

Subpart 32.10 - Performance-Based Payments

Parent topic: [Part 32 - Contract Financing](#)

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.