance of the advance payments,) (without interest, except as provided by the proposed advance payment clause,) (is in the public interest) (will facilitate the *national defense*).

Authorization

(c) The advance payments, of which (the amount at any time outstanding) (the aggregate amount, less the aggregate amounts repaid, or withdrawn by the Government), *shall* not exceed \$ _____, are hereby authorized under (41 U.S.C. chapter 45, Contract Financing) (10 U.S.C. chapter 277) (the Extraordinary *Contracting* Authority of Government Agencies in Connection with *National Defense* Functions (50 U.S.C. 1431-1435) and Executive Order No.10789 of November 14,1958 (3 CFR 1958 Supp. pp. 72-74)) [*or, if other, cite appropriate authority*] on (terms substantially as contained in the proposed advance payment clause, a copy (an outline) of which is annexed to this authorization) (the following terms:) [*Insert the appropriate terms.*] (All prior authorizations for advance payments under Contract No. _____ are superseded.)

_____ [Signature]

_____ [Name Typed]

_____ [Title of Authorized Official]

[*Each Findings, Determination, and Authorization shall be individually prepared to fit the particular circumstances at hand. Paragraphs(a)(1), (2), (3) and (4) and paragraphs (b) and (c) shall be used in each case. If the contract is (a) for experimental, developmental or research work and with a nonprofit educational or research institution, or (b) only for management and operation of a Government-owned plant, paragraph (a)(5) should not be included. If the advance payment is to be made without interest to the contractor, include paragraph (a)(6), (7), or (8). If any advance payments have previously been authorized for the contract, include the final sentence of paragraph (c). The alternate parenthetical wording or other modifications may be used as appropriate. The paragraphs actually used shall be renumbered sequentially.*]

32.411 Agreement for special account at a financial institution.

The *contracting officer* must use substantially the following form of agreement for a special account for advance payments:

Agreement for Special Account

This agreement is entered into this ____ day of ____, 20__, between the *United States* of America (the Government), represented by the *Contracting Officer* executing this agreement, ____ [*Insert the name of the Contractor*], a ____ [*Insert the name of the State of incorporation*] corporation (the Contractor), and ____, a financial institution operating under the laws of ____, located at _____ (the financial institution).

Recitals

(a) Under date of ____, 20__, the Government and the Contractor entered into Contract No. ____, or a related *supplemental agreement*, providing for advance payments to the Contractor. A copy of the advance payment terms was furnished to the financial institution.

(b) The contract or *supplemental agreement* requires that amounts advanced to the Contractor be deposited separate from the Contractor's general or other funds, in a Special Account at a member bank of the Federal Reserve System, any "insured" bank within the meaning of the Act creating the Federal Deposit *Insurance* Corporation (12 U.S.C. 1811), or a credit union insured by the National Credit Union Administration. The parties agree to deposit the amounts with the financial institution, which meets the requirement.

(c) This Special Account is designated " _____ [*Insert the Contractor's name*], _____ [*Insert the name of the Government agency*] Special Account."

Covenants

In consideration of the foregoing, and for other good and valuable considerations, the parties agree to the following conditions:

(a) The Government *shall* have a lien on the credit balance in the account to secure the repayment of all advance payments made to the Contractor. The lien is paramount to any lien or *claim* of the financial institution regarding the account.

(b) The financial institution is bound by the terms of the contract relating to the deposit and withdrawal of funds in the Special Account, but is not responsible for the application of funds withdrawn from the account. The financial institution *shall* act on written directions from the *Contracting Officer*, the administering office, or a duly authorized representative of either. The financial institution is not liable to any party to this agreement for any action that complies with the written directions. Any written directions received by the financial institution through the *Contracting Officer* on ____ [*Insert the name of the agency*] stationery and purporting to be signed by, or by the direction of ____ or duly authorized representative, *shall* be, as far as the rights, duties, and liabilities of the financial institution are concerned, considered as being properly issued and filed with the financial institution by the ____ [*Insert the name of the agency*].

(c) The Government, or its authorized representatives, *shall* have access to the books and records maintained by the financial institution regarding the Special Account at all reasonable times and for all reasonable purposes, including (but not limited to), the *inspection* or copying of the books and

records and any and all pertinent memoranda, checks, correspondence, or documents. The financial institution *shall* preserve the books and records for a period of 6 years after the closing of this Special Account.

(d) In the event of the service of any writ of attachment, levy of execution, or commencement of garnishment proceedings regarding the Special Account, the financial institution will promptly notify _____ [*Insert the name of the administering office*].

(e) While this Special Account exists, the financial institution *shall* inform the Government each month of the financial institution's published prime interest rate and changes to the rate during the month. The financial institution *shall* give this information to the *Contracting Officer* on the last business day of the month. [*This covenant will not be included in the Special Account Agreements covering interest-free advance payments.*]

Each of the parties to this agreement has executed the agreement on _____, 20____.

[*Signatures and Official Titles*]

32.412 Contract clause.

(a) The *contracting officer shall* insert the clause at 52.232-12, Advance Payments, in *solicitations* and contracts under which the Government will provide advance payments, except as provided in 32.412(b).

(b) If the agency desires to waive the countersignature requirement because of the contractor's financial strength, good performance record, and favorable experience concerning cost disallowances, the *contracting officer shall* use the clause with its *Alternate I*.

(c) If a cost-reimbursement contract is contemplated, the *contracting officer shall* use the clause with its *Alternate II*.

(d) If the agency considers a more rapid liquidation appropriate, the *contracting officer shall* use the clause with its *Alternate III*.

(e) If the agency provides advance payments under the contract at no interest to the prime contractor, the *contracting officer shall* use the clause with its *Alternate IV*.

(f) If the requirement for a special account is eliminated in accordance with 32.409-3(e) or (g), the *contracting officer shall* insert in the *solicitation* or contract the clause set forth in *Alternate V* of 52.232-12, Advance Payments, instead of the basic clause.

Subpart 32.5 - Progress Payments Based on Costs

32.500 Scope of subpart.

This subpart prescribes policies, procedures, forms, *solicitation* provisions, and *contract clauses* for providing contract financing through progress payments based on costs. This subpart does not apply

to-

(a) Payments under cost-reimbursement contracts, but see [32.110](#) for progress payments made to subcontractors under cost-reimbursement prime contracts; or

(b) Contracts for *construction* or for shipbuilding or ship conversion, alteration, or repair, when the contracts provide for progress payments based on a percentage or stage of completion.

32.501 General.

Progress payments *may* be customary or unusual. Customary progress payments are those made under the general guidance in this subpart, using the customary progress payment rate, the cost base, and frequency of payment established in the Progress Payments clause, and either the ordinary liquidation method or the *alternate* method as provided in subsections [32.503-8](#) and [32.503-9](#). Any other progress payments are considered unusual, and *may* be used only in exceptional cases when authorized in accordance with subsection [32.501-2](#).

32.501-1 Customary progress payment rates.

(a) The customary progress payment rate is 80 percent, applicable to the total costs of performing the contract. The customary rate for contracts with small business concerns is 85 percent.

(b) The *contracting officer must*-

(1) Consider any rate higher than those permitted in paragraph (a) of this section an unusual progress payment; and

(2) Not include a higher rate in a contract unless advance agency approval is obtained as prescribed in [32.501-2](#).

(c) When advance payments and progress payments are authorized under the same contract, the *contracting officer must* not authorize a progress payment rate higher than the customary rate.

(d) In accordance with [10 U.S.C. 3804\(b\)](#) and [41 U.S.C. 4504\(b\)](#), the limit for progress payments is 80 percent on work accomplished under undefinitized *contract actions*. The *contracting officer must* not authorize a higher rate under unusual progress payments or other customary progress payments for the undefinitized actions.

32.501-2 Unusual progress payments.

(a) The *contracting officer may* provide unusual progress payments only if-

(1) The contract necessitates predelivery expenditures that are large in relation to contract price and in relation to the contractor's working capital and credit;

(2) The contractor fully documents an actual need to supplement any private financing available, including guaranteed loans; and

(3) The contractor's request is approved by the *head of the contracting activity* or a designee. In addition, see [32.502-2](#).

(b) The excess of the unusual progress payment rate approved over the customary progress payment rate *should* be the lowest amount possible under the circumstances.

(c) Progress payments will not be considered unusual merely because they are on letter contracts or the definitive contracts that supersede letter contracts.

32.501-3 Contract price.

(a) For the purpose of making progress payments and determining the limitation on progress payments, the contract price *shall* be as follows:

(1) Under firm-fixed price contracts, the contract price is the current amount fixed by the contract plus the not-to-exceed amount for any unpriced modifications.

(2) If the contract is redeterminable or subject to economic price adjustment, the contract price is the initial price until modified.

(3) Under a fixed-price incentive contract, the contract price is the target price plus the not-to-exceed amount of unpriced modifications. However, if the contractor's properly incurred costs exceed the target price, the *contracting officer may* provisionally increase the price up to the ceiling or maximum price.

(4) Under a letter contract, the contract price is the maximum amount obligated by the contract as modified.

(5) Under an unpriced order issued against a basic ordering agreement, the contract price is the maximum amount obligated by the order, as modified.

(6) Any portion of the contract specifically providing for reimbursement of costs only *shall* be excluded from the contract price.

(b) The *contracting officer shall* not make progress payments or increase the contract price beyond the funds obligated under the contract, as amended.

32.501-4 [Reserved]

32.501-5 Other protective terms.

If the *contracting officer* considers it necessary for protection of the Government's interest, protective terms such as the following *may* be used in addition to the Progress Payments clause of the contract:

(a) Personal or corporate guarantees.

(b) Subordinations or standbys of indebtedness.

(c) Special bank accounts.

(d) Protective covenants of the kinds in paragraph (p) of the clause at [52.232-12](#), Advance Payments.

(e) A provision, included in the *solicitation* and resultant contract when *first article testing* is required (see [subpart 9.3](#)), limiting progress payments on *first article* work by a stated amount or percentage.

32.502 Preaward matters.

This section covers matters that generally are relevant only before contract award. This does not preclude taking actions discussed here after award, if appropriate; *e.g.*, postaward addition of a Progress Payments clause for consideration.

32.502-1 Use of customary progress payments.

The *contracting officer* may use a Progress Payments clause in *solicitations* and contracts, in accordance with this subpart. The *contracting officer* must reject as nonresponsive bids conditioned on progress payments when the *solicitation* did not provide for progress payments.

32.502-2 Contract finance office clearance.

The *contracting officer* shall obtain the approval of the contract finance office or other offices designated under agency procedures before taking any of the following actions:

(a) Providing a progress payment rate higher than the customary rate (see [32.501-1](#)).

(b) Deviating from the progress payments terms prescribed in this part.

(c) Providing progress payments to a contractor-

(1) Whose financial condition is in doubt;

(2) Who has had an advance payment request or loan guarantee denied for financial reasons (or approved but withdrawn or lapsed) within the previous 12 months; or

(3) Who is named in the consolidated list of contractors indebted to the *United States* (known commonly as the "Hold-up List").

32.502-3 Solicitation provisions.

(a) The *contracting officer* shall insert the provision at [52.232-13](#), Notice of Progress Payments, in invitations for bids and requests for proposals that include a Progress Payments clause.

(b)

(1) Under the authority of the statutes cited in [32.101](#), an invitation for bids *may* restrict the availability of progress payments to small business concerns only.

(2) The *contracting officer shall* insert the provision at [52.232-14](#), Notice of Availability of Progress Payments Exclusively for Small Business Concerns, in invitations for bids if it is anticipated that-

(i) Both small business concerns and others *may* submit bids in response to the same invitation; and

(ii) Only the small business bidders would need progress payments.

(c) The *contracting officer shall* insert the provision at [52.232-15](#), Progress Payments Not Included, in invitations for bids if the *solicitation* will not contain one of the provisions prescribed in paragraphs (a) and (b) of this section.

32.502-4 Contract clauses.

(a)

(1) Insert the clause at [52.232-16](#), Progress Payments, in-

(i) *Solicitations* that *may* result in contracts providing for progress payments based on costs; and

(ii) Fixed-price contracts under which the Government will provide progress payments based on costs.

(2) If advance agency approval has been given in accordance with [32.501-1](#), the *contracting officer may* substitute a different customary rate for other than small business concerns for the progress payment and liquidation rate indicated.

(3) If an unusual progress payment rate is approved for the prime contractor (see [32.501-2](#)), substitute the approved rate for the customary rate in paragraphs (a)(1), (a)(6), and (b) of the clause.

(4) If the liquidation rate is changed from the customary progress payment rate (see [32.503-8](#) and [32.503-9](#)), substitute the new rate for the rate in paragraphs (a)(1), (a)(6), and (b) of the clause.

(5) If an unusual progress payment rate is approved for a subcontract (see [32.504\(c\)](#) and [32.501-2](#)), modify paragraph (j)(6) of the clause to specify the new rate, the name of the subcontractor, and that the new rate *shall* be used for that subcontractor in lieu of the customary rate.

(b) If the contractor is a small business concern, use the clause with its AlternateI.

(c) If the contract is a letter contract, use the clause with its AlternateII.

(d) If the contractor is not a small business concern, and progress payments are authorized under an indefinite-delivery contract, basic ordering agreement, or their equivalent, use the clause with its AlternateIII.

(e) If the nature of the contract necessitates separate progress payment rates for portions of work that are clearly severable and accounting segregation would be maintained (*e.g.*, annual production requirements), describe the application of separate progress payment rates in a supplementary special provision within the contract. The contractor *must* submit separate progress payment

requests and subsequent *invoices* for the severable portions of work in order to maintain accounting integrity.

32.503 Postaward matters.

This section covers matters that are generally relevant only after award of a contract. This does not preclude taking actions discussed here before award, if appropriate; *e.g.*, preaward review of accounting systems and controls.

32.503-1 [Reserved]

32.503-2 Supervision of progress payments.

(a) The extent of progress payments supervision, by prepayment review or periodic review, *should* vary inversely with the contractor's experience, performance record, reliability, quality of management, and financial strength, and with the adequacy of the contractor's accounting system and controls. Supervision *shall* be of a kind and degree sufficient to provide timely knowledge of the need for, and timely opportunity for, any actions necessary to protect Government interests.

(b) The administering office *must* keep itself informed of the contractor's overall operations and financial condition, since difficulties encountered and losses suffered in operations outside the particular progress payment contract *may* affect adversely the performance of that contract and the liquidation of the progress payments.

(c) For contracts with contractors-

(1) Whose financial condition is doubtful or not strong in relation to progress payments outstanding or to be outstanding;

(2) With management of doubtful capacity;

(3) Whose accounting controls are found by experience to be weak; or

(4) Experiencing substantial difficulties in performance, full information on progress under the contract involved (including the status of subcontracts) and on the contractor's other operations and overall financial condition *should* be obtained and analyzed frequently, with a view to protecting the Government's interests better and taking such action as *may* be proper to make contract performance more certain.

(d) So far as practicable, all cost problems, particularly those involving *indirect costs*, that are likely to create disagreements in future administration of the contract *should* be identified and resolved at the inception of the contract (see [31.109](#)).

32.503-3 Initiation of progress payments and review of accounting system.

(a) For contractors that the administrative *contracting officer* (ACO) has found by previous experience or recent audit review (within the last 12 months) to be-

- (1) Reliable, competent, and capable of satisfactory performance;
- (2) Possessed of an adequate accounting system and controls; and
- (3) In sound financial condition, progress payments in amounts requested by the contractor *should* be approved as a matter of course.

(b) For all other contractors, the ACO *shall* not approve progress payments before determining (1) that (i) the contractor will be capable of liquidating any progress payments or (ii) the Government is otherwise protected against loss by additional protective provisions, and (2) that the contractor's accounting system and controls are adequate for proper administration of progress payments. The services of the *responsible audit agency* or office *should* be used to the greatest extent practicable. However, if the auditor so advises, a complete audit *may* not be necessary.

32.503-4 Approval of progress payment requests.

(a) When the reliability of the contractor and the adequacy of the contractor's accounting system and controls have been established (see 32.503-3 of this section) the ACO *may*, in approving any particular progress payment request (including initial requests on new contracts), rely upon that accounting system and upon the contractor's certification, without requiring audit or review of the request before payment.

(b) The ACO *should* not routinely ask for audits of progress payment requests. However, when there is reason to-

(1) Question the reliability or accuracy of the contractor's certification; or

(2) Believe that the contract will involve a loss, the ACO *should* ask for a review or audit of the request before payment is approved or the request is otherwise disposed of.

(c) When there is reason to doubt the amount of a progress payment request, only the doubtful amount *should* be withheld, subject to later adjustment after review or audit; any clearly proper and due amounts *should* be paid without awaiting resolution of the differences.

32.503-5 Administration of progress payments.

(a) While the ACO *may*, in approving progress payment requests under 32.503-3 of this section, rely on the contractor's accounting system and certification without prepayment review, postpayment reviews (including audits when considered necessary) *shall* be made periodically, or when considered desirable by the ACO to determine the validity of progress payments already made and expected to be made.

(b) These postpayment reviews or audits *shall*, as a minimum, include a determination of whether or not-

(1) The unliquidated progress payments are fairly supported by the value of the work accomplished on the undelivered portion of the contract;

(2) The applicable limitation on progress payments in the Progress Payments clause has been exceeded;

(3)

(i) The unpaid balance of the contract price will be adequate to cover the anticipated cost of completion; or

(ii) The contractor has adequate resources to complete the contract; and

(4) There is reason to doubt the adequacy and reliability of the contractor's accounting system and controls and certification.

(c) Under indefinite-delivery contracts, the *contracting officer should* administer progress payments made under each individual order as if the order constituted a separate contract, unless agency procedures provide otherwise. When the contract will be administered by an agency other than the awarding agency, the *contracting officer shall* coordinate with the *contract administration office* if the awarding agency wants the administration of progress payments to be on a basis other than order-by-order.

32.503-6 Suspension or reduction of payments.

(a) *General.* The Progress Payments clause provides a Government right to reduce or suspend progress payments, or to increase the liquidation rate, under specified conditions. These conditions and actions are discussed in paragraphs (b) through (g) of this subsection.

(1) The *contracting officer shall* take these actions only in accordance with the contract terms and never precipitately or arbitrarily. These actions *should* be taken only after-

(i) Notifying the contractor of the intended action and providing an opportunity for discussion;

(ii) Evaluating the effect of the action on the contractor's operations, based on the contractor's financial condition, projected cash requirements, and the existing or available credit arrangements; and

(iii) Considering the general equities of the particular situation.

(2) The *contracting officer shall* take immediate unilateral action only if warranted by circumstances such as overpayments or unsatisfactory contract performance.

(3) In all cases, the *contracting officer shall*-

(i) Act fairly and reasonably;

(ii) Base decisions on *substantial evidence*; and

(iii) Document the contract file. Findings made under paragraph (c) of the Progress Payments clause *shall be in writing*.

(b) Contractor noncompliance.

(1) The contractor *must* comply with all material requirements of the contract. This includes the requirement to maintain an efficient and reliable accounting system and controls, adequate for the proper administration of progress payments. If the system or controls are deemed inadequate,

progress payments *shall* be suspended (or the portion of progress payments associated with the unacceptable portion of the contractor's accounting system *shall* be suspended) until the necessary changes have been made.

(2) If the contractor fails to comply with the contract without fault or negligence, the *contracting officer* will not take action permitted by paragraph (c)(1) of the Progress Payments clause, other than to correct overpayments and collect amounts due from the contractor.

(c) Unsatisfactory financial condition.

(1) If the *contracting officer* finds that contract performance (including full liquidation of progress payments) is endangered by the contractor's financial condition, or by a failure to make progress, the *contracting officer shall* require the contractor to make additional operating or financial arrangements adequate for completing the contract without loss to the Government.

(2) If the *contracting officer* concludes that further progress payments would increase the probable loss to the Government, the *contracting officer shall* suspend progress payments and all other payments until the unliquidated balance of progress payments is eliminated.

(d) *Excessive inventory*. If the inventory allocated to the contract exceeds reasonable requirements (including a reasonable accumulation of inventory for continuity of operations), the *contracting officer should*, in addition to requiring the transfer of excessive inventory from the contract, take one or more of the following actions, as necessary, to avoid or correct overpayment:

(1) Eliminate the costs of the excessive inventory from the costs eligible for progress payments, with appropriate reduction in progress payments outstanding.

(2) Apply additional deductions to billings for deliveries (increase liquidation).

(e) Delinquency in payment of costs of performance.

(1) If the contractor is delinquent in paying the costs of contract performance in the ordinary course of business, the *contracting officer shall* evaluate whether the delinquency is caused by an unsatisfactory financial condition and, if so, *shall* apply the guidance in paragraph (c) of this section. If the contractor's financial condition is satisfactory, the *contracting officer shall* not deny progress payments if the contractor agrees to-

(i) Cure the payment delinquencies;

(ii) Avoid further delinquencies; and

(iii) Make additional arrangements adequate for completing the contract without loss to the Government.

(2) If the contractor has, in good faith, disputed amounts claimed by subcontractors, suppliers, or others, the *contracting officer shall* not consider the payments delinquent until the amounts due are established by the parties through litigation or arbitration. However, the amounts *shall* be excluded from costs eligible for progress payments so long as they are disputed.

(3) Determinations of delinquency in making contributions under employee pension, profit sharing, or stock ownership plans, and exclusion of costs for such contributions from progress payment

requests, *shall* be in accordance with paragraph (a)(3) of the clause at 52.232-16, Progress Payments, without regard to the provisions of 32.503-6.

(f) *Fair value of undelivered work*. Progress payments *must* be commensurate with the fair value of work accomplished in accordance with contract requirements. The *contracting officer must* adjust progress payments when necessary to ensure that the fair value of undelivered work equals or exceeds the amount of unliquidated progress payments. On loss contracts, the application of a loss ratio as provided at paragraph (g) of this subsection constitutes this adjustment.

(g) Loss contracts.

(1) If the sum of the total costs incurred under a contract plus the estimated costs to complete the performance are likely to exceed the contract price, the *contracting officer shall* compute a loss ratio factor and adjust future progress payments to exclude the element of loss. The loss ratio factor is computed as follows:

(i) Revise the current contract price used in progress payment computations (the current ceiling price under fixed-price incentive contracts) to include the not-to-exceed amount for any pending *change orders* and unpriced orders.

(ii) Divide the revised contract price by the sum of the total costs incurred to date plus the estimated additional costs of completing the contract performance.

(2) If the *contracting officer* believes a loss is probable, future progress payment requests *shall* be modified as follows:

(i) The contract price *shall* be the revised amount computed under paragraph (g)(1)(i) of this section.

(ii) The total costs eligible for progress payments *shall* be the product of-

(A) the sum of paid costs eligible for progress payments times;

(B) the loss ratio factor computed under paragraph (g)(1)(ii) of this section.

(iii) The costs applicable to items delivered, invoiced, and accepted *shall* not include costs in excess of the contract price of the items.

(3) The *contracting officer may* use audit assistance, technical services, management reports, and other sources of pertinent data to evaluate progress payment requests. If the *contracting officer* concludes that the contractor's figures in the contractor's progress payment request are not correct, the *contracting officer shall*-

(i) In the manner prescribed in paragraph (g)(4) of this section, prepare a supplementary analysis to be attached to the contractor's request;

(ii) Advise the contractor *in writing* of the differences; and

(iii) Adjust all further progress payments in accordance with paragraph (g)(1) of this section, using the *contracting officer's* figures, until the difference is resolved.

(4) The following is an example of the supplementary analysis required in paragraph (g)(3) of this subsection:

Section I:

Contract price	\$2,850,000
<i>Change orders</i> and unpriced orders (to extent funds have been obligated)	\$150,000
Revised contract price	\$3,000,000

Section II:

Total costs incurred to date	\$2,700,000
Estimated additional costs to complete	\$900,000
Total costs to complete	\$3,600,000

$$\text{Loss ratio factor} \frac{\$3,000,000}{\$3,600,000} = 83.3\%$$

Total costs eligible for progress payments	\$2,700,000
Loss ratio factor	□83.3%
Recognized costs for progress payments	\$2,249,100
Progress payment rate	□80.0%
<i>Alternate</i> amount to be used	\$1,799,280

Section III:

Factored costs of items delivered*	\$750,000
Recognized costs applicable to undelivered items (\$2,249,100-\$750,000)	\$1,499,100

*This amount *must* be the same as the contract price of the items delivered.

32.503-7 [Reserved]

32.503-8 Liquidation rates-ordinary method.

The Government recoups progress payments through the deduction of liquidations from payments that would otherwise be due to the contractor for completed contract items. To determine the amount of the liquidation, the *contracting officer* applies a liquidation rate to the contract price of contract items delivered and accepted. The ordinary method is that the liquidation rate is the same as the progress payment rate. At the beginning of a contract, the *contracting officer must* use this method.

32.503-9 Liquidation rates-alternate method.

(a) The liquidation rate determined under [32.503-8](#) shall apply throughout the period of contract performance unless the *contracting officer* adjusts the liquidation rate under the *alternate* method in this [32.503-9](#). The objective of the *alternate* liquidation rate method is to permit the contractor to retain the earned profit element of the contract prices for completed items in the liquidation process. The *contracting officer may* reduce the liquidation rate if-

- (1) The contractor requests a reduction in the rate;
- (2) The rate has not been reduced in the preceding 12 months;
- (3) The contract delivery schedule extends at least 18 months from the contract award date;
- (4) Data on actual costs are available-
 - (i) For the *products* delivered, or
 - (ii) If no deliveries have been made, for a performance period of at least 12 months;
- (5) The reduced liquidation rate would result in the Government recouping under each *invoice* the full extent of the progress payments applicable to the costs allocable to that *invoice*;
- (6) The contractor would not be paid for more than the costs of items delivered and accepted (less allocable progress payments) and the earned profit on those items;
- (7) The unliquidated progress payments would not exceed the limit prescribed in paragraph (a)(5) of the Progress Payments clause;
- (8) The parties agree on an appropriate rate; and
- (9) The contractor agrees to certify annually, or more often if requested by the *contracting officer*, that the *alternate* rate continues to meet the conditions of subsections 5, 6, and 7 of this section. The certificate *must* be accompanied by adequate supporting information.

(b) The *contracting officer shall* change the liquidation rate in the following circumstances:

- (1) The rate *shall* be increased for both previous and subsequent transactions, if the contractor experiences a lower profit rate than the rate anticipated at the time the liquidation rate was

associated with contract items already delivered, as well as subsequent progress payments.

(2) The rate *shall* be increased or decreased in keeping with the successive changes to the contract price or target profit when-

(i) The target profit is changed under a fixed-price incentive contract with successive targets; or

(ii) A redetermined price involves a change in the profit element under a contract with prospective price redetermination at stated intervals.

(c) Whenever the liquidation rate is changed, the *contracting officer shall* issue a *contract modification* to specify the new rate in the Progress Payments clause. Adequate consideration for these *contract modifications* is provided by the consideration included in the initial contract. The parties *shall* promptly make the payment or liquidation required in the circumstances.

32.503-10 Establishing alternate liquidation rates.

(a) The *contracting officer must* ensure that the liquidation rate is-

(1) High enough to result in Government recoupment of the applicable progress payments on each billing; and

(2) Supported by documentation included in the administration office contract file.

