

FEDERAL ACQUISITION CIRCULAR

November 22, 2002

Number 2001-10

Federal Acquisition Circular (FAC) 2001-10 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator for the National Aeronautics and Space Administration.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 2001-10 are effective December 23, 2002, except for Items II, III, and V, which are effective November 22, 2002.

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FAC 2001-10 LIST of SUBJECTS

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FAC 2001-10 SUMMARY of ITEMS

Federal Acquisition Circular (FAC) 2001-10 amends the Federal Acquisition Regulation (FAR) as specified below:

Item I—General Records Schedule (FAR Case 2002-016)

This final rule amends the FAR to reflect the previous language of FAR 4.705-2 exactly as it was written prior to revision of this subsection by FAC 97-18, Item IV, General Records Schedule (FAR case 1999-615) published in the *Federal Register* on June 6, 2000 (65 FR 36012). It was brought to the attention of the Councils that the prior change to FAR 4.705-2 made in FAC 97-18 inadvertently resulted in longer record retention periods for contractors and subcontractors. This final rule—

- Revises the subsection title of FAR 4.705-2 to read "Pay administration records" instead of "Construction contract pay administration records," thus, making all record retention requirements in the entire subsection applicable to all contracts rather than limiting it to construction contracts;

- Revises FAR 4.705-2(a) to change from a record retention period of 3 years after completion of contract unless contract performance is the subject of enforcement action, to 4 years after generation of the records.

For the period from June 6, 2000, through the effective date of this final rule, compliance with either the record retention requirements contained in this rule or the requirements published in FAC 97-18 is acceptable.

Replacement pages: Part 4 TOC 4-1 and 4-2; and 4.7-1 and 4.7-2.

Item II—Executive Order 13202, Preservation of Open Competition and Government Neutrality Towards Government Contractors' Labor Relations on Federal and Federally Funded Construction Projects (FAR Case 2001-016)

This final rule terminates the stay and adopts the May 16, 2001, interim rule as final without change. The rule amends FAR Parts 17, 22, and 36 to implement Executive Order 13202, as amended by Executive Order 13208. Contracting officers, or any construction manager acting on behalf of the Government, may not require or prohibit offerors, contractors, or subcontractors from entering into or adhering to project labor agreements with one or more labor organizations. It also permits agency heads to exempt a project from the requirements of the Executive order under special

circumstances, but the exemption may not be related to the possibility of, or an actual, labor dispute.

Replacement pages: 36.2-1 and 36.2-2.

**Item III—Caribbean Basin Country End Products
(FAR Case 2000-306)**

The interim rule published in the *Federal Register* as Item V of FAC 2001-04 (67 FR 6116, February 8, 2002), is converted to a final rule with changes. The interim rule implemented the determination of the United States Trade Representative (USTR) to extend the treatment of certain end products, from countries designated by the President as beneficiaries under the Caribbean Basin Economic Recovery Act, as eligible products under the Trade Agreements Act, with the exception of end products from the Dominican Republic, Honduras, and Panama. It also implemented Section 211 of the United States–Caribbean Basin Trade Partnership Act and the determination of the USTR as to which countries qualify for the enhanced trade benefits under that Act. However, on July 12, 2002, the USTR published a notice in the *Federal Register* to reinstate the treatment on Government procurement of products from Honduras. The notice stated that products of Honduras shall be treated as eligible products for purposes of section 1-101 of Executive Order 12260. Such treatment shall not apply to products originating in Honduras that are excluded from duty-free treatment under 19 U.S.C. 2703(b). The determination to reinstate Honduras as published by the USTR has been incorporated in this final rule.

Replacement pages: 25.1-1 and 25.1-2; 25.4-1 and 25.4-2; and 52.2-133 and 52.2-134.

Item IV—Financing Policies (FAR Case 2000-007)

This final rule revises certain financing policies at FAR Part 32, Contract Financing, and related contract provisions at FAR Part 52. The rule—

- Removes the restriction on use of performance-based payments on fixed-price contracts prior to definitization; and

- Permits large businesses, in their billings to the Government, to include certain vendor and subcontractor costs that have been incurred, but not actually paid, provided that, ordinarily, they pay the subcontractor within 30 days.

Replacement pages: 32.5-7 and 32.5-8; 32.10-1 and 32.10-2; 52.2-65 and 52.2-66; 52.2-81 and 52.2-82; 52.2-193 and 52.2-194; and 52.2-203 and 52.2-204.

Item V—Technical Amendments

These amendments update references and make editorial changes at FAR 7.105(b)(4)(i) and 19.502-2(a).

Replacement pages: 7.1-3 and 7.1-4; and 19.5-1 and 19.5-2.

LOOSELEAF ONLY CORRECTIONS

PART 33—PROTESTS, DISPUTES, AND APPEALS

33.104 [Corrected]

Amend section 33.104 in the introductory text of paragraphs (b)(1) and (c)(2) by removing the word "nonnegotiable" and adding "nondelegable" in its place.

Replacement pages: 33.1-3 thru 33.1-6.

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FAC 2001-10 FILING INSTRUCTIONS

NOTE: The FAR is now segmented by subparts. The FAR page numbers reflect FAR Subparts. For example, "7.1-3" is page 3 of Subpart 7.1, and "52.2-134" is page 134 of Subpart 52.2.

The following pages reflect FAR rules and looseleaf only amendments that are effective November 22, 2002:

Remove Pages

7.1-3 and 7.1-4

19.5-1 and 19.5-2

25.1-1 and 25.1-2

25.4-1 and 25.4-2

33.1-3 thru 33.1-6

36.2-1 and 36.2-2

52.2-133 and 52.2-134

Insert Pages

7.1-3 and 7.1-4

19.5-1 and 19.5-2

25.1-1 and 25.1-2

25.4-1 and 25.4-2

33.1-3 thru 33.1-6

36.2-1 and 36.2-2

52.2-133 and 52.2-134

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(2) *Applicable conditions.* State all significant conditions affecting the acquisition, such as—

(i) Requirements for compatibility with existing or future systems or programs; and

(ii) Any known cost, schedule, and capability or performance constraints.

(3) *Cost.* Set forth the established cost goals for the acquisition and the rationale supporting them, and discuss related cost concepts to be employed, including, as appropriate, the following items:

(i) *Life-cycle cost.* Discuss how life-cycle cost will be considered. If it is not used, explain why. If appropriate, discuss the cost model used to develop life-cycle-cost estimates.

(ii) *Design-to-cost.* Describe the design-to-cost objective(s) and underlying assumptions, including the rationale for quantity, learning-curve, and economic adjustment factors. Describe how objectives are to be applied, tracked, and enforced. Indicate specific related solicitation and contractual requirements to be imposed.

(iii) *Application of should-cost.* Describe the application of should-cost analysis to the acquisition (see 15.407-4).

(4) *Capability or performance.* Specify the required capabilities or performance characteristics of the supplies or the performance standards of the services being acquired and state how they are related to the need.

(5) *Delivery or performance-period requirements.* Describe the basis for establishing delivery or performance-period requirements (see Subpart 11.4). Explain and provide reasons for any urgency if it results in concurrency of development and production or constitutes justification for not providing for full and open competition.

(6) *Trade-offs.* Discuss the expected consequences of trade-offs among the various cost, capability or performance, and schedule goals.

(7) *Risks.* Discuss technical, cost, and schedule risks and describe what efforts are planned or underway to reduce risk and the consequences of failure to achieve goals. If concurrency of development and production is planned, discuss its effects on cost and schedule risks.

(8) *Acquisition streamlining.* If specifically designated by the requiring agency as a program subject to acquisition streamlining, discuss plans and procedures to—

(i) Encourage industry participation by using draft solicitations, presolicitation conferences, and other means of stimulating industry involvement during design and development in recommending the most appropriate application and tailoring of contract requirements;

(ii) Select and tailor only the necessary and cost-effective requirements; and

(iii) State the timeframe for identifying which of those specifications and standards, originally provided for guidance only, shall become mandatory.

(b) *Plan of action—(1) Sources.* Indicate the prospective sources of supplies or services that can meet the need. Consider required sources of supplies or services (see Part 8). Include consideration of small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns (see Part 19), and the impact of any bundling that might affect their participation in the acquisition (see 7.107) (15 U.S.C. 644(e)). Address the extent and results of the market research and indicate their impact on the various elements of the plan (see Part 10).

(2) *Competition.* (i) Describe how competition will be sought, promoted, and sustained throughout the course of the acquisition. If full and open competition is not contemplated, cite the authority in 6.302, discuss the basis for the application of that authority, identify the source(s), and discuss why full and open competition cannot be obtained.

(ii) Identify the major components or subsystems. Discuss component breakout plans relative to these major components or subsystems. Describe how competition will be sought, promoted, and sustained for these components or subsystems.

(iii) Describe how competition will be sought, promoted, and sustained for spares and repair parts. Identify the key logistic milestones, such as technical data delivery schedules and acquisition method coding conferences, that affect competition.

(iv) When effective subcontract competition is both feasible and desirable, describe how such subcontract competition will be sought, promoted, and sustained throughout the course of the acquisition. Identify any known barriers to increasing subcontract competition and address how to overcome them.

(3) *Source-selection procedures.* Discuss the source-selection procedures for the acquisition, including the timing for submission and evaluation of proposals, and the relationship of evaluation factors to the attainment of the acquisition objectives (see Subpart 15.3).

(4) *Acquisition considerations.* (i) For each contract contemplated, discuss contract type selection (see Part 16); use of multiyear contracting, options, or other special contracting methods (see Part 17); any special clauses, special solicitation provisions, or FAR deviations required (see Subpart 1.4); whether sealed bidding or negotiation will be used and why; whether equipment will be acquired by lease or purchase (see Subpart 7.4) and why; and any other contracting considerations. Provide rationale if a performance-based contract will not be used or if a performance-based contract for services is contemplated on other than a firm-fixed-price basis (see 37.102(a) and 16.505(a)(3)).

(ii) For each order contemplated, discuss—

(A) For information technology acquisitions, how the capital planning and investment control requirements of 40 U.S.C. 1422 and OMB Circular A-130 will be met (see 7.103(t) and Part 39); and

(B) Why this action benefits the Government, such as when—

(1) The agency can accomplish its mission more efficiently and effectively (*e.g.*, take advantage of the servicing agency's specialized expertise; or gain access to contractors with needed expertise); or

(2) Ordering through an indefinite delivery contract facilitates access to small business concerns, including small disadvantaged business concerns, 8(a) contractors, women-owned small business concerns, HUBZone small business concerns, veteran-owned small business concerns, or service-disabled veteran-owned small business concerns.

(5) *Budgeting and funding.* Include budget estimates, explain how they were derived, and discuss the schedule for obtaining adequate funds at the time they are required (see Subpart 32.7).

(6) *Product or service descriptions.* Explain the choice of product or service description types (including performance-based contracting descriptions) to be used in the acquisition.

(7) *Priorities, allocations, and allotments.* When urgency of the requirement dictates a particularly short delivery or performance schedule, certain priorities may apply. If so, specify the method for obtaining and using priorities, allocations, and allotments, and the reasons for them (see Subpart 11.6).

(8) *Contractor versus Government performance.* Address the consideration given to OMB Circular No. A-76 (see Subpart 7.3).

(9) *Inherently governmental functions.* Address the consideration given to OFPP Policy Letter 92-1 (see Subpart 7.5).

(10) *Management information requirements.* Discuss, as appropriate, what management system will be used by the Government to monitor the contractor's effort.

(11) *Make or buy.* Discuss any consideration given to make-or-buy programs (see 15.407-2).

(12) *Test and evaluation.* To the extent applicable, describe the test program of the contractor and the Government. Describe the test program for each major phase of a major system acquisition. If concurrency is planned, discuss the extent of testing to be accomplished before production release.

(13) *Logistics considerations.* Describe—

(i) The assumptions determining contractor or agency support, both initially and over the life of the acquisition, including consideration of contractor or agency main-

tenance and servicing (see Subpart 7.3) and distribution of commercial items;

(ii) The reliability, maintainability, and quality assurance requirements, including any planned use of warranties (see Part 46);

(iii) The requirements for contractor data (including repurchase data) and data rights, their estimated cost, and the use to be made of the data (see Part 27); and

(iv) Standardization concepts, including the necessity to designate, in accordance with agency procedures, technical equipment as "standard" so that future purchases of the equipment can be made from the same manufacturing source.

(14) *Government-furnished property.* Indicate any property to be furnished to contractors, including material and facilities, and discuss any associated considerations, such as its availability or the schedule for its acquisition (see Part 45).

(15) *Government-furnished information.* Discuss any Government information, such as manuals, drawings, and test data, to be provided to prospective offerors and contractors.

(16) *Environmental and energy conservation objectives.* Discuss all applicable environmental and energy conservation objectives associated with the acquisition (see Part 23), the applicability of an environmental assessment or environmental impact statement (see 40 CFR 1502), the proposed resolution of environmental issues, and any environmentally-related requirements to be included in solicitations and contracts.

(17) *Security considerations.* For acquisitions dealing with classified matters, discuss how adequate security will be established, maintained, and monitored (see Subpart 4.4).

(18) *Contract administration.* Describe how the contract will be administered. In contracts for services, include how inspection and acceptance corresponding to the work statement's performance criteria will be enforced.

(19) *Other considerations.* Discuss, as applicable, standardization concepts, the industrial readiness program, the Defense Production Act, the Occupational Safety and Health Act, foreign sales implications, and any other matters germane to the plan not covered elsewhere.

(20) *Milestones for the acquisition cycle.* Address the following steps and any others appropriate:

- Acquisition plan approval.
- Statement of work.
- Specifications.
- Data requirements.
- Completion of acquisition-package preparation.
- Purchase request.
- Justification and approval for other than full and open competition where applicable and/or any required D&F approval.

Subpart 19.5—Set-Asides for Small Business**19.501 General.**

(a) The purpose of small business set-asides is to award certain acquisitions exclusively to small business concerns. A “set-aside for small business” is the reserving of an acquisition exclusively for participation by small business concerns. A small business set-aside may be open to all small businesses. A small business set-aside of a single acquisition or a class of acquisitions may be total or partial.

(b) The determination to make a small business set-aside may be unilateral or joint. A unilateral determination is one that is made by the contracting officer. A joint determination is one that is recommended by the Small Business Administration (SBA) procurement center representative and concurred in by the contracting officer.

(c) For acquisitions exceeding the simplified acquisition threshold, the requirement to set aside an acquisition for HUBZone small business concerns (see 19.1305) takes priority over the requirement to set aside the acquisition for small business concerns.

(d) The contracting officer shall review acquisitions to determine if they can be set aside for small business, giving consideration to the recommendations of agency personnel having cognizance of the agency's small business programs. The contracting officer shall document why a small business set-aside is inappropriate when an acquisition is not set aside for small business, unless a HUBZone small business set-aside or HUBZone small business sole source award is anticipated. If the acquisition is set aside for small business based on this review, it is a unilateral set-aside by the contracting officer. Agencies may establish threshold levels for this review depending upon their needs.

(e) At the request of an SBA procurement center representative, the contracting officer shall make available for review at the contracting office (to the extent of the SBA representative's security clearance) all proposed acquisitions in excess of the micro-purchase threshold that have not been unilaterally set aside for small business.

(f) To the extent practicable, unilateral determinations initiated by a contracting officer shall be used as the basis for small business set-asides rather than joint determinations by an SBA procurement center representative and a contracting officer.

(g) All solicitations involving set-asides must specify the applicable small business size standard and NAICS code (see 19.303).

(h) Except as authorized by law, a contract may not be awarded as a result of a small business set-aside if the cost to the awarding agency exceeds the fair market price.

19.502 Setting aside acquisitions.**19.502-1 Requirements for setting aside acquisitions.**

(a) The contracting officer shall set aside an individual acquisition or class of acquisitions for competition among small businesses when—

(1) It is determined to be in the interest of maintaining or mobilizing the Nation's full productive capacity, war or national defense programs; or

(2) Assuring that a fair proportion of Government contracts in each industry category is placed with small business concerns; and the circumstances described in 19.502-2 or 19.502-3(a) exist.

(b) This requirement does not apply to purchases of \$2,500 or less (\$15,000 or less for acquisitions as described in 13.201(g)), or purchases from required sources of supply under Part 8 (*e.g.*, Federal Prison Industries, Committee for Purchase From People Who are Blind or Severely Disabled, and Federal Supply Schedule contracts).

19.502-2 Total small business set-asides.

(a) Except for those acquisitions set aside for very small business concerns (see subpart 19.9), each acquisition of supplies or services that has an anticipated dollar value exceeding \$2,500 (\$15,000 for acquisitions as described in 13.201(g)), but not over \$100,000, is automatically reserved exclusively for small business concerns and shall be set aside for small business unless the contracting officer determines there is not a reasonable expectation of obtaining offers from two or more responsible small business concerns that are competitive in terms of market prices, quality, and delivery. If the contracting officer does not proceed with the small business set-aside and purchases on an unrestricted basis, the contracting officer shall include in the contract file the reason for this unrestricted purchase. If the contracting officer receives only one acceptable offer from a responsible small business concern in response to a set-aside, the contracting officer should make an award to that firm. If the contracting officer receives no acceptable offers from responsible small business concerns, the set-aside shall be withdrawn and the requirement, if still valid, shall be resolicited on an unrestricted basis. The small business reservation does not preclude the award of a contract with a value not greater than \$100,000 under Subpart 19.8, Contracting with the Small Business Administration, under 19.1007(c), Solicitations equal to or less than the ESB reserve amount, or under 19.1305, HUBZone set-aside procedures.

(b) The contracting officer shall set aside any acquisition over \$100,000 for small business participation when there is a reasonable expectation that (1) offers will be obtained from at least two responsible small business concerns offering the products of different small business concerns (but see paragraph (c) of this subsection); and (2) award will be made at fair market prices. Total small business set-asides shall not be

made unless such a reasonable expectation exists (but see 19.502-3 as to partial set-asides). Although past acquisition history of an item or similar items is always important, it is not the only factor to be considered in determining whether a reasonable expectation exists. In making R&D small business set-asides, there must also be a reasonable expectation of obtaining from small businesses the best scientific and technological sources consistent with the demands of the proposed acquisition for the best mix of cost, performances, and schedules.

(c) For small business set-asides other than for construction or services, any concern proposing to furnish a product that it did not itself manufacture must furnish the product of a small business manufacturer unless the SBA has granted either a waiver or exception to the nonmanufacturer rule (see 19.102(f)). In industries where the SBA finds that there are no small business manufacturers, it may issue a waiver to the nonmanufacturer rule (see 19.102(f)(4) and (5)). In addition, SBA has excepted procurements processed under simplified acquisition procedures (see Part 13), where the anticipated cost of the procurement will not exceed \$25,000, from the nonmanufacturer rule. Waivers permit small businesses to provide any firm's product. The exception permits small businesses to provide any domestic firm's product. In both of these cases, the contracting officer's determination in paragraph (b)(1) of this subsection or the decision not to set aside a procurement reserved for small business under paragraph (a) of this subsection will be based on the expectation of receiving offers from at least two responsible small businesses, including nonmanufacturers, offering the products of different concerns.

(d) The requirements of this subsection do not apply to acquisitions over \$25,000 during the period when small business set-asides cannot be considered for the four designated industry groups (see 19.1007(b)).

19.502-3 Partial set-asides.

(a) The contracting officer shall set aside a portion of an acquisition, except for construction, for exclusive small business participation when—

- (1) A total set-aside is not appropriate (see 19.502-2);
- (2) The requirement is severable into two or more economic production runs or reasonable lots;
- (3) One or more small business concerns are expected to have the technical competence and productive capacity to satisfy the set-aside portion of the requirement at a fair market price;
- (4) The acquisition is not subject to simplified acquisition procedures; and
- (5) A partial set-aside shall not be made if there is a reasonable expectation that only two concerns (one large and one small) with capability will respond with offers unless authorized by the head of a contracting activity on a case-by-case

basis. Similarly, a class of acquisitions, not including construction, may be partially set aside. Under certain specified conditions, partial set-asides may be used in conjunction with multiyear contracting procedures.

(b) When the contracting officer determines that a portion of an acquisition is to be set aside, the requirement shall be divided into a set-aside portion and a non-set-aside portion, each of which shall (1) be an economic production run or reasonable lot and (2) have terms and a delivery schedule comparable to the other. When practicable, the set-aside portion should make maximum use of small business capacity.

(c)(1) The contracting officer shall award the non-set-aside portion using normal contracting procedures.

(2)(i) After all awards have been made on the non-set-aside portion, the contracting officer shall negotiate with eligible concerns on the set-aside portion, as provided in the solicitation, and make award. Negotiations shall be conducted only with those offerors who have submitted responsive offers on the non-set-aside portion. Negotiations shall be conducted with small business concerns in the order of priority as indicated in the solicitation (but see paragraph (c)(2)(ii) of this section). The set-aside portion shall be awarded as provided in the solicitation. An offeror entitled to receive the award for quantities of an item under the non-set-aside portion and who accepts the award of additional quantities under the set-aside portion shall not be requested to accept a lower price because of the increased quantities of the award, nor shall negotiation be conducted with a view to obtaining such a lower price based solely upon receipt of award of both portions of the acquisition. This does not prevent acceptance by the contracting officer of voluntary reductions in the price from the low eligible offeror before award, acceptance of voluntary refunds, or the change of prices after award by negotiation of a contract modification.

(ii) If equal low offers are received on the non-set-aside portion from concerns eligible for the set-aside portion, the concern that is awarded the non-set-aside part of the acquisition shall have first priority with respect to negotiations for the set-aside.

19.502-4 Methods of conducting set-asides.

(a) Total small business set-asides may be conducted by using simplified acquisition procedures (see Part 13), sealed bids (see Part 14), or competitive proposals (see Part 15). Partial small business set-asides may be conducted using sealed bids (see Part 14), or competitive proposals (see Part 15).

(b) Except for offers on the non-set-aside portion of partial set-asides, offers received from concerns that do not qualify as small business concerns shall be considered nonresponsive and shall be rejected. However, before rejecting an offer otherwise eligible for award because of questions concerning the size representation, an SBA determination must be obtained (see Subpart 19.3).

25.000 Scope of part.

This part provides policies and procedures for acquiring foreign supplies, services, and construction materials. It implements the Buy American Act, trade agreements, and other laws and regulations.

25.001 General.

(a) The Buy American Act—

(1) Restricts the purchase of supplies, that are not domestic end products, for use within the United States. A foreign end product may be purchased if the contracting officer determines that the price of the lowest domestic offer is unreasonable or if another exception applies (see Subpart 25.1); and

(2) Requires, with some exceptions, the use of only domestic construction materials in contracts for construction in the United States (see Subpart 25.2).

(b) The restrictions in the Buy American Act are not applicable in acquisitions subject to certain trade agreements (see Subpart 25.4). In these acquisitions, end products and construction materials from certain countries receive nondiscriminatory treatment in evaluation with domestic offers. Generally, the dollar value of the acquisition determines which of the trade agreements applies. Exceptions to the

applicability of the trade agreements are described in Subpart 25.4.

(c) The test to determine the country of origin for an end product under the trade agreements is different from the test to determine the country of origin for an end product under the Buy American Act (see the various country “end product” definitions in 25.003). The Buy American Act uses a two-part test to define a “domestic end product” (manufacture in the United States and a formula based on cost of domestic components). Under the trade agreements, the test to determine country of origin is “substantial transformation” (*i.e.*, transforming an article into a new and different article of commerce, with a name, character, or use distinct from the original article).

(d) On April 22, 1992, the President made a determination under section 305 of the Trade Agreements Act to impose sanctions against some European Union countries for discriminating against U.S. products and services (see Subpart 25.6).

25.002 Applicability of subparts.

The following table shows the applicability of the subparts. Subpart 25.5 provides comprehensive procedures for offer evaluation and examples.

SUBPART	SUPPLIES FOR USE		CONSTRUCTION		SERVICES PERFORMED	
	INSIDE U.S.	OUTSIDE U.S.	INSIDE U.S.	OUTSIDE U.S.	INSIDE U.S.	OUTSIDE U.S.
25.1 Buy American Act—Supplies	X	—	—	—	—	—
25.2 Buy American Act—Construction Materials	—	—	X	—	—	—
25.3 [Reserved]	—	—	—	—	—	—
25.4 Trade Agreements	X	X	X	X	X	X
25.5 Evaluating Foreign Offers—Supply Contracts	X	X	—	—	—	—
25.6 Trade Sanctions	X	X	X	X	X	X
25.7 Prohibited Sources	X	X	X	X	X	X
25.8 Other International Agreements and Coordination	X	X	—	X	—	X
25.9 Customs and Duties	X	—	—	—	—	—
25.10 Additional Foreign Acquisition Regulations	X	X	X	X	X	X
25.11 Solicitation Provisions and Contract Clauses	X	X	X	X	X	X

25.003 Definitions.

As used in this part—

“Canadian end product” means an article that—

(1) Is wholly the growth, product, or manufacture of Canada; or

(2) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in Canada into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to the article, provided that the value of those incidental services does not exceed that of the article itself.

“Caribbean Basin country” means any of the following countries: Antigua and Barbuda, Aruba, Bahamas, Barbados, Belize, British Virgin Islands, Costa Rica, Dominica, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Montserrat, Netherlands Antilles, Nicaragua, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Trinidad and Tobago.

“Caribbean Basin country end product”—

(1) Means an article that—

(i)(A) Is wholly the growth, product, or manufacture of a Caribbean Basin country; or

(B) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in a Caribbean Basin country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed; and

(ii) Is not excluded from duty-free treatment for Caribbean countries under 19 U.S.C. 2703(b).

(A) For this reason, the following articles are not Caribbean Basin country end products:

(1) Tuna, prepared or preserved in any manner in airtight containers.

(2) Petroleum, or any product derived from petroleum.

(3) Watches and watch parts (including cases, bracelets, and straps) of whatever type including, but not limited to, mechanical, quartz digital, or quartz analog, if such watches or watch parts contain any material that is the product of any country to which the Harmonized Tariff Schedule of the United States (HTSUS) column 2 rates of duty apply (*i.e.*, Afghanistan, Cuba, Laos, North Korea, and Vietnam).

(4) Certain of the following: textiles and apparel articles; footwear, handbags, luggage, flat goods, work gloves, and leather wearing apparel; or handloomed, handmade, and folklore articles.

(B) Access to the HTSUS to determine duty-free status of articles of the types listed in paragraph (1)(ii)(A)(4) of this definition is available via the Internet at <http://www.customs.ustreas.gov/impoexpo/impoexpo.htm>. In particular, see the following:

(1) General Note 3(c), Products Eligible for Special Tariff treatment.

(2) General Note 17, Products of Countries Designated as Beneficiary Countries under the United States-Caribbean Basin Trade Partnership Act of 2000.

(3) Section XXII, Chapter 98, Subchapter II, Articles Exported and Returned, Advanced or Improved Abroad, U.S. Note 7(b).

(4) Section XXII, Chapter 98, Subchapter XX, Goods Eligible for Special Tariff Benefits under the United States-Caribbean Basin Trade Partnership Act; and

(2) Refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the acquisition, includes services (except transportation services) incidental to the article, provided that the value of those incidental services does not exceed that of the article itself.

“Civil aircraft and related articles” means—

(1) All aircraft other than aircraft to be purchased for use by the Department of Defense or the U.S. Coast Guard;

(2) The engines (and parts and components for incorporation into the engines) of these aircraft;

(3) Any other parts, components, and subassemblies for incorporation into the aircraft; and

(4) Any ground flight simulators, and parts and components of these simulators, for use with respect to the aircraft, whether to be used as original or replacement equipment in the manufacture, repair, maintenance, rebuilding, modification, or conversion of the aircraft and without regard to whether the aircraft or articles receive duty-free treatment under section 601(a)(2) of the Trade Agreements Act.

“Component” means an article, material, or supply incorporated directly into an end product or construction material.

“Construction material” means an article, material, or supply brought to the construction site by a contractor or subcontractor for incorporation into the building or work. The term also includes an item brought to the site preassembled from articles, materials, or supplies. However, emergency life safety systems, such as emergency lighting, fire alarm, and audio evacuation systems, that are discrete systems incorporated into a public building or work and that are produced as complete systems, are evaluated as a single and distinct construction material regardless of when or how the individual parts or components of those systems are delivered to the construction site. Materials purchased directly by the Government are supplies, not construction material.

“Cost of components” means—

Subpart 25.4—Trade Agreements

25.400 Scope of subpart.

(a) This subpart provides policies and procedures applicable to acquisitions that are subject to—

(1) The Trade Agreements Act (the Agreement on Government Procurement, as approved by Congress in the Trade Agreements Act of 1979 (19 U.S.C. 2501, *et seq.*), and as amended by the Uruguay Round Agreements Act (Pub. L. 103-465));

(2) The Caribbean Basin Trade Initiative (the determination of the U.S. Trade Representative that end products granted duty-free entry from countries designated by the President as beneficiaries under the Caribbean Basin Economic Recovery Act (19 U.S.C. 2701, *et seq.*), with the exception of the Dominican Republic and Panama, must be treated as eligible products under the Trade Agreements Act);

(3) NAFTA (the North American Free Trade Agreement, as approved by Congress in the North American Free Trade Agreement Implementation Act of 1993 (19 U.S.C. 3301 note));

(4) The Israeli Trade Act (the U.S.-Israel Free Trade Area Agreement, as approved by Congress in the United States-Israel Free Trade Area Implementation Act of 1985 (19 U.S.C. 2112 note)); or

(5) The Agreement on Trade in Civil Aircraft (U.S. Trade Representative waiver of the Buy American Act for signatories of the Agreement on Trade in Civil Aircraft, as implemented in the Trade Agreements Act of 1979 (19 U.S.C. 2513)).

(b) For application of the trade agreements that are unique to individual agencies, see agency regulations.

25.401 Exceptions.

(a) This subpart does not apply to—

(1) Acquisitions set aside for small businesses;

(2) Acquisitions of arms, ammunition, or war materials, or purchases indispensable for national security or for national defense purposes, including all services purchased in support of military forces located overseas;

(3) Acquisitions of end products for resale;

(4) Acquisitions under Subpart 8.6, Acquisition from Federal Prison Industries, Inc., and Subpart 8.7, Acquisition from Nonprofit Agencies Employing People Who Are Blind or Severely Disabled;

(5) Other acquisitions not using full and open competition, if authorized by Subpart 6.2 or 6.3, when the limitation of competition would preclude use of the procedures of this subpart (but see 6.303-1(d)); or sole source acquisitions justified in accordance with 13.501(a); and

(6) Acquisitions of the following excluded services:

(i) Automatic data processing (ADP) telecommunications and transmission services, except enhanced (*i.e.*, value-added) telecommunications services.

(ii) Research and development.

(iii) Transportation services (including launching services, but not including travel agent services).

(iv) Utility services.

(b)(1) Other services not covered by the Trade Agreements Act are—

(i) Dredging; and

(ii) Management and operation contracts to certain Government or privately owned facilities used for Government purposes, including Federally Funded Research and Development Centers (FFRDCs).

(2) Other services not covered by NAFTA are—

(i) ADP teleprocessing and timesharing services (D305), telecommunications network management services (D316), automated news services, data services or other information services (D317), and other ADP and telecommunications services (D399) (Federal Service Code from the Federal Procurement Data System Product/Service Code Manual indicated in parentheses);

(ii) Operation of all facilities by the Department of Defense, Department of Energy, or the National Aeronautics and Space Administration; and all Government-owned research and development facilities or Government-owned environmental laboratories;

(iii) Maintenance, repair, modification, rebuilding and installation of equipment related to ships; and

(iv) Nonnuclear ship repair.

25.402 General.

The trade agreements waive the applicability of the Buy American Act for some foreign supplies and construction materials from certain countries. The Trade Agreements Act and NAFTA specify procurement procedures designed to ensure fairness. The value of the acquisition is a determining factor in the applicability of the trade agreements. When the restrictions of the Buy American Act are waived for eligible products, offers of those products (eligible offers) receive equal consideration with domestic offers. Under the Trade Agreements Act, only U.S.-made end products or eligible products may be acquired (also see 25.403(c)). See Subpart 25.5 for evaluation procedures for supply contracts subject to trade agreements.

25.403 Trade Agreements Act.

(a) *General.* The Agreement on Government Procurement of the Trade Agreements Act—

(1) Waives application of the Buy American Act to the end products and construction materials of designated countries;

(2) Prohibits discriminatory practices based on foreign ownership;

(3) Restricts purchases to end products identified in 25.403(c);

(4) Requires certain procurement procedures designed to ensure fairness (see 25.408).

(b) *Thresholds.* (1) Except as provided in 25.401, the Trade Agreements Act applies to an acquisition for supplies or services if the estimated value of the acquisition is \$169,000 or more; the Trade Agreements Act applies to an acquisition for construction if the estimated value of the acquisition is \$6,481,000 or more. These dollar thresholds are subject to revision by the U.S. Trade Representative approximately every 2 years (see Executive Order 12260).

(2) To determine whether the Trade Agreements Act applies to the acquisition of products by lease, rental, or lease-purchase contract (including lease-to-ownership, or lease-with-option-to purchase), calculate the estimated acquisition value as follows:

(i) If a fixed-term contract of 12 months or less is contemplated, use the total estimated value of the acquisition.

(ii) If a fixed-term contract of more than 12 months is contemplated, use the total estimated value of the acquisition plus the estimated residual value of the leased equipment at the conclusion of the contemplated term of the contract.

(iii) If an indefinite-term contract is contemplated, use the estimated monthly payment multiplied by the total number of months that ordering would be possible under the proposed contract, *i.e.*, the initial ordering period plus any optional ordering periods.

(iv) If there is any doubt as to the contemplated term of the contract, use the estimated monthly payment multiplied by 48.

(3) The estimated value includes the value of all options.

(4) If, in any 12-month period, recurring or multiple awards for the same type of product or products are anticipated, use the total estimated value of these projected awards to determine whether the Trade Agreements Act applies. Do not divide any acquisition with the intent of reducing the estimated value of the acquisition below the dollar threshold of the Trade Agreements Act.

(c) *Purchase restriction.* (1) In acquisitions subject to the Trade Agreements Act, acquire only U.S.-made end products or eligible products (designated, Caribbean Basin, or NAFTA country end products) unless offers for such end products are either not received or are insufficient to fulfill the requirements.

(2) This restriction does not apply to purchases by the Department of Defense from a country with which it has entered into a reciprocal agreement, as provided in departmental regulations.

25.404 Caribbean Basin Trade Initiative.

Under the Caribbean Basin Trade Initiative, the United States Trade Representative has determined that, for acquisitions subject to the Trade Agreements Act, Caribbean Basin country end products must be treated as eligible products.

25.405 North American Free Trade Agreement (NAFTA).

(a) An acquisition of supplies is not subject to NAFTA if the estimated value of the acquisition is less than \$25,000. For acquisitions subject to NAFTA, evaluate offers of NAFTA country end products without regard to the restrictions of the Buy American Act, except that for acquisitions with an estimated value of less than \$56,190, only Canadian end products are eligible products. Eligible products from NAFTA countries are entitled to the nondiscriminatory treatment of the Trade Agreements Act. NAFTA does not prohibit the purchase of other foreign end products.

(b) NAFTA applies to construction materials if the estimated value of the construction contract is \$7,304,733 or more.

(c) The procedures in 25.408 apply to the acquisition of NAFTA country services, other than services identified in 25.401. NAFTA country services are services provided by a firm established in a NAFTA country under service contracts with an estimated acquisition value of \$56,190 or more (\$7,304,733 or more for construction).

25.406 Israeli Trade Act.

Acquisitions of supplies by most agencies are subject to the Israeli Trade Act, if the estimated value of the acquisition is \$50,000 or more but does not exceed the Trade Agreements Act threshold for supplies (see 25.403(b)(1)). Agencies other than the Department of Defense, the Department of Energy, the Department of Transportation, the Bureau of Reclamation of the Department of the Interior, the Federal Housing Finance Board, and the Office of Thrift Supervision must evaluate offers of Israeli end products without regard to the restrictions of the Buy American Act. The Israeli Trade Act does not prohibit the purchase of other foreign end products.

25.407 Agreement on Trade in Civil Aircraft.

Under the authority of Section 303 of the Trade Agreements Act, the U.S. Trade Representative has waived the Buy American Act for civil aircraft and related articles, that meet the substantial transformation test of the Trade Agreements Act, from countries that are parties to the Agreement on Trade in Civil Aircraft. Those countries are Austria, Belgium, Bulgaria, Canada, Denmark, Egypt, Finland, France, Germany, Greece, Ireland, Italy, Japan, Luxembourg, Macao, the Netherlands, Norway, Portugal, Romania, Spain, Sweden, Switzerland, and the United Kingdom.

compelling reasons or is determined, in writing, to be in the best interest of the Government. Such justification or determination shall be approved at a level above the contracting officer, or by another official pursuant to agency procedures.

(4) Pursuing an agency protest does not extend the time for obtaining a stay at GAO. Agencies may include, as part of the agency protest process, a voluntary suspension period when agency protests are denied and the protester subsequently files at GAO.

(g) Agencies shall make their best efforts to resolve agency protests within 35 days after the protest is filed. To the extent permitted by law and regulation, the parties may exchange relevant information.

(h) Agency protest decisions shall be well-reasoned, and explain the agency position. The protest decision shall be provided to the protester using a method that provides evidence of receipt.

33.104 Protests to GAO.

Procedures for protests to GAO are found at 4 CFR part 21 (GAO Bid Protest Regulations). In the event guidance concerning GAO procedure in this section conflicts with 4 CFR part 21, 4 CFR part 21 governs.

(a) *General procedure.* (1) A protester is required to furnish a copy of its complete protest to the official and location designated in the solicitation or, in the absence of such a designation, to the contracting officer, so it is received no later than 1 day after the protest is filed with the GAO. The GAO may dismiss the protest if the protester fails to furnish a complete copy of the protest within 1 day.

(2) Immediately after receipt of the GAO's written notice that a protest has been filed, the agency shall give notice of the protest to the contractor if the award has been made, or, if no award has been made, to all parties who appear to have a reasonable prospect of receiving award if the protest is denied. The agency shall furnish copies of the protest submissions to such parties with instructions to (i) communicate directly with the GAO, and (ii) provide copies of any such communication to the agency and to other participating parties when they become known. However, if the protester has identified sensitive information and requests a protective order, then the contracting officer shall obtain a redacted version from the protester to furnish to other interested parties, if one has not already been provided.

(3)(i) Upon notice that a protest has been filed with the GAO, the contracting officer shall immediately begin compiling the information necessary for a report to the GAO. The agency shall submit a complete report to the GAO within 30 days after the GAO notifies the agency by telephone that a protest has been filed, or within 20 days after receipt from the GAO of a determination to use the express option, unless the GAO—

(A) Advises the agency that the protest has been dismissed; or

(B) Authorizes a longer period in response to an agency's request for an extension. Any new date is documented in the agency's file.

(ii) When a protest is filed with the GAO, and an actual or prospective offeror so requests, the procuring agency shall, in accordance with any applicable protective orders, provide actual or prospective offerors reasonable access to the protest file. However, if the GAO dismisses the protest before the documents are submitted to the GAO, then no protest file need be made available. Information exempt from disclosure under 5 U.S.C. 552 may be redacted from the protest file. The protest file shall be made available to non-intervening actual or prospective offerors within a reasonable time after submittal of an agency report to the GAO. The protest file shall include an index and as appropriate—

(A) The protest;

(B) The offer submitted by the protester;

(C) The offer being considered for award or being protested;

(D) All relevant evaluation documents;

(E) The solicitation, including the specifications or portions relevant to the protest;

(F) The abstract of offers or relevant portions; and

(G) Any other documents that the agency determines are relevant to the protest, including documents specifically requested by the protester.

(iii) At least 5 days prior to the filing of the report, in cases in which the protester has filed a request for specific documents, the agency shall provide to all parties and the GAO a list of those documents, or portions of documents, that the agency has released to the protester or intends to produce in its report, and those documents that the agency intends to withhold from the protester and the reasons for the proposed withholding. Any objection to the scope of the agency's proposed disclosure or nondisclosure of the documents must be filed with the GAO and the other parties within 2 days after receipt of this list.

(iv) The agency report to the GAO shall include—

(A) A copy of the documents described in 33.104(a)(3)(ii);

(B) The contracting officer's signed statement of relevant facts, including a best estimate of the contract value, and a memorandum of law. The contracting officer's statement shall set forth findings, actions, and recommendations, and any additional evidence or information not provided in the protest file that may be necessary to determine the merits of the protest; and

(C) A list of parties being provided the documents.

(4)(i) At the same time the agency submits its report to the GAO, the agency shall furnish copies of its report to the protester and any intervenors. A party shall receive all relevant documents, except—

(A) Those that the agency has decided to withhold from that party for any reason, including those covered by a protective order issued by the GAO. Documents covered by a protective order shall be released only in accordance with the terms of the order. Examples of documents the agency may decide to exclude from a copy of the report include documents previously furnished to or prepared by a party; classified information; and information that would give the party a competitive advantage; and

(B) Protester's documents which the agency determines, pursuant to law or regulation, to withhold from any interested party.

(ii)(A) If the protester requests additional documents within 2 days after the protester knew the existence or relevance of additional documents, or should have known, the agency shall provide the requested documents to the GAO within 2 days of receipt of the request.

(B) The additional documents shall also be provided to the protester and other interested parties within this 2-day period unless the agency has decided to withhold them for any reason (see subdivision (a)(4)(i) of this section). This includes any documents covered by a protective order issued by the GAO. Documents covered by a protective order shall be provided only in accordance with the terms of the order.

(C) The agency shall notify the GAO of any documents withheld from the protester and other interested parties and shall state the reasons for withholding them.

(5) The GAO may issue protective orders which establish terms, conditions, and restrictions for the provision of any document to an interested party. Protective orders prohibit or restrict the disclosure by the party of procurement sensitive information, trade secrets or other proprietary or confidential research, development or commercial information that is contained in such document. Protective orders do not authorize withholding any documents or information from the United States Congress or an executive agency.

(i) *Requests for protective orders.* Any party seeking issuance of a protective order shall file its request with the GAO as soon as practicable after the protest is filed, with copies furnished simultaneously to all parties.

(ii) *Exclusions and rebuttals.* Within 2 days after receipt of a copy of the protective order request, any party may file with the GAO a request that particular documents be excluded from the coverage of the protective order, or that particular parties or individuals be included in or excluded from the protective order. Copies of the request shall be furnished simultaneously to all parties.

(iii) *Additional documents.* If the existence or relevance of additional documents first becomes evident after a protective order has been issued, any party may request that these additional documents be covered by the protective order. Any party to the protective order also may request that individuals not already covered by the protective order be included in the order. Requests shall be filed with the GAO, with copies furnished simultaneously to all parties.

(iv) *Sanctions and remedies.* The GAO may impose appropriate sanctions for any violation of the terms of the protective order. Improper disclosure of protected information will entitle the aggrieved party to all appropriate remedies under law or equity. The GAO may also take appropriate action against an agency which fails to provide documents designated in a protective order.

(6) The protester and other interested parties are required to furnish a copy of any comments on the agency report directly to the GAO within 10 days, or 5 days if express option is used, after receipt of the report, with copies provided to the contracting officer and to other participating interested parties. If a hearing is held, these comments are due within 5 days after the hearing.

(7) Agencies shall furnish the GAO with the name, title, and telephone number of one or more officials (in both field and headquarters offices, if desired) whom the GAO may contact who are knowledgeable about the subject matter of the protest. Each agency shall be responsible for promptly advising the GAO of any change in the designated officials.

(b) Protests before award. (1) When the agency has received notice from the GAO of a protest filed directly with the GAO, a contract may not be awarded unless authorized, in accordance with agency procedures, by the head of the contracting activity, on a nondelegable basis, upon a written finding that—

(i) Urgent and compelling circumstances which significantly affect the interest of the United States will not permit awaiting the decision of the GAO; and

(ii) Award is likely to occur within 30 days of the written finding.

(2) A contract award shall not be authorized until the agency has notified the GAO of the finding in paragraph (b)(1) of this section.

(3) When a protest against the making of an award is received and award will be withheld pending disposition of the protest, the contracting officer should inform the offerors whose offers might become eligible for award of the protest. If appropriate, those offerors should be requested, before expiration of the time for acceptance of their offer, to extend the time for acceptance to avoid the need for resolicitation. In the event of failure to obtain such extensions of offers, consideration should be given to proceeding under paragraph (b)(1) of this section.

(c) *Protests after award.* (1) When the agency receives notice of a protest from the GAO within 10 days after contract award or within 5 days after a debriefing date offered to the protester for any debriefing that is required by 15.505 or 15.506, whichever is later, the contracting officer shall immediately suspend performance or terminate the awarded contract, except as provided in paragraphs (c)(2) and (3) of this section.

(2) In accordance with agency procedures, the head of the contracting activity may, on a nondelegable basis, authorize contract performance, notwithstanding the protest, upon a written finding that—

(i) Contract performance will be in the best interests of the United States; or

(ii) Urgent and compelling circumstances that significantly affect the interests of the United States will not permit waiting for the GAO's decision.

(3) Contract performance shall not be authorized until the agency has notified the GAO of the finding in paragraph (c)(2) of this section.

(4) When it is decided to suspend performance or terminate the awarded contract, the contracting officer should attempt to negotiate a mutual agreement on a no-cost basis.

(5) When the agency receives notice of a protest filed with the GAO after the dates contained in paragraph (c)(1), the contracting officer need not suspend contract performance or terminate the awarded contract unless the contracting officer believes that an award may be invalidated and a delay in receiving the supplies or services is not prejudicial to the Government's interest.

(d) *Findings and notice.* If the decision is to proceed with contract award, or continue contract performance under paragraphs (b) or (c) of this section, the contracting officer shall include the written findings or other required documentation in the file. The contracting officer also shall give written notice of the decision to the protester and other interested parties.

(e) *Hearings.* The GAO may hold a hearing at the request of the agency, a protester, or other interested party who has responded to the notice in paragraph (a)(2) of this section. A recording or transcription of the hearing will normally be made, and copies may be obtained from the GAO. All parties may file comments on the hearing and the agency report within 5 days of the hearing.

(f) *GAO decision time.* GAO issues its recommendation on a protest within 100 days from the date of filing of the protest with the GAO, or within 65 days under the express option. The GAO attempts to issue its recommendation on an amended protest that adds a new ground of protest within the time limit of the initial protest. If an amended protest cannot be resolved within the initial time limit, the GAO may resolve the amended protest through an express option.

(g) *Notice to GAO.* If the agency has not fully implemented the GAO recommendations with respect to a solicitation for a contract or an award or a proposed award of a contract within 60 days of receiving the GAO recommendations, the head of the contracting activity responsible for that contract shall report the failure to the GAO not later than 5 days after the expiration of the 60-day period. The report shall explain the reasons why the GAO's recommendation, exclusive of costs, has not been followed by the agency.

(h) *Award of costs.* (1) If the GAO determines that a solicitation for a contract, a proposed award, or an award of a contract does not comply with a statute or regulation, the GAO may recommend that the agency pay to an appropriate protester the cost, exclusive of profit, of filing and pursuing the protest, including reasonable attorney, consultant, and expert witness fees, and bid and proposal preparation costs. The agency shall use funds available for the procurement to pay the costs awarded.

(2) The protester shall file its claim for costs with the contracting agency within 60 days after receipt of the GAO's recommendation that the agency pay the protester its costs. Failure to file the claim within that time may result in forfeiture of the protester's right to recover its costs.

(3) The agency shall attempt to reach an agreement on the amount of costs to be paid. If the agency and the protester are unable to agree on the amount to be paid, the GAO may, upon request of the protester, recommend to the agency the amount of costs that the agency should pay.

(4) Within 60 days after the GAO recommends the amount of costs the agency should pay the protester, the agency shall notify the GAO of the action taken by the agency in response to the recommendation.

(5) No agency shall pay a party, other than a small business concern within the meaning of section 3(a) of the Small Business Act (see 19.001, "Small business concern"), costs under paragraph (h)(2) of this section—

(i) For consultant and expert witness fees that exceed the highest rate of compensation for expert witnesses paid by the Government pursuant to 5 U.S.C. 3109 and 5 CFR 304.105; or

(ii) For attorneys' fees that exceed \$150 per hour, unless the agency determines, based on the recommendation of the Comptroller General on a case-by-case basis, that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee. The cap placed on attorneys' fees for businesses, other than small businesses, constitutes a benchmark as to a "reasonable" level for attorneys' fees for small businesses.

(6) Before paying a recommended award of costs, agency personnel should consult legal counsel. Section 33.104(h) applies to all recommended awards of costs that have not yet been paid.

(7) Any costs the contractor receives under this section shall not be the subject of subsequent proposals, billings, or claims against the Government, and those exclusions should be reflected in the cost agreement.

(8) If the Government pays costs, as provided in paragraph (h)(1) of this section, where a postaward protest is sustained as the result of an awardee's intentional or negligent misstatement, misrepresentation, or miscertification, the Government may require the awardee to reimburse the Government the amount of such costs. In addition to any other remedy available, and pursuant to the requirements of Subpart 32.6, the Government may collect this debt by offsetting

the amount against any payment due the awardee under any contract between the awardee and the Government.

33.105 [Reserved]

33.106 Solicitation provision and contract clause.

(a) The contracting officer shall insert the provision at 52.233-2, Service of Protest, in solicitations for contracts expected to exceed the simplified acquisition threshold.

(b) The contracting officer shall insert the clause at 52.233-3, Protest After Award, in all solicitations and contracts. If a cost reimbursement contract is contemplated, the contracting officer shall use the clause with its Alternate I.

Subpart 36.2—Special Aspects of Contracting for Construction

36.201 Evaluation of contractor performance.

(a) *Preparation of performance evaluation reports.*

(1) The contracting activity shall evaluate contractor performance and prepare