(b) The minimum liquidation rate is the expected progress payments divided by the contract price. Each of these factors is discussed below:

(1) The *contracting officer must* compute the expected progress payments by multiplying the estimated cost of performing the contract by the progress payment rate.

(2) For purposes of computing the liquidation rate, the *contracting officer may* adjust the estimated cost and the contract price to include the estimated value of any work authorized but not yet priced and any projected economic adjustments; however, the *contracting officer's* adjustment *must not* exceed the Government's estimate of the price of all authorized work or the funds obligated for the contract.

(3) The following are examples of the computation. Assuming an estimated price of \$2,200,000 and total estimated costs eligible for progress payments of \$2,000,000:

(i) If the progress payment rate is 80 percent, the minimum liquidation rate *should* be 72.7 percent, computed as follows:

$$\frac{\$2,000,000 \times 80\%}{\$2,200,000} = 72.7\%$$

(ii) If the progress payment rate is 85 percent, the minimum liquidation rate *should* be 77.3 percent, computed as follows:

$$\frac{\$2,000,000 \times 85\%}{\$2,200,000} = 77.3\%$$

(4) Minimum liquidation rates will generally be expressed to tenths of a percent. Decimals between tenths will be rounded up to the next highest tenth (not necessarily the nearest tenth), since rounding down would produce a rate below the minimum rate calculated.

32.503-11 Adjustments for price reduction.

(a) If a retroactive downward price reduction occurs under a redeterminable contract that provides for progress payments, the *contracting officer shall*-

(1) Determine the refund due and obtain repayment from the contractor for the excess of payments made for delivered items over amounts due as recomputed at the reduced prices; and

(2) Increase the unliquidated progress payments amount for overdeductions made from the contractor's billings for items delivered.

(b) The *contracting officer shall* also increase the unliquidated progress payments amount if the contractor makes an interim or voluntary price reduction under a redeterminable or incentive contract.

32.503-12 Maximum unliquidated amount.

(a) The *contracting officer shall* ensure that any excess of the unliquidated progress payments over the contractual limitation in paragraph (a) of the Progress Payments clause in the contract is promptly corrected through one or more of the following actions:

(1) Increasing the liquidation rate.

(2) Reducing the progress payment rate.

(3) Suspending progress payments.

(b) The excess described in paragraph (a) of this section is most likely to arise under the following circumstances:

(1) The costs of performance exceed the contract price.

(2) The *alternate* method of liquidation (see [32.503-9](#)) is used and the actual costs of performance exceed the cost estimates used to establish the liquidation rate.

(3) The rate of progress or the quality of contract performance is unsatisfactory.

(4) The rate of rejections, waste, or spoilage is excessive.

(c) As required, the services of the *responsible audit agency* or office *should* be fully utilized, along with the services of qualified cost analysis and engineering personnel.

32.503-13 [Reserved]

32.503-14 Protection of Government title.

(a) Since the Progress Payments clause gives the Government title to all of the materials, work-in-process, finished goods, and other items of property described in paragraph (d) of the Progress Payments clause, under the contract under which progress payments have been made, the ACO *must* ensure that the Government title to these inventories is not compromised by other encumbrances. Ordinarily, the ACO, in the absence of reason to believe otherwise, *may* rely upon the contractor's certification contained in the progress payment request.

(b) If the ACO becomes aware of any arrangement or condition that would impair the Government's title to the property affected by progress payment, the ACO *shall* require additional protective provisions (see [32.501-5](#)) to establish and protect the Government's title.

(c) The existence of any such encumbrance is a violation of the contractor's obligations under the contract, and the ACO *may*, if necessary, suspend or reduce progress payments under the terms of the Progress Payments clause covering failure to comply with any material requirement of the contract. In addition, if the contractor fails to disclose an existing encumbrance in the progress payments certification, the ACO *should* consult with legal counsel concerning possible violation of [31 U.S.C.3729](#), the False *Claims* Act.

32.503-15 Application of Government title terms.

(a) Property to which the Government obtains title by operation of the Progress Payments clause solely is not, as a consequence, Government-furnished property.

(b) Although property title is vested in the Government under the Progress Payments clause, the *acquisition*, handling, and disposition of certain types of property are governed by-

(1) The clause at [52.245-1](#), Government Property; and

(2) The termination clauses at [52.249](#), for *termination inventory*.

(c) The contractor *may* sell or otherwise dispose of current production *scrap* in the ordinary course of business on its own volition, even if title has vested in the Government under the Progress Payments clause. The *contracting officer shall* require the contractor to credit the costs of the contract performance with the proceeds of the *scrap* disposition.

(d) When the title to materials or other inventories is vested in the Government under the Progress Payments clause, the contractor *may* transfer the inventory items from the contract for its own use or other disposition only if, and on terms, approved by the *contracting officer*. The contractor *shall*-

(1) Eliminate the costs allocable to the transferred property from the costs of contract performance, and

(2) Repay or credit to the Government an amount equal to the unliquidated progress payments, allocable to the transferred property.

(e) If excess property remains after the contract performance is complete and all contractor obligations under the contract are satisfied, including full liquidation of progress payments, the excess property is outside the scope of the Progress Payments clause. Therefore, the contractor

holds title to it.

32.503-16 Risk of loss.

(a) Under the Progress Payments clause, and except for normal spoilage, the contractor bears the risk of loss for Government property under the clause, even though title is vested in the Government, unless the Government has expressly assumed this risk. The clauses prescribed in this regulation related to progress payments, default, and terminations do not constitute a Government assumption of this risk.

(b) If a loss occurs in connection with property for which the contractor bears the risk, the contractor is obligated to repay to the Government the amount of unliquidated progress payments based on costs allocable to the property.

(c) The contractor is not obligated to pay for the loss of property for which the Government has assumed the risk of loss. However, a serious loss *may* impede the satisfactory progress of contract performance, so that the *contracting officer may* need to act under paragraph (c)(5) of the Progress Payments clause.

32.504 Subcontracts under prime contracts providing progress payments.

(a) Subcontracts *may* include either performance-based payments, provided they meet the criteria in [32.1003](#), or progress payments, provided they meet the criteria in [subpart 32.5](#) for customary progress payments, but not both. Subcontracts for commercial purchases *may* include *commercial product* or *commercial service* purchase financing terms, provided they meet the criteria in [32.202-1](#).

(b) The contractor's requests for progress payments *may* include the full amount of *commercial product* or *commercial service* purchase financing payments, performance-based payments, or progress payments to a subcontractor, whether paid or unpaid, provided that unpaid amounts are limited to amounts determined due and that the contractor will pay-

(1) In accordance with the terms and conditions of a subcontract or *invoice*; and

(2) Ordinarily within 30 days of the submission of the contractor's progress payment request to the Government.

(c) If the contractor is considering making unusual progress payments to a subcontractor, the parties will be guided by the policies in [32.501-2](#). If the Government approves unusual progress payments for the subcontract, the *contracting officer must* issue a *contract modification* to specify the new rate in paragraph (j)(6) of the clause at [52.232-16](#), Progress Payments, in the prime contract. This will allow the contractor to include the progress payments to the subcontractor in the cost basis for progress payments by the Government. This modification is not a deviation and does not require the clearance prescribed in [32.502-2\(b\)](#).

(d) The contractor has a duty to ensure that financing payments to subcontractors conform to the standards and principles prescribed in paragraph (j) of the Progress Payments clause in the prime contract. Although the *contracting officer should*, to the extent appropriate, review the subcontract as part of the overall administration of progress payments in the prime contract, there is no special

requirement for *contracting officer* review or consent merely because the subcontract includes financing payments, except as provided in paragraph (c) of this section. However, the *contracting officer must* ensure that the contractor has installed the necessary management control systems, including internal audit procedures.

(e) When financing payments are in the form of progress payments, the Progress Payments clause at [52.232-16](#) requires that the subcontract include the substance of the Progress Payments clause in the prime contract, modified to indicate that the contractor, not the Government, awards the subcontract and administers the progress payments. The following exceptions apply to wording modifications:

(1) The subcontract terms on title to property under progress payments *shall* provide for vesting of title in the Government, not the contractor, as in paragraph (d) of the Progress Payments clause in the prime contract. A reference to the contractor *may*, however, be substituted for "Government" in paragraph (d)(2)(iv) of the clause.

(2) In the subcontract terms on reports and access to records, the contractor *shall* not delete the references to "*Contracting Officer*" and "Government" in adapting paragraph (g) of the Progress Payments clause in the contract, but *may* expand the terms as follows:

(i) The term "*Contracting Officer*" *may* be changed to "*Contracting Officer* or Prime Contractor."

(ii) The term "the Government" *may* be changed to "the Government or Prime Contractor."

(3) The subcontract special terms regarding default *shall* include paragraph (h) of the Progress Payments clause in the contract through its subdivision (i). The rest of paragraph (h) is optional.

(f) When financing payments are in the form of performance-based payments, the Performance-Based Payments clause at [52.232-32](#) requires that the subcontract terms include the substance of the Performance-Based Payments clause, modified to indicate that the contractor, not the Government, awards the subcontract and administers the performance-based payments, and include appropriately worded modifications similar to those noted in paragraph (e) of this section.

(g) When financing payments are in the form of *commercial product* or *commercial service* purchase financing, the subcontract *must* include a contract financing clause structured in accordance with [32.206](#).

Subpart 32.6 - Contract Debts

32.600 Scope of subpart.

This subpart prescribes policies and procedures for identifying, collecting, and deferring collection of contract debts (including interest, if applicable). Sections [32.607](#), [32.608](#), and [32.610](#) of this subpart do not apply to *claims* against common carriers for transportation overcharges and *freight* and cargo losses ([31 U.S.C. 3726](#)).

32.601 General.

(a) Contract debts are amounts that-

(1) Have been paid to a contractor to which the contractor is not currently entitled under the terms and conditions of the contract; or

(2) Are otherwise due from the contractor under the terms and conditions of the contract.

(b) Contract debts include, but are not limited to, the following:

(1) Billing and price reductions resulting from contract terms for price redetermination or for determination of prices under incentive type contracts.

(2) Price or cost reductions for defective *certified cost or pricing data*.

(3) Financing payments determined to be in excess of the contract limitations at [52.232-16\(a\)\(7\)](#), Progress Payments, or [52.232-32\(d\)\(2\)](#), Performance-Based Payments, or any *contract clause* for financing of *commercial products* or *commercial services*.

(4) Increases to financing payment liquidation rates.

(5) Overpayments disclosed by quarterly statements required under price redetermination or incentive contracts.

(6) Price adjustments resulting from Cost Accounting Standards (CAS) noncompliances or changes in cost accounting practice.

(7) Reinspection costs for nonconforming *supplies* or services.

(8) Duplicate or erroneous payments.

(9) Damages or excess costs related to defaults in performance.

(10) Breach of contract obligations concerning progress payments, performance-based payments, advance payments, financing of *commercial products* or *commercial services*, or Government-furnished property.

(11) Government expense of correcting defects.

(12) Overpayments related to errors in quantity or billing or deficiencies in quality.

(13) Delinquency in contractor payments due under agreements or arrangements for deferral or postponement of collections.

(14) Reimbursement of amounts due under [33.102\(b\)\(3\)](#) and [33.104\(h\)\(8\)](#).

32.602 Responsibilities.

(a) The *contracting officer* has primary responsibility for identifying and demanding payment of contract debts except those resulting from errors made by the payment office. The *contracting officer shall* not collect contract debts or otherwise agree to *liquidate* contract debts (*e.g.*, offset the amount of the debt against existing unpaid bills due the contractor, or allow contractors to retain contract debts to cover amounts that *may* become payable in future periods).

(b) The payment office has primary responsibility for-

- (1) Collecting contract debts identified by *contracting officers*;
- (2) Identifying and collecting duplicate and erroneous payments; and
- (3) Authorizing the liquidation of contract debts in accordance with agency procedures.

32.603 Debt determination.

(a) If the *contracting officer* has any indication that a contractor owes money to the Government under a contract, the *contracting officer shall* determine promptly whether an actual debt is due and the amount. Any unnecessary delay *may* contribute to-

- (1) Loss of timely availability of the funds to the program for which the funds were initially provided;
- (2) Increased difficulty in collecting the debt; or
- (3) Actual monetary loss to the Government.

(b) The amount of indebtedness determined by the *contracting officer shall* be an amount that-

- (1) Is based on the merits of the case; and
- (2) Is consistent with the contract terms.

32.604 Demand for payment.

(a) Except as provided in paragraph (c) of this section, the *contracting officer shall* take the following actions:

(1) Issue the demand for payment as soon as the *contracting officer* has determined that an actual debt is due the Government and the amount.

(2) Issue the demand for payment even if-

- (i) The debt is or will be the subject of a bilateral modification;
- (ii) The contractor is otherwise obligated to pay the money under the existing contract terms; or
- (iii) The contractor has agreed to repay the debt.

(3) Issue the demand for payment as a part of the final decision, if a final decision is required by 32.605(a).

(b) The demand for payment *shall* include the following:

- (1) A description of the debt, including the debt amount.
- (2) A distribution of the principal amount of the debt by line(s) of accounting subject to the following:

(i) If the debt affects multiple lines of accounting, the *contracting officer shall*, to the maximum extent practicable, identify all affected lines of accounting. If it is not practicable to identify all affected lines of accounting, the *contracting officer may* select representative lines of accounting in accordance with paragraph (b)(2)(ii) of this section.

(ii) In selecting representative lines of accounting, the *contracting officer shall*-

(A) Consider the affected departments or agencies, years of appropriations, and the predominant types of appropriations; and

(B) Not distribute to any line of accounting an amount of the principal in excess of the total obligation for the line of accounting; and

(iii) Include the lines of accounting even if the associated funds are expired or cancelled. While cancelled funds will be deposited in a miscellaneous receipt account of the Treasury if collected, the funds are tracked under the closed year appropriation(s) to comply with the Anti-Deficiency Act.

(iv) If the debt affects multiple contracts and the lines of accounting are not readily available, the *contracting officer shall*-

(A) Issue the demand for payment without the distribution of the principal amount to the affected lines of accounting;

(B) Include a statement in the demand for payment advising when the distribution will be provided; and

(C) Provide the distribution by the date identified in the demand for payment.

(3) The basis for and amount of any accrued interest or penalty.

(4)

(i) For debts resulting from specific contract terms (*e.g.*, debts resulting from incentive clause provisions, Quarterly Limitation on Payments Statement, Cost Accounting Standards, price reduction for defective *pricing*), a notification stating that payment *should* be made promptly, and that interest is due in accordance with the terms of the contract. Interest *shall* be computed from the date specified in the applicable *contract clause* until repayment by the contractor. The interest rate *shall* be the rate specified in the applicable *contract clause*. In the case of a debt arising from a price reduction for defective *pricing*, or as specifically set forth in a Cost Accounting Standards (CAS) clause in the contract, interest is computed from the date of overpayment by the Government until repayment by the contractor at the underpayment rate established by the Secretary of the Treasury, for the periods affected, under 26 U.S.C. 6621(a)(2).

(ii) For all other contract debts, a notification stating that any amounts not paid within 30 days from the date of the demand for payment will bear interest. Interest *shall* be computed from the date of the demand for payment until repayment by the contractor. The interest rate *shall* be the interest rate established by the Secretary of the Treasury, as provided in [41 U.S.C. 7109](#), which is applicable to the period in which the amount becomes due, and then at the rate applicable for each six-month period as established by the Secretary until the amount is paid.

(5) A statement advising the contractor-

- (i) To contact the *contracting officer* if the contractor believes the debt is invalid or the amount is incorrect; and
 - (ii) If the contractor agrees, to remit a check payable to the agency's payment office annotated with the contract number along with a copy of the demand for payment to the payment office identified in the contract or as otherwise specified in the demand letter in accordance with agency procedures.
- (6) Notification that the payment office *may* initiate procedures, in accordance with the applicable statutory and regulatory requirements, to offset the debt against any payments otherwise due the contractor.
- (7) Notification that the debt *may* be subject to administrative charges in accordance with the requirements of 31 U.S.C. 3717(e) and the Debt Collection Improvement Act of 1996.
- (8) Notification that the contractor *may* submit a request for installment payments or deferment of collection if immediate payment is not practicable or if the amount is disputed.
- (c) Except as provided in paragraph (d) of this section, the *contracting officer should* not issue a demand for payment if the *contracting officer* only becomes aware of the debt when the contractor-
- (1) Provides a lump sum payment or submits a credit *invoice*. (A credit *invoice* is a contractor's request to *liquidate* the debt against existing unpaid bills due the contractor); or
 - (2) Notifies the *contracting officer* that the payment office overpaid on an *invoice payment*. When the contractor provides the notification, the *contracting officer shall* notify the payment office of the overpayment.
 - (d) If a demand for payment was not issued as provided for in paragraph (c) of this section, the *contracting officer shall* issue a demand for payment no sooner than 30 days after the *contracting officer* becomes aware of the debt unless-
 - (1) The contractor has liquidated the debt;
 - (2) The contractor has requested an installment payment agreement; or
 - (3) The payment office has issued a demand for payment.
- (e) The *contracting officer shall*-
- (1) Furnish a copy of the demand for payment to the contractor by certified mail, return receipt requested, or by any other method that provides evidence of receipt; and
 - (2) Forward a copy of the demand to the payment office.

32.605 Final decisions.

- (a) The *contracting officer shall* issue a final decision as required by 33.211 if-
- (1) The *contracting officer* and the contractor are unable to reach agreement on the existence or amount of a debt in a timely manner;
 - (2) The contractor fails to *liquidate* a debt previously demanded by the *contracting officer* within the

timeline specified in the demand for payment unless the amounts were not repaid because the contractor has requested an installment payment agreement; or

(3) The contractor requests a deferment of collection on a debt previously demanded by the *contracting officer* (see [32.607-2](#)).

(b) If a demand for payment was previously issued for the debt, the demand for payment included in the final decision *shall* identify the same *due date* as the original demand for payment.

(c) The *contracting officer shall*-

(1) Furnish the decision to the contractor by certified mail, return receipt requested, or by any other method that provides evidence of receipt; and

(2) Forward a copy to the payment office identified in the contract.

32.606 Debt collection.

(a) If the contractor has not liquidated the debt within 30 days of the date due or requested installment payments or deferment of collection, the payment office *shall* initiate withholding of principal, interest, penalties, and administrative charges. In the event the contract is assigned under the *Assignment of Claims Act of 1940* (31 U.S .C. 3727 and 41U.S .C. 6305), the rights of the assignee will be scrupulously respected and withholding of payments *shall* be consistent with those rights. For additional information on *assignment of claims*, see [subpart 32.8](#).

(b) As provided for in the Debt Collection Improvement Act of 1996 (31 U.S .C. 3711(g)(1)), payment offices are required to transfer any debt that is delinquent more than 180 days to the Department of Treasury for collection.

(c) The *contracting officer shall* periodically follow up with the payment office to determine whether the debt has been collected and credited to the correct appropriation(s).

32.607 Installment payments and deferment of collection.

(a) The *contracting officer shall* not approve or deny a contractor's request for installment payments or deferment of collections. The office designated in agency procedures is responsible for approving or denying requests for installment payments or deferment of collections.

(b) If a contractor has not appealed the debt or filed an action under the Disputes clause of the contract and the contractor has submitted a proposal for debt deferment or installment payments-

(1) The office designated in agency procedures *may* arrange for deferment/installment payments if the contractor is unable to pay at once in full or the contractor's operations under *national defense* contracts would be seriously impaired. The arrangement *shall* include appropriate covenants and securities and *should* be limited to the shortest practicable maturity; and

(2) The deferment/installment agreement *shall* include a specific schedule or plan for payment. It *should* permit the Government to make periodic financial reviews of the contractor and to require payments earlier than required by the agreement if the Government considers the contractor's ability to pay improved. It *should* also provide for required stated or measurable payments on the

occurrence of specific events or contingencies that improve the contractor's ability to pay.

(c) If not already applicable under the contract terms, interest on contract debt *shall* be made an element of any agreement entered into for installment payments or deferment of collection.

32.607-1 Installment payments.

If a contractor requests an installment payment agreement, the *contracting officer shall* notify the contractor to send a written request for installment payments to the office designated in agency procedures.

32.607-2 Deferment of collection.

(a) All requests for deferment of collection *must* be submitted *in writing* to the *contracting officer*.

(1) If the contractor has appealed the debt under the procedures of the Disputes clause of the contract, the information with the request for deferment *may* be limited to an explanation of the contractor's financial condition.

(2) Actions filed by contractors under the Disputes Clause *shall* not suspend or delay collection.

(3) If there is no appeal pending or action filed under the Disputes clause of the contract, the following information about the contractor *should* be submitted with the request:

(i) Financial condition.

(ii) Contract backlog.

(iii) Projected cash receipts and requirements.

(iv) The feasibility of immediate payment of the debt.

(v) The probable effect on operations of immediate payment in full.

(b) Upon receipt of the contractor's written request, the *contracting officer shall* promptly provide a notification to the payment office and advise the payment office that the contractor's request is under consideration.

(c)

(1) The *contracting officer should* consider any information necessary to develop a recommendation on the deferment request.

(2) The *contracting officer shall* forward the following to the office designated in agency procedures for a decision:

(i) A copy of the contractor's request for a deferment of collection.

(ii) A written recommendation on the request and the basis for the recommendation including the advisability of deferment to avoid possible overcollections.

(iii) A statement as to whether the contractor has an appeal pending or action filed under the Disputes clause of the contract and the docket number if the appeal has been filed.

(iv) A copy of the *contracting officer's* final decision (see [32.605](#)).

(d) The office designated in agency procedures *may* authorize a deferment pending the resolution of appeal to avoid possible overcollections. The agency is required to use unexpired funds to pay interest on overcollections.

(e) Deferments pending disposition of appeal *may* be granted to small business concerns and financially weak contractors, balancing the need for Government security against loss and undue hardship on the contractor.

(f) The deferment agreement *shall* not provide that a *claim* of the Government will not become due and payable pending mutual agreement on the amount of the *claim* or, in the case of a dispute, until the decision is reached.

(g) At a minimum, the deferment agreement *shall* contain the following:

(1) A description of the debt.

(2) The date of first demand for payment.

(3) Notice of an interest charge, in conformity with [32.608](#) and the FAR clause at [52.232-17](#), Interest; or, in the case of a debt arising from a defective *pricing* or a CAS noncompliance overpayment, interest, as prescribed by the applicable Price Reduction for Defective *Certified Cost or Pricing Data* or CAS clause (see [32.607\(c\)](#)).

(4) Identification of the office to which the contractor is to send debt payments.

(5) A requirement for the contractor to submit financial information requested by the Government and for reasonable access to the contractor's records and property by Government representatives.

(6) Provision for the Government to terminate the deferment agreement and accelerate the maturity of the debt if the contractor defaults or if bankruptcy or insolvency proceedings are instituted by or against the contractor.

(7) Protective requirements that are considered by the Government to be prudent and feasible in the specific circumstances. The coverage of protective terms at [32.409](#) and [32.501-5](#) *may* be used as a guide.

(h) If a contractor appeal of the debt determination is pending, the deferment agreement *shall* also include a requirement that the contractor *shall*-

(1) Diligently prosecute the appeal; and

(2) Pay the debt in full when the appeal is decided, or when the parties reach agreement on the debt amount.

(i) The deferment agreement *may* provide for the right to make early payments without prejudice, for refund of overpayments, and for crediting of interest.

32.608 Interest.

32.608-1 Interest charges.

Unless specified otherwise in the clause at 52.232-17, Interest, interest charges *shall* apply to any contract debt unpaid after 30 days from the issuance of a demand unless-

- (a) The contract is a kind excluded under 32.611; or
- (b) The contract or debt has been exempted from interest charges under agency procedures.

32.608-2 Interest credits.

(a) An equitable interest credit *shall* be applied under the following circumstances:

- (1) When the amount of debt initially determined is subsequently reduced; *e.g.*, through a successful appeal.
- (2) When any amount collected by the Government is in excess of the amount found to be due on appeal under the Disputes Clause of the contract.
- (3) When the collection procedures followed in a given case result in an overcollection of the debt due.
- (4) When the responsible official determines that the Government has unduly delayed payments to the contractor on the same contract at some time during the period to which the interest charge applied, provided an interest penalty was not paid for such late payment.

(b) Any appropriate interest credits *shall* be computed under the following procedures:

- (1) Interest at the rate under 52.232-17 *shall* be charged on the reduced debt from the date of collection by the Government until the date the monies are remitted to the contractor.
- (2) Interest *may* not be reduced for any time between the *due date* under the demand and the period covered by a deferment of collection, unless the contract includes an interest clause; *e.g.*, the clause prescribed in 32.611.
- (3) Interest *shall* not be credited in an amount that, when added to other amounts refunded or released to the contractor, exceeds the total amount that has been collected, or withheld for the purpose of collecting the debt. This limitation *shall* be further reduced by the amount of any limitation applicable under paragraph (b)(2) of this subsection.

32.609 Delays in receipt of notices or demands.

If interest is accrued based on the date of the demand letter and delivery of the demand letter is delayed by the Government (*e.g.*, undue delay after dating at the originating office or delays in the mail), the date of the debt and accrual of interest *shall* be extended to a time that is fair and reasonable under the particular circumstances.

32.610 Compromising debts.

For debts under \$100,000, excluding interest, the designated agency official *may* compromise the debt pursuant to the Federal *Claims* Collection Standards (31 CFR part 902) and agency regulations. Unless specifically authorized by agency procedures, *contracting officers* cannot compromise debts.

32.611 Contract clause.

(a) The *contracting officer shall* insert the clause at [52.232-17](#), Interest, in *solicitations* and contracts unless it is contemplated that the contract will be in one or more of the following categories:

- (1) Contracts at or below the *simplified acquisition threshold*.
- (2) Contracts with Government agencies.
- (3) Contracts with a State or local government or instrumentality.
- (4) Contracts with a foreign government or instrumentality.
- (5) Contracts without any provision for profit or fee with a nonprofit organization.
- (6) Contracts described in [subpart 5.5](#), Paid Advertisements.
- (7) Any other exceptions authorized under agency procedures.

(b) The *contracting officer may* insert the FAR clause at [52.232-17](#), Interest, in *solicitations* and contracts when it is contemplated that the contract will be in any of the categories specified in [32.611\(a\)](#).

Subpart 32.7 - Contract Funding

32.700 Scope of subpart.

This subpart (a) describes basic requirements for contract funding and (b) prescribes procedures for using limitation of cost or limitation of funds clauses. Detailed *acquisition* funding requirements are contained in agency fiscal regulations.

32.701 [Reserved]

32.702 Policy.

No officer or employee of the Government *may* create or authorize an obligation in excess of the funds available, or in advance of appropriations (Anti-Deficiency Act, [31 U.S.C. 1341](#)), unless otherwise authorized by law. Before executing any contract, the *contracting officer shall*-

- (a) Obtain written assurance from responsible fiscal authority that adequate funds are available or

(b) Expressly condition the contract upon availability of funds in accordance with [32.703-2](#).

32.703 Contract funding requirements.

32.703-1 General.

(a) If the contract is fully funded, funds are obligated to cover the price or target price of a fixed-price contract or the estimated cost and any fee of a cost-reimbursement contract.

(b) If the contract is incrementally funded, funds are obligated to cover the amount allotted and any corresponding increment of fee.

32.703-2 Contracts conditioned upon availability of funds.

(a) *Fiscal year contracts.* The *contracting officer* may initiate a *contract action* properly chargeable to funds of the new fiscal year before these funds are available, provided that the contract includes the clause at [52.232-18](#), Availability of Funds (see [32.706-1\(a\)](#)). This authority *may* be used only for operation and maintenance and continuing services (*e.g.*, rentals, utilities, and supply items not financed by stock funds)-

(1) Necessary for normal operations; and

(2) For which Congress previously had consistently appropriated funds, unless specific statutory authority exists permitting applicability to other requirements.

(b) *Indefinite-quantity or requirements contracts.* A one-year indefinite-quantity or requirements contract for services that is funded by annual appropriations *may* extend beyond the fiscal year in which it begins; provided, that-

(1) Any specified minimum quantities are certain to be ordered in the initial fiscal year (see [37.106](#)) and

(2) The contract includes the clause at [52.232-19](#), Availability of Funds for the Next Fiscal Year (see [32.706-1\(b\)](#)).

(c) *Acceptance of supplies or services.* The Government *shall* not accept *supplies* or services under a contract conditioned upon the availability of funds until the *contracting officer* has given the contractor notice, to be confirmed *in writing*, that funds are available.

32.703-3 Contracts crossing fiscal years.

(a) A contract that is funded by annual appropriations *may* not cross fiscal years, except in accordance with statutory authorization (*e.g.*, [41 U.S.C.6302](#), [31 U.S.C.1308](#), [42 U.S.C. 2459a](#), [42 U.S.C.3515](#), and paragraph (b) of this subsection), or when the contract calls for an *end product* that cannot feasibly be subdivided for separate performance in each fiscal year (*e.g.*, contracts for expert or consultant services).

(b) The head of an *executive agency*, except NASA, may enter into a contract, exercise an *option*, or place an order under a contract for severable services for a period that begins in one fiscal year and ends in the next fiscal year if the period of the contract awarded, *option* exercised, or order placed does not exceed one year ([10 U.S.C. 3133](#) and [41 U.S.C. 3902](#)). Funds made available for a fiscal year may be obligated for the total amount of an action entered into under this authority.

32.704 Limitation of cost or funds.

(a)

(1) When a contract contains the clause at [52.232-20](#), Limitation of Cost; or [52.232-22](#), Limitation of Funds, the *contracting officer*, upon learning that the contractor is approaching the estimated cost of the contract or the limit of the funds allotted, *shall* promptly obtain funding and programming information pertinent to the contract's continuation and notify the contractor *in writing* that-

(i) Additional funds have been allotted, or the estimated cost has been increased, in a specified amount;

(ii) The contract is not to be further funded and that the contractor *should* submit a proposal for an adjustment of fee, if any, based on the percentage of work completed in relation to the total work called for under the contract;

(iii) The contract is to be terminated; or

(A) The Government is considering whether to allot additional funds or increase the estimated cost-

(B) The contractor is entitled by the contract terms to stop work when the funding or cost limit is reached; and

(C) Any work beyond the funding or cost limit will be at the contractor's risk.

(2) Upon learning that a partially funded contract containing any of the clauses referenced in paragraph (a)(1) of this section will receive no further funds, the *contracting officer shall* promptly give the contractor written notice of the decision not to provide funds.

(b) Under a cost-reimbursement contract, the *contracting officer may* issue a *change order*, a direction to replace or repair defective items or work, or a termination notice without immediately increasing the funds available. Since a contractor is not obligated to incur costs in excess of the estimated cost in the contract, the *contracting officer shall* ensure availability of funds for directed actions. The *contracting officer may* direct that any increase in the estimated cost or amount allotted to a contract be used for the sole purpose of funding termination or other specified expenses.

(c) Government personnel encouraging a contractor to continue work in the absence of funds will incur a violation of Revised Statutes section 3679 ([31 U.S.C. 1341](#)) that *may* subject the violator to civil or criminal penalties.

32.705 Unenforceability of Unauthorized Obligations.

Many *supplies* or services are acquired subject to supplier license agreements. These are

particularly common in *information technology acquisitions*, but they *may* apply to any supply or service. For example, *computer software* and services delivered through the internet (web services) are often subject to license agreements, referred to as End User License Agreements (EULA), Terms of Service (TOS), or other similar legal instruments or agreements. Many of these agreements contain indemnification clauses that are inconsistent with Federal law and unenforceable, but which could create a violation of the Anti-Deficiency Act ([31 U.S.C. 1341](#)) if agreed to by the Government.

32.706 Contract clauses.

32.706-1 Clauses for contracting in advance of funds.

(a) Insert the clause at [52.232-18](#), Availability of Funds, in *solicitations* and contracts if the contract will be chargeable to funds of the new fiscal year and the *contract action* will be initiated before the funds are available.

(b) The *contracting officer shall* insert the clause at [52.232-19](#), Availability of Funds for the Next Fiscal Year, in *solicitations* and contracts if a one-year indefinite-quantity or requirements contract for services is contemplated and the contract-

(1) Is funded by annual appropriations; and

(2) Is to extend beyond the initial fiscal year (see [32.703-2\(b\)](#)).

32.706-2 Clauses for limitation of cost or funds.

(a) The *contracting officer shall* insert the clause at [52.232-20](#), Limitation of Cost, in *solicitations* and contracts if a fully funded cost-reimbursement contract is contemplated, whether or not the contract provides for payment of a fee.

(b) The *contracting officer shall* insert the clause at [52.232-22](#), Limitation of Funds, in *solicitations* and contracts if an incrementally funded cost-reimbursement contract is contemplated.

32.706-3 Clause for unenforceability of unauthorized obligations.

The *contracting officer shall* insert the clause at [52.232-39](#), Unenforceability of Unauthorized Obligations in all *solicitations* and contracts.

Subpart 32.8 - Assignment of Claims

32.800 Scope of subpart.

This subpart prescribes policies and procedures for the *assignment of claims* under the *Assignment of Claims Act of 1940*, as amended, ([31 U.S.C. 3727](#), [41 U.S.C. 6305](#)) (hereafter referred to as "the Act").

32.801 Definitions.

Designated agency, as used in this subpart, means any department or agency of the executive branch of the *United States* Government (see [32.803\(d\)](#)).

No-setoff commitment, as used in this subpart, means a contractual undertaking that, to the extent permitted by the Act, payments by the *designated agency* to the assignee under an *assignment of claims* will not be reduced to *liquidate* the indebtedness of the contractor to the Government.

32.802 Conditions.

Under the *Assignment of Claims Act*, a contractor *may* assign moneys due or to become due under a contract if all the following conditions are met:

- (a) The contract specifies payments aggregating \$1,000 or more.
- (b) The assignment is made to a bank, trust company, or other financing institution, including any Federal lending agency.
- (c) The contract does not prohibit the assignment.
- (d) Unless otherwise expressly permitted in the contract, the assignment-
 - (1) Covers all unpaid amounts payable under the contract;
 - (2) Is made only to one party, except that any assignment *may* be made to one party as agent or trustee for two or more parties participating in the financing of the contract; and
 - (3) Is not subject to further assignment.
- (e) The assignee sends a written notice of assignment together with a true copy of the assignment instrument to the-
 - (1) *Contracting officer* or the *agency head*;
 - (2) *Surety* on any bond applicable to the contract; and
 - (3) Disbursing officer designated in the contract to make payment.

32.803 Policies.

(a) Any *assignment of claims* that has been made under the Act to any type of financing institution listed in [32.802\(b\)](#) *may* thereafter be further assigned and reassigned to any such institution if the conditions in [32.802\(d\)](#) and (e) continue to be met.

(b) A contract *may* prohibit the *assignment of claims* if the agency determines the prohibition to be in the Government's interest.

(c) Under a requirements or indefinite quantity type contract that authorizes ordering and payment by multiple Government activities, amounts due for individual orders for \$1,000 or more *may* be

assigned.

(d) Any contract of a *designated agency* (see FAR [32.801](#)), except a contract under which full payment has been made, *may* include a *no-setoff commitment* only when a determination of need is made by the *head of the agency*, in accordance with the Presidential delegation of authority dated October 3, 1995, and after such determination has been published in the *Federal Register*. The Presidential delegation makes such determinations of need subject to further guidance issued by the Office of Federal *Procurement* Policy. The following guidance has been provided:

Use of the no-setoff provision *may* be appropriate to facilitate the *national defense*; in the event of a national *emergency* or natural disaster; or when the use of the no-setoff provision *may* facilitate private financing of contract performance. However, in the event an *offeror* is significantly indebted to the *United States*, the *contracting officer* should consider whether the inclusion of the *no-setoff commitment* in a particular contract is in the best interests of the *United States*. In such an event, the *contracting officer* should consult with the Government officer(s) responsible for collecting the debt(s).

(e) When an assigned contract does not include a *no-setoff commitment*, the Government *may* apply against payments to the assignee any liability of the contractor to the Government arising independently of the assigned contract if the liability existed at the time notice of the assignment was received even though that liability had not yet matured so as to be due and payable.

32.804 Extent of assignee's protection.

(a) No payments made by the Government to the assignee under any contract assigned in accordance with the Act *may* be recovered on account of any liability of the contractor to the Government. This immunity of the assignee is effective whether the contractor's liability arises from or independently of the assigned contract.

(b) Except as provided in paragraph (c) of this section, the inclusion of a *no-setoff commitment* in an assigned contract entitles the assignee to receive contract payments free of reduction or setoff for-

(1) Any liability of the contractor to the Government arising independently of the contract; and

(2) Any of the following liabilities of the contractor to the Government arising from the assigned contract:

(i) Renegotiation under any statute or *contract clause*.

(ii) Fines.

(iii) Penalties, exclusive of amounts that *may* be collected or withheld from the contractor under, or for failure to comply with, the terms of the contract.

(iv) Taxes or social security contributions.

(v) Withholding or nonwithholding of taxes or social security contributions.

(c) In some circumstances, a setoff *may* be appropriate even though the assigned contract includes a *no-setoff commitment*; *e.g.*-

(1) When the assignee has neither made a loan under the assignment nor made a commitment to do

so; or

(2) To the extent that the amount due on the contract exceeds the amount of any loans made or expected to be made under a firm commitment for financing.

32.805 Procedure.

(a) Assignments.

(1) Assignments by corporations *shall* be-

(i) Executed by an authorized representative;

(ii) Attested by the secretary or the assistant secretary of the corporation; and

(iii) Impressed with the corporate seal or accompanied by a true copy of the resolution of the corporation's board of directors authorizing the signing representative to execute the assignment.

(2) Assignments by a partnership *may* be signed by one partner, if the assignment is accompanied by *adequate evidence* that the signer is a general partner of the partnership and is authorized to execute assignments on behalf of the partnership.

(3) Assignments by an individual *shall* be signed by that individual and the *signature* acknowledged before a notary public or other person authorized to administer oaths.

(b) *Filing.* The assignee *shall* forward to each party specified in 32.802(e) an original and three copies of the notice of assignment, together with one true copy of the instrument of assignment. The true copy *shall* be a certified duplicate or photostat copy of the original assignment.

(c) *Format for notice of assignment.* The following is a suggested format for use by an assignee in providing the notice of assignment required by 32.802(e).

Notice of Assignment

To: _____ [*Address to one of the parties specified in 32.802(e)*].

This has reference to Contract No. _____ dated _____, entered into between _____ [*Contractor's name and address*] and _____ [*Government agency, name of office, and address*], for _____ [*Describe nature of the contract*].

Moneys due or to become due under the contract described above have been assigned to the undersigned under the provisions of the *Assignment of Claims Act* of 1940, as amended, (31 U.S.C.3727, 41 U.S.C. 6305).

A true copy of the instrument of assignment executed by the Contractor on _____ [*Date*], is attached to the original notice.

Payments due or to become due under this contract *should* be made to the undersigned assignee.

Please return to the undersigned the three enclosed copies of this notice with appropriate notations showing the date and hour of receipt, and signed by the person acknowledging receipt on behalf of

the addressee.

Very truly yours,

_____ [Name of Assignee]

By _____ [Signature of Signing Officer]

_____ [Title of Signing Officer]

_____ [Address of Assignee]

Acknowledgement

Receipt is acknowledged of the above notice and of a copy of the instrument of assignment. They were received ___ (a.m.) (p.m.) on ____, 20__.

_____ [Signature]

_____ [Title]

_____ On behalf of

_____ [Name of Addressee of this Notice]

(d) *Examination by the Government.* In examining and processing notices of assignment and before acknowledging their receipt, *contracting officers should* assure that the following conditions and any additional conditions specified in agency regulations, have been met:

(1) The contract has been properly approved and executed.

(2) The contract is one under which *claims may* be assigned.

(3) The assignment covers only money due or to become due under the contract.

(4) The assignee is registered separately in the *System for Award Management* unless one of the exceptions in 4.1102 applies.

(e) Release of assignment.

(1) A release of an assignment is required whenever-

(i) There has been a further assignment or reassignment under the Act; or

(ii) The contractor wishes to reestablish its right to receive further payments after the contractor's obligations to the assignee have been satisfied and a balance remains due under the contract.

(2) The assignee, under a further assignment or reassignment, in order to establish a right to receive payment from the Government, *must* file with the addressees listed in 32.802(e) a-

(i) Written notice of release of the contractor by the assigning financing institution;

(ii) Copy of the release instrument;

(iii) Written notice of the further assignment or reassignment; and

(iv) Copy of the further assignment or reassignment instrument.

(3) If the assignee releases the contractor from an *assignment of claims* under a contract, the contractor, in order to establish a right to receive payment of the balance due under the contract, *must* file a written notice of release together with a true copy of the release of assignment instrument with the addressees noted in [32.802\(e\)](#).

(4) The addressee of a notice of release of assignment or the official acting on behalf of that addressee *shall* acknowledge receipt of the notice.

32.806 Contract clauses.

(a)

(1) The *contracting officer shall* insert the clause at [52.232-23](#), *Assignment of Claims*, in *solicitations* and contracts expected to exceed the *micro-purchase threshold*, unless the contract will prohibit the *assignment of claims* (see [32.803\(b\)](#)). The use of the clause is not required for *purchase orders*. However, the clause *may* be used in *purchase orders* expected to exceed the *micro-purchase threshold*, that are accepted *in writing* by the contractor, if such use is consistent with agency policies and regulations.

(2) If a *no-setoff commitment* has been authorized (see [32.803\(d\)](#)), the *contracting officer shall* use the clause with its Alternate I.

(b) The *contracting officer shall* insert the clause at [52.232-24](#), *Prohibition of Assignment of Claims*, in *solicitations* and contracts for which a determination has been made under agency regulations that the prohibition of *assignment of claims* is in the Government's interest.

Subpart 32.9 - Prompt Payment

32.900 Scope of subpart.

This subpart prescribes policies, procedures, and clauses for implementing Office of Management and Budget (OMB) prompt payment regulations at 5 CFR Part 1315.

32.901 Applicability.

(a) This subpart applies to *invoice payments* on all contracts, except contracts with payment terms and late payment penalties established by other governmental authority (*e.g.*, tariffs).

(b) This subpart does not apply to *contract financing payments* (see definition at [32.001](#)).

32.902 Definitions.

As used in this subpart-

Discount for prompt payment means an *invoice payment* reduction offered by the contractor for payment prior to the *due date*.

Mixed invoice means an *invoice* that contains items with different payment *due dates*.

Payment date means the date on which a check for payment is dated or, for an *electronic funds transfer (EFT)*, the *settlement date*.

Settlement date, as it applies to *electronic funds transfer*, means the date on which an *electronic funds transfer* payment is credited to the contractor's financial institution.

32.903 Responsibilities.

(a) *Agency heads-*

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

(2) *May* prescribe additional standards for establishing *invoice payment due dates* (see [32.904](#)) 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 in this subpart;

(4) *Must* inform contractors of points of contact within their cognizant payment offices to enable contractors to obtain status of *invoices*; and

(5) *May* authorize the use of the accelerated payment methods specified at [5 CFR 1315.5](#), but see [32.009-1\(a\)](#).

(b) When drafting *solicitations* and contracts, *contracting officers* must identify for each *line item number*, *subline item number*, or exhibit *line item number-*

(1) The applicable Prompt Payment clauses that apply 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*.

32.904 Determining payment due dates.

(a) *General*. Agency procedures *must* ensure that, when specifying *due dates*, *contracting officers* give full consideration to the time reasonably required by Government officials to fulfill their administrative responsibilities under the contract.

(b) *Payment due dates*. Except as prescribed in paragraphs (c) through (f) of this section, or as

authorized in [32.908\(a\)\(2\)](#) or (c)(2), the *due date* for making an *invoice payment* is as follows:

(1) The later of the following two events:

(i) The 30 thday after the *designated billing office* receives a *proper invoice* from the contractor (except as provided in paragraph (b)(3) of this section).

(ii) The 30 thday after Government acceptance of *supplies* delivered or services performed.

(A) For a final *invoice*, when the payment amount is subject to contract settlement actions, acceptance is deemed to occur on the effective date of the contract settlement.

(B) For the sole purpose of computing an interest penalty that might be due the contractor-

(1) Government acceptance is deemed to occur constructively on the 7 thday after the contractor delivers *supplies* or performs 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;

(2) If actual acceptance occurs within the constructive acceptance period, the Government *must* base the determination of an interest penalty on the actual date of acceptance;

(3) The constructive acceptance requirement does not compel Government officials to accept *supplies* or services, perform contract administration functions, or make payment prior to fulfilling their responsibilities; and

(4) Except for a contract for the purchase of a *commercial product* or *commercial service*, including a brand-name *commercial product* 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 *contracting officer* *must* document in the contract file the justification for extending the constructive acceptance period beyond 7 days. Extended acceptance periods *must* not be a routine agency practice and *must* be used only when necessary to permit proper Government *inspection* and testing of the *supplies* delivered or services performed.

(2) If the contract does not require submission of an *invoice* for payment (e.g., periodic lease payments), the *contracting officer* *must* specify the *due date* in the contract.

(3) 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* is the 30 thday after the date of the contractor's *invoice*, provided the *designated billing office* receives a *proper invoice* and there is no disagreement over quantity, quality, or contractor compliance with contract requirements.

(c) Architect-engineer contracts.

(1) The *due date* for making payments on contracts that contain the clause at [52.232-10](#), Payments Under Fixed-Price Architect-Engineer Contracts, is as follows:

(i) The *due date* for work or services completed by the contractor is the later of the following two events:

(A) The 30 thday after the *designated billing office* receives a *proper invoice* from the contractor.

(B) The 30 thday after Government acceptance of the work or services completed by the contractor.

(1) For a final *invoice*, when the payment amount is subject to contract settlement actions (*e.g.*, release of *claims*), acceptance is deemed to occur on the effective date of the settlement.

(2) For the sole purpose of computing an interest penalty that might be due the contractor, Government acceptance is deemed to occur constructively on the 7 thday after the contractor completes the work or services in accordance with the terms and conditions of the contract (see also paragraph (c)(2) of this section). If actual acceptance occurs within the constructive acceptance period, the Government *must* base the determination of an interest penalty on the actual date of acceptance.

(ii) The *due date* for progress payments is the 30 thday 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-

(A) Government approval is deemed to occur constructively on the 7 thday after the *designated billing office* receives the contractor estimates (see also paragraph (c)(2) of this section).

(B) If actual approval occurs within the constructive approval period, the Government *must* base the determination of an interest penalty on the actual date of approval.

(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* is the 30 thday after the date of the contractor's *invoice* or payment request, provided the *designated billing office* receives a *proper invoice* or payment request and there is no disagreement over quantity, quality, or contractor compliance with contract requirements.

(2) The constructive acceptance and constructive approval requirements described in paragraphs (c)(1)(i) and (ii) 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. The *contracting officer* *must* document in the contract file the justification for extending the constructive acceptance or approval period beyond 7 days.

(d) *Construction* contracts.

(1) The *due date* for making payments on *construction* contracts is 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, is 14 days after the *designated billing office* receives a proper payment request.

(A) 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* is the 14 thday after the date of the contractor's

payment request, provided the *designated billing office* receives a proper payment request and there is no disagreement over quantity, quality, or contractor compliance with contract requirements.

(B) 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 *contracting officer* must document in the contract file the justification for extending the *due date* beyond 14 days.

(C) The *contracting officer* must 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, will be as specified in the contract or, if not specified, 30 days after approval by the *contracting officer* for release to the contractor. The *contracting officer* must base the release of retained amounts 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) is as follows:

(A) The later of the following two events:

(1) The 30 thday after the *designated billing office* receives a *proper invoice* from the contractor.

(2) The 30 thday after Government acceptance of the work or services completed by the contractor. For a final *invoice*, when the payment amount is subject to contract settlement actions (e.g., release of contractor *claims*), acceptance is deemed to occur on the effective date of the contract settlement.

(B) 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* is the 30 thday after the date of the contractor's *invoice*, provided the *designated billing office* receives a *proper invoice* and there is no disagreement over quantity, quality, or contractor compliance with contract requirements.

(2) For the sole purpose of computing an interest penalty that might be due the contractor for payments described in paragraph (d)(1)(iii) of this section-

(i) Government acceptance or approval is deemed to occur constructively on the 7 thday after the contractor completes the work or services in accordance with the terms and conditions of the contract, unless there is a disagreement over quantity, quality, contractor compliance with a contract requirement, or the requested amount;

(ii) If actual acceptance occurs within the constructive acceptance period, the Government *must* base the determination of an interest penalty on the actual date of acceptance;

(iii) The constructive acceptance requirement does not compel Government officials to accept work or services, approve contractor estimates, perform contract administration functions, or make payment prior to fulfilling their responsibilities; and

(iv) 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. The *contracting officer must* document in the contract file the justification for extending the constructive acceptance or approval beyond 7 days.

(3) *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 *must* not 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.

(4)

(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. The Government *must* recover this interest from subsequent payments to the contractor. Therefore, *contracting officers* normally *must* make no demand for payment. *Contracting officers must-*

(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 is responsible for making the deduction of interest. Amounts collected in accordance with these provisions revert to the *United States* Treasury.

(e) *Cost-reimbursement contracts for services*. For purposes of computing late payment interest penalties that *may* apply, the *due date* for making interim payments on cost-reimbursement contracts for services is 30 days after the date of receipt of a *proper invoice*.

(f) *Food and specified items*.

If the items delivered are:

Payment *must* be made as close as possible to, but not later than:

(1) *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.

7th *day* after product delivery.

(2) *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)).

7th *day* after product delivery.

(3) *Perishable agricultural commodities*. As defined in section 1(4) of the Perishable Agricultural Commodities Act of 1930 (7 U.S.C. 499a(4)).

10th *day* after product delivery, unless another date is specified in the contract.

(4) *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. 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*. If questions arise regarding the proper classification of a specific product, the *contracting officer must* follow prevailing industry practices 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.

10th *day* after a *proper invoice* has been received.

(g) *Multiple payment due dates*. *Contracting officers may* encourage, but not require, contractors to submit separate *invoices* for *products* with different payment *due dates* under the same contract or order. When an *invoice* contains items with different payment *due dates* (*i.e.*, a *mixed invoice*), the payment office will, subject to agency policy-

(1) Pay the entire *invoice* on the earliest *due date*; or

(2) Split *invoice payments*, making payments by the applicable *due dates*.

32.905 Payment documentation and process.

(a) *General*. Payment will be based on receipt of a *proper invoice* and satisfactory contract performance.

(b) Content of *invoices*.

(1) A *proper invoice must* include the following items (except for interim payments on cost reimbursement contracts for services):

(i) Name and address of the contractor.

(ii) *Invoice* date and *invoice* number. (Contractors *should* date *invoices* as close as possible to the date of mailing or transmission.)

(iii) Contract number or other authorization for *supplies* delivered or services performed (including order number and *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*, *discount for prompt*

payment 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 notify in the event of a defective *invoice*.

(viii) *Taxpayer Identification Number (TIN)*. The contractor *must* include its TIN on the *invoice* only if required by agency procedures. (See [4.9](#) TIN requirements.)

(ix) *Electronic funds transfer (EFT)* banking information.

(A) The contractor *must* include EFT banking information on the *invoice* only if required by agency procedures.

(B) If EFT banking information is not required to be on the *invoice*, in order for the *invoice* to be a *proper invoice*, the contractor *must* have submitted correct EFT banking information in accordance with the applicable *solicitation* provision (e.g., [52.232-38](#), Submission of *Electronic Funds Transfer Information with Offer*), *contract clause* (e.g., [52.232-33](#), Payment by *Electronic Funds Transfer-System for Award Management*, or [52.232-34](#), Payment by *Electronic Funds Transfer-Other Than System for Award Management*), or applicable agency procedures.

(C) EFT banking information is not required if the Government waived the requirement to pay by EFT.

(x) Any other information or documentation required by the contract (e.g., evidence of *shipment*).

(2) An interim payment request under a cost-reimbursement contract for services constitutes a *proper invoice* for purposes of this subsection if it includes all of the information required by the contract.

(3) If the *invoice* does not comply with these requirements, the *designated billing office must* return it within 7 days after receipt (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 the reasons why it is not a *proper invoice*. If such notice is not timely, then the *designated billing office must* adjust the *due date* for the purpose of determining an interest penalty, if any.

(c) *Authorization to pay*. All *invoice payments*, with the exception of interim payments on cost-reimbursement contracts for services, *must* be supported by a *receiving report* or other Government documentation authorizing payment (e.g., Government certified voucher). 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 *must*, 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 that the designated Government official-
- (i) Accepted the *supplies* or services; or
 - (ii) Approved the progress payment request, if the request is 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*, printed name, title, mailing address, and telephone number of the designated Government official responsible for acceptance or approval functions.
- (d) *Billing office*. The *designated billing office* must immediately annotate each *invoice* with the actual date it receives the *invoice*.
- (e) *Payment office*. The *designated payment office* will annotate each *invoice* and *receiving report* with the actual date it receives the *invoice*.

32.906 Making payments.

- (a) *General*. The Government will not make *invoice payments* earlier than 7 days prior to the *due dates* specified in the contract unless the *agency head* determines-
- (1) To make earlier payment on a case-by-case basis; or
 - (2) That the use of accelerated payment methods is necessary. See 32.903(a)(5), but see 32.009-1(a).
- (b) *Payment office*. The *designated payment office*-
- (1) Will mail checks on the same *day* they are dated;
 - (2) For payments made by EFT, will specify a date on or before the established *due date* for settlement of the payment at a Federal Reserve Bank;
 - (3) When the *due date* falls on a Saturday, Sunday, or legal holiday when Government offices are closed, *may* make payment on the following working *day* without incurring a late payment interest penalty.
 - (4) When it is determined that the *designated billing office* erroneously rejected a *proper invoice* and upon resubmission of the *invoice*, will enter in the payment system the original date the *invoice* was received by the *designated billing office* for the purpose of calculating the correct payment *due date* and any interest penalties that *may* be due.
- (c) Partial deliveries.
- (1) *Contracting officers must*, 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 clause at 52.232-1, Payments, provides that 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.

(d) *Contractor identifier*. Each payment or remittance advice will use the contractor *invoice* number in addition to any Government or contract information in describing any payment made.

(e) *Discounts*. When a *discount for prompt payment* is taken, the *designated payment office* will make payment to the contractor as close as possible to, but not later than, the end of the discount period. The discount period is specified by the contractor and is calculated from the date of the contractor's *proper 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 Government offices are closed, the *designated payment office* may make payment on the following working *day* and take a discount. Payment terms are specified in the clause at 52.232-8, Discounts for Prompt Payment.

32.907 Interest penalties.

(a) *Late payment*. The *designated payment office* will pay an interest penalty automatically, without request from the contractor, when all of the following conditions, if applicable, have been met:

(1) The *designated billing office* received a *proper invoice*.

(2) The Government processed a *receiving report* or other Government documentation authorizing payment, 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*.

(5) In the case of interim payments on cost-reimbursement contracts for services, when payment is made more than 30 days after the *designated billing office* receives a *proper invoice*.

(b) *Improperly taken discount*. The *designated payment office* will pay an interest penalty automatically, without request from the contractor, if the Government takes a *discount for prompt payment* improperly. The interest penalty is calculated on the amount of discount taken for the period beginning with the firstday after the end of the discount period through the date when the contractor is paid.

(c) Failure to pay interest.

(1) The *designated payment office* will pay a penalty amount, in addition to the interest penalty amount, only if-

(i) The Government owes an interest penalty of \$1 or more;

(ii) The *designated payment office* does not pay the interest penalty within 10 days after the date the *invoice* amount is paid; and

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

(2)

(i) Contractors *must* support written demands for additional penalty payments with the following data. The Government *must* not request additional data. Contractors *must*-

(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 is due; and

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

(3) If there is no postmark or the postmark is illegible-

(i) The *designated payment office* that receives the demand will annotate it with the date of receipt, provided the demand is received on or before the 40 thday after payment was made; or

(ii) If the *designated payment office* fails to make the required annotation, the Government will determine the demand's validity based on the date the contractor has placed on the demand; provided such date is no later than the 40 thday after payment was made.

(d) Disagreements.

(1) The payment office will not pay interest penalties if payment delays are due to disagreement between the Government and contractor concerning-

(i) The payment amount;

(ii) Contract compliance; or

(iii) Amounts temporarily withheld or retained in accordance with the terms of the contract.

(2) The Government and the contractor *must* resolve *claims* involving disputes, and any interest that *may* be payable in accordance with the Disputes clause.

(e) *Computation of interest penalties.* The Government will compute interest penalties in accordance with OMB prompt payment regulations at 5 CFR Part 1315. These regulations are available via the Internet at <http://www.fms.treas.gov/prompt/>.

(f) *Unavailability of funds.* The temporary unavailability of funds to make a timely payment does not relieve an agency from the obligation to pay interest penalties.

32.908 Contract clauses.

(a) 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 32.904(c)(2), 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) As provided in 32.903, agency policies and procedures *may* authorize amendment of paragraphs (a)(1)(i) and (ii) of the clause to insert a period shorter than 30 days (but not less than 7 days) for making contract *invoice payments*.

(b) 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 32.904(d)(1)(i)(B), 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 32.904(d)(2)(iv), 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.

(c) Insert the clause at 52.232-25, Prompt Payment, in all other *solicitations* and contracts, except when the clause at 52.212-4, Contract Terms and Conditions-*Commercial Products* and *Commercial Services*, applies, or when payment terms and late payment penalties are established by other governmental authority (*e.g.*, tariffs).

(1) As authorized in 32.904(b)(1)(ii)(B)(4), 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 product* or *commercial service*, including a brand-name *commercial product* for authorized resale (*e.g.*, commissary items).

(2) As provided in 32.903, agency policies and procedures *may* authorize amendment of paragraphs (a)(1)(i) and (ii) of the clause to insert a period shorter than 30 days (but not less than 7 days) for making contract *invoice payments*.

(3) If the contract is a cost-reimbursement contract for services, use the clause with its *Alternate I*.

32.909 Contractor inquiries.

(a) Direct questions involving-

- (1) Delinquent payments to the *designated billing office* or *designated payment office*; and
 - (2) Disagreements in payment amount or timing to the *contracting officer* for resolution. The *contracting officer* must coordinate within appropriate *contracting* channels and seek the advice of other offices as necessary to resolve dis-agreements.
- (b) Small business concerns *may* contact the agency's local small business specialist or representative from the *Office of Small and Disadvantaged Business Utilization* to obtain additional assistance related to payment issues, late payment interest penalties, and information on the Prompt Payment Act.

Subpart 32.10 - Performance-Based Payments

32.1000 Scope of subpart.

This subpart provides policy and procedures for performance-based payments under noncommercial purchases pursuant to [subpart 32.1](#).

32.1001 Policy.

- (a) Performance-based payments are the preferred Government financing method when the *contracting officer* finds them practical, and the contractor agrees to their use.
- (b) Performance-based payments are *contract financing payments* that are not payment for accepted items.
- (c) Performance-based payments are fully recoverable, in the same manner as progress payments, in the event of default.
- (d) Performance-based payments are *contract financing payments* and, therefore, are not subject to the interest-penalty provisions of prompt payment (see [subpart 32.9](#)). These payments *shall* be made in accordance with agency policy.
- (e) Performance-based payments *shall* not be used for-
 - (1) Payments under cost-reimbursement *line items*;
 - (2) Contracts for *architect-engineer services* or *construction*, or for shipbuilding or ship conversion, alteration, or repair, when the contracts provide for progress payments based upon a percentage or stage of completion; or
 - (3) Contracts awarded through sealed bid procedures.

32.1002 Bases for performance-based payments.

Performance-based payments *may* be made on any of the following bases:

- (a) Performance measured by objective, quantifiable methods.
- (b) Accomplishment of defined events.
- (c) Other quantifiable measures of results.

32.1003 Criteria for use.

The *contracting officer* may use performance-based payments for individual orders and contracts provided-

- (a) The *contracting officer* and *offeror* agree on the performance-based payment terms;
- (b) The contract, individual order, or *line item* is a fixed-price type;
- (c) For indefinite delivery contracts, the individual order does not provide for progress payments; and
- (d) For other than indefinite delivery contracts, the contract does not provide for progress payments.

32.1004 Procedures.

Performance-based payments *may* be made either on a whole contract or on a deliverable item basis, unless otherwise prescribed by agency regulations. Financing payments to be made on a whole contract basis are applicable to the entire contract, and not to specific deliverable items. Financing payments to be made on a deliverable item basis are applicable to a specific individual deliverable item. (A deliverable item for these purposes is a separate item with a distinct unit price. Thus, a *line item* for 10 airplanes, with a unit price of \$1,000,000 each, has 10 deliverable items-the separate planes. A *line item* for 1 lot of 10 airplanes, with a lot price of \$10,000,000, has only one deliverable item-the lot.)

- (a) Establishing performance bases.

(1) The basis for performance-based payments *may* be either specifically described events (*e.g.*, milestones) or some measurable criterion of performance. Each event or performance criterion that will trigger a finance payment *shall* be an integral and necessary part of contract performance and *shall* be identified in the contract, along with a description of what constitutes successful performance of the event or attainment of the performance criterion. The signing of contracts or modifications, the exercise of *options*, the passage of time, or other such occurrences do not represent meaningful efforts or actions and *shall* not be identified as events or criteria for performance-based payments. An event need not be a critical event in order to trigger a payment, but the Government *must* be able to readily verify successful performance of each such event or performance criterion.

(2) Events or criteria *may* be either severable or cumulative. The successful completion of a severable event or criterion is independent of the accomplishment of any other event or criterion. Conversely, the successful accomplishment of a cumulative event or criterion is dependent upon the previous accomplishment of another event. A contract *may* provide for more than one series of severable and/or cumulative performance events or criteria performed in parallel. The *contracting*

officer shall include the following in the contract:

(i) The contract *shall* not permit payment for a cumulative event or criterion until the dependent event or criterion has been successfully completed.

(ii) The contract *shall* specifically identify severable events or criteria.

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

(iv) Because performance-based payments are contract financing, events or criteria *shall* not serve as a vehicle to reward the contractor for completion of performance levels over and above what is required for successful completion of the contract.

(v) If payment of performance-based finance amounts is on a deliverable item basis, each event or performance criterion *shall* be part of the performance necessary for that deliverable item and *shall* be identified to a specific *line item* or *subline item*.

(b) Establishing performance-based finance payment amounts.

(1) The *contracting officer shall* establish a complete, fully defined schedule of events or performance criteria and payment amounts when negotiating contract terms. If a *contract action* significantly affects the price, or event or performance criterion, the *contracting officer* responsible for *pricing the contract modification shall* adjust the performance-based payment schedule appropriately.

(2) Total performance-based payments *shall*-

(i) Reflect prudent contract financing provided only to the extent needed for contract performance (see [32.104\(a\)](#)); and

(ii) Not exceed 90 percent of the contract price if on a whole contract basis, or 90 percent of the delivery item price if on a delivery item basis.

(3) The contract *shall* specifically state the amount of each performance-based payment either as a dollar amount or as a percentage of a specifically identified price (*e.g.*, contract price or unit price of the deliverable item). The payment of contract financing has a cost to the Government in terms of interest paid by the Treasury to borrow funds to make the payment. Because the *contracting officer* has wide discretion as to the timing and amount of the performance-based payments, the *contracting officer shall* ensure that-

(i) The total contract price is fair and reasonable, all factors considered; and

(ii) Performance-based payment amounts are commensurate with the value of the performance event or performance criterion and are not expected to result in an unreasonably low or negative level of contractor investment in the contract. To confirm sufficient investment, the *contracting officer may* request expenditure profile information from *offerors*, but only if other information in the proposal, or information otherwise available to the *contracting officer*, is expected to be insufficient.

(4) Unless agency procedures prescribe the bases for establishing performance-based payment amounts, *contracting officers may* establish them on any rational basis, including (but not limited to)-

(i) Engineering estimates of stages of completion;

(ii) Engineering estimates of hours or other measures of effort to be expended in performance of an event or achievement of a performance criterion; or

(iii) The estimated projected cost of performance of particular events.

(5) When subsequent *contract modifications* are issued, the *contracting officer shall* adjust the performance-based payment schedule as necessary to reflect the actions required by those *contract modifications*.

(c) *Instructions for multiple appropriations.* If there is more than one appropriation account (or subaccount) funding payments on the contract, the *contracting officer shall* provide instructions to the Government payment office for distribution of financing payments to the respective funds accounts. Distribution instructions *shall* be consistent with the contract's liquidation provisions.

(d) *Liquidating performance-based finance payments.* Performance-based amounts *shall* be liquidated by deducting a percentage or a designated dollar amount from the *delivery payments*. The *contracting officer shall* specify the liquidation rate or designated dollar amount in the contract. The method of liquidation *shall* ensure complete liquidation no later than final payment.

(1) If the *contracting officer* establishes the performance-based payments on a delivery item basis, the liquidation amount for each *line item* is the percent of that delivery item price that was previously paid under performance-based finance payments or the designated dollar amount.

(2) If the performance-based finance payments are on a whole contract basis, liquidation is by predesignated liquidation amounts or liquidation percentages.

(e) Competitive negotiated *solicitations*.

(1) If a *solicitation* requests *offerors* to propose performance-based payments, the *solicitation shall* specify-

(i) What, if any, terms *shall* be included in all *offers*; and

(ii) The extent to which and how *offeror*-proposed performance-based payment terms will be evaluated. Unless agencies prescribe other evaluation procedures, if the *contracting officer* anticipates that the cost of providing performance-based payments would have a significant impact on determining the *best value offer*, the *solicitation should* state that the evaluation of the *offeror's* proposed prices will include an adjustment to reflect the estimated cost to the Government of providing each *offeror's* proposed performance-based payments (see *Alternate I* to the provision at [52.232-28](#)).

(2) The *contracting officer shall*-

(i) Review the proposed terms to ensure they comply with this section; and

(ii) Use the adjustment method at [32.205\(c\)](#) if the price is to be adjusted for evaluation purposes in accordance with paragraph (e)(1)(ii) of this section.

32.1005 Solicitation provision and contract clause.

(a) Insert the clause at 52.232-32, Performance-Based Payments, in-

(1) *Solicitations* that may result in contracts providing for performance-based payments; and

(2) Fixed-price contracts under which the Government will provide performance-based payments.

(b)

(1) Insert the *solicitation* provision at 52.232-28, invitation to Propose Performance-Based Payments, in negotiated *solicitations* that invite *offerors* to propose performance-based payments.

(2) Use the provision with its *Alternate I* in competitive negotiated *solicitations* if the Government intends to adjust proposed prices for proposal evaluation purposes (see 32.1004(e)).

32.1006 [Reserved]

32.1007 Administration and payment of performance-based payments.

(a) *Responsibility*. The *contracting officer* responsible for administering performance-based payments (see 42.302(a)(13)) for the contract *shall* review and approve all performance-based payments for that contract.

(b) *Approval of financing requests*. Unless otherwise provided in agency regulations, or by agreement with the appropriate payment official-

(1) The *contracting officer shall* be responsible for receiving, approving, and transmitting all performance-based payment requests to the appropriate payment office; and

(2) Each approval *shall* specify the amount to be paid, necessary contractual information, and the appropriation account(s) (see 32.1004(c)) to be charged for the payment.

(c) *Reviews*. The *contracting officer* is responsible for determining what reviews are required for protection of the Government's interests. The *contracting officer should* consider the contractor's experience, performance record, reliability, financial strength, and the adequacy of controls established by the contractor for the administration of performance-based payments. Based upon the risk to the Government, post-payment reviews and verifications *should* normally be arranged as considered appropriate by the *contracting officer*. If considered necessary by the *contracting officer*, pre-payment reviews *may* be required.

(d) *Incomplete performance*. The *contracting officer shall* not approve a performance-based payment until the specified event or performance criterion has been successfully accomplished in accordance with the contract. If an event is cumulative, the *contracting officer shall* not approve the performance-based payment unless all identified preceding events or criteria are accomplished.

(e) *Government-caused delay*. Entitlement to a performance-based payment is solely on the basis of successful performance of the specified events or performance criteria. However, if there is a Government-caused delay, the *contracting officer may* renegotiate the performance-based payment

schedule to facilitate contractor billings for any successfully accomplished portions of the delayed event or criterion.

32.1008 Suspension or reduction of performance-based payments.

The *contracting officer shall* apply the policy and procedures in paragraphs (a), (b), (c), and (e) of 32.503-6, *Suspension or reduction of payments*, whenever exercising the Government's rights to suspend or reduce performance-based payments in accordance with paragraph (e) of the clause at 52.232-32, *Performance-Based Payments*.

32.1009 Title.

(a) Since the clause at 52.232-32, *Performance-Based Payments*, gives the Government title to the property described in paragraph (f) of the clause, the *contracting officer shall* ensure that the Government title is not compromised by other encumbrances. Ordinarily, the *contracting officer*, in the absence of reason to believe otherwise, *may* rely upon the contractor's certification contained in the payment request.

(b) If the *contracting officer* becomes aware of any arrangement or condition that would impair the Government's title to the property affected by the *Performance-Based Payments* clause, the *contracting officer shall* require additional protective provisions.

(c) The existence of any such encumbrance is a violation of the contractor's obligations under the contract, and the *contracting officer may*, if necessary, suspend or reduce payments under the terms of the *Performance-Based Payments* clause covering failure to comply with a material requirement of the contract. In addition, if the contractor fails to disclose an existing encumbrance in the certification, the *contracting officer should* consult with legal counsel concerning possible violation of 31 U.S.C.3729, the *False Claims Act*.

32.1010 Risk of loss.

(a) Under the clause at 52.232-32, *Performance-Based Payments*, and except for normal spoilage, the contractor bears the risk of loss for Government property, even though title is vested in the Government, unless the Government has expressly assumed this risk. The clauses prescribed in this regulation related to performance-based payments, default, and terminations do not constitute a Government assumption of risk.

(b) If a loss occurs in connection with property for which the contractor bears the risk, and the property is needed for performance, the contractor is obligated to repay the Government the performance-based payments related to the property.

(c) The contractor is not obligated to pay for the loss of property for which the Government has assumed the risk of loss. However, a serious loss *may* impede the satisfactory progress of contract performance, so that the *contracting officer may* need to act under paragraph (e)(2) of the *Performance-Based Payments* clause. In addition, while the contractor is not required to repay previous performance-based payments in the event of a loss for which the Government has assumed the risk, such a loss *may* prevent the contractor from making the certification required by the *Performance-Based Payments* clause.

Subpart 32.11 - Electronic Funds Transfer

32.1100 Scope of subpart.

This subpart provides policy and procedures for contract financing and *delivery payments* to contractors by *electronic funds transfer (EFT)*.

32.1101 Statutory requirements.

[31 U.S.C.3332](#) requires, subject to implementing regulations of the Secretary of the Treasury at 31 CFR Part 208, that EFT be used to make all contract payments.

32.1102 Definitions.

As used in this subpart-

Electronic Funds Transfer information (EFT) means information necessary for making a payment by EFT through specified EFT mechanisms.

Governmentwide commercial purchase card means a card that is similar in nature to a commercial credit card that is used to make financing and *delivery payments* for *supplies* and services. The purchase card is an EFT method and it *may* be used as a means to meet the requirement to pay by EFT, to the extent that purchase card limits do not preclude such payments.

Payment information means the payment advice provided by the Government to the contractor that identifies what the payment is for, any computations or adjustments made by the Government, and any information required by the Prompt Payment Act.

32.1103 Applicability.

The Government *shall* provide all contract payments through EFT except if-

(a) The office making payment under a contract that requires payment by EFT, loses the ability to release payment by EFT. To the extent authorized by 31 CFR Part 208, the payment office *shall* make necessary payments pursuant to paragraph (a)(2) of the clause at either [52.232-33](#) or [52.232-34](#) until such time as it can make EFT payments;

(b) The payment is to be received by or on behalf of the contractor outside the *United States* and Puerto Rico (but see [32.1106\(b\)](#));

(c) A contract is paid in other than *United States* currency (but see [32.1106\(b\)](#));

(d) Payment by EFT under a *classified contract* could compromise the safeguarding of *classified information* or national security, or arrangements for appropriate EFT payments would be impractical due to security considerations;

(e) A contract is awarded by a deployed *contracting officer* in the course of military operations, including, but not limited to, *contingency operations* as defined in [2.101](#), or a contract is awarded by any *contracting officer* in the conduct of *emergency operations*, such as responses to natural disasters or national or civil *emergencies*, if-

(1) EFT is not known to be possible; or

(2) EFT payment would not support the objectives of the operation;

(f) The agency does not expect to make more than one payment to the same recipient within a one-year period;

(g) An agency's need for *supplies* and services is of such unusual and compelling urgency that the Government would be seriously injured unless payment is made by a method other than EFT;

(h) There is only one source for *supplies* and services and the Government would be seriously injured unless payment is made by a method other than EFT; or

(i) Otherwise authorized by Department of the Treasury Regulations at 31 CFR Part 208.

32.1104 Protection of EFT information.

The Government *shall* protect against improper disclosure of contractors' EFT information.

32.1105 Assignment of claims.

The use of EFT payment methods is not a substitute for a properly executed *assignment of claims* in accordance with [subpart 32.8](#). EFT information that shows the ultimate recipient of the transfer to be other than the contractor, in the absence of a proper *assignment of claims*, is considered to be incorrect EFT information within the meaning of the "*Suspension of Payment*" paragraphs of the EFT clauses at [52.232-33](#) and [52.232-34](#).

32.1106 EFT mechanisms.

(a) *Domestic EFT mechanisms*. The EFT clauses at [52.232-33](#) and [52.232-34](#) are designed for use with the domestic *United States* banking system, using *United States* currency, and only the specified mechanisms (U.S. Automated Clearing House, and Fedwire Transfer System) of EFT. However, the head of an agency *may* authorize the use of any other EFT mechanism for domestic EFT with the concurrence of the office or agency responsible for making payments.

(b) *Nondomestic EFT mechanisms and other than United States currency*. The Government *shall* provide payment by other than EFT for payments received by or on behalf of the contractor outside the *United States* and Puerto Rico or for contracts paid in other than *United States* currency. However, the head of an agency *may* authorize appropriate use of EFT with the concurrence of the office or agency responsible for making payments if-

(1) The political, financial, and communications infrastructure in a foreign country supports payment by EFT; or

(2) Payments of other than *United States* currency *may* be made safely.

32.1107 Payment information.

The payment or disbursing office *shall* forward to the contractor available *payment information* that is suitable for transmission as of the date of release of the EFT instruction to the Federal Reserve System.

32.1108 Payment by Governmentwide commercial purchase card.

A *Governmentwide commercial purchase card* charge authorizes the third party (*e.g.*, financial institution) that issued the purchase card to make immediate payment to the contractor. The Government reimburses the third party at a later date for the third party's payment to the contractor.

(a) The clause at 52.232-36, *Payment by Third Party*, governs when a contractor submits a charge against the purchase card for contract payment. The clause provides that the contractor *shall* make such payment requests by a charge to a Government account with the third party at the time the payment clause(s) of the contract authorizes the contractor to submit a request for payment, and for the amount due in accordance with the terms of the contract. To the extent that such a payment would otherwise be approved, the charge against the purchase card *should* not be disputed when the charge is reported to the Government by the third party. To the extent that such payment would otherwise not have been approved, an authorized individual (see 1.603-3) *shall* take action to remove the charge, such as by disputing the charge with the third party or by requesting that the contractor credit the charge back to the Government under the contract.

(b)

(1) Written contracts to be paid by purchase card *should* include the clause at 52.232-36, *Payment by Third Party*, as prescribed by 32.1110(d). However, payment by a purchase card *may* be made under a contract that does not contain the clause to the extent the contractor agrees to accept that method of payment.

(2)

(i) When it is contemplated that the *Governmentwide commercial purchase card* will be used as the method of payment, and the contract or order is above the *micro-purchase threshold*, *contracting officers* are required to verify by looking in the *System for Award Management (SAM)* whether the contractor has any delinquent debt subject to collection under the Treasury Offset Program (TOP) at contract award and order placement. Information on TOP is available at <http://fms.treas.gov/debt/index.html>.

(ii) The *contracting officer* *shall* not authorize the *Governmentwide commercial purchase card* as a method of payment during any period the SAM indicates that the contractor has delinquent debt subject to collection under the TOP. In such cases, payments under the contract *shall* be made in accordance with the clause at 52.232-33, *Payment by Electronic Funds Transfer-System for Award Management*, or 52.232-34, *Payment by Electronic Funds Transfer-Other Than System for Award Management*, as appropriate (see FAR 32.1110(d)).

(iii) *Contracting officers shall* not use the presence of the SAM debt flag indicator to exclude a contractor from receipt of the contract award or issuance or placement of an order.

(iv) The *contracting officer may* take steps to authorize payment by *Governmentwide commercial purchase card* when a contractor alerts the *contracting officer* that the SAM debt flag indicator has been changed to no longer show a delinquent debt.

(c) The clause at 52.232-36, Payment by Third Party, requires that the contract-

(1) Identify the third party and the particular purchase card to be used; and

(2) Not include the purchase card account number. The purchase card account number *should* be provided separately to the contractor.

32.1109 EFT information submitted by offerors.

If *offerors* are required to submit EFT information prior to award, the successful *offeror* is not responsible for resubmitting this information after award of the contract except to make changes, or to place the information on *invoices* if required by agency procedures. Therefore, *contracting officers shall* forward EFT information provided by the successful *offeror* to the appropriate office.

32.1110 Solicitation provision and contract clauses.

(a) The *contracting officer shall* insert the clause at-

(1) 52.232-33, Payment by *Electronic Funds Transfer-System for Award Management*, in *solicitations* and contracts that include the provision at 52.204-7 *System for Award Management*, or an agency clause that requires a contractor to be registered in SAM and maintain registration until final payment, unless-

(i) Payment will be made through a third party arrangement (see 13.301 and paragraph (d) of this section); or

(ii) An exception listed in 32.1103(a) through (i) applies.

(2)

(i) 52.232-34, Payment by *Electronic Funds Transfer-Other than System for Award Management*, in *solicitations* and contracts that require EFT as the method for payment but do not include the provision at 52.204-7, *System for Award Management*, or a similar agency clause that requires the contractor to be registered in the SAM.

(ii)

(A) If permitted by agency procedures, the *contracting officer may* insert in paragraph (b)(1) of the clause, a particular time after award, such as a fixed number of days, or event such as the submission of the first request for payment.

(B) If no agency procedures are prescribed, the time period inserted in paragraph (b)(1) of the clause shall be "no later than 15 days prior to submission of the first request for payment."

(b) If the *head of the agency* has authorized, in accordance with [32.1106](#), to use a nondomestic EFT mechanism, the *contracting officer* shall insert in *solicitations* and contracts a clause substantially the same as [52.232-33](#) or [52.232-34](#) that clearly addresses the nondomestic EFT mechanism.

(c) If EFT information is to be submitted to other than the payment office in accordance with agency procedures, the *contracting officer* shall insert in *solicitations* and contracts the clause at [52.232-35](#), Designation of Office for Government Receipt of *Electronic Funds Transfer Information*, or a clause substantially the same as [52.232-35](#) that clearly informs the contractor where to send the EFT information.

(d) If payment under a written contract will be made by a charge to a Government account with a third party such as a *Governmentwide commercial purchase card*, then the *contracting officer* shall insert the clause at [52.232-36](#), Payment by Third Party, in *solicitations* and contracts. Payment by a purchase card *may* also be made under a contract that does not contain the clause at [52.232-36](#), to the extent the contractor agrees to accept that method of payment. When the clause at [52.232-36](#) is included in a *solicitation* or contract, the *contracting officer* shall also insert the clause at [52.232-33](#), Payment by *Electronic Funds Transfer-System for Award Management*, or [52.232-34](#), Payment by *Electronic Funds Transfer-Other Than System for Award Management*, as appropriate.

(e) If the contract or agreement provides for the use of *delivery orders*, and provides that the ordering office designate the method of payment for individual orders, the *contracting officer* shall insert, in the *solicitation* and contract or agreement, the clause at [52.232-37](#), Multiple Payment Arrangements, and, to the extent they are applicable, the clauses at-

(1) [52.232-33](#), Payment by *Electronic Funds Transfer-System for Award Management*;

(2) [52.232-34](#), Payment by *Electronic Funds Transfer-Other than System for Award Management*;
and

(3) [52.232-36](#), Payment by Third Party.

(f) If more than one disbursing office will make payment under a contract or agreement, the *contracting officer*, or ordering office (if the contract provides for choices between EFT clauses on individual orders or classes of orders), shall include or identify the EFT clause appropriate for each office and shall identify the applicability by disbursing office and *line item*.

(g) If the *solicitation* contains the clause at [52.232-34](#), Payment by *Electronic Funds Transfer-Other than System for Award Management*, and an *offeror* is required to submit EFT information prior to award-

(1) The *contracting officer* shall insert in the *solicitation* the provision at [52.232-38](#), Submission of *Electronic Funds Transfer Information with Offer*, or a provision substantially the same; and

(2) For sealed bid *solicitations*, the *contracting officer* shall amend [52.232-38](#) to ensure that a bidder's EFT information-

(i) Is not a part of the bid to be opened at the public opening; and

(ii) May not be released to members of the general public who request a copy of the bid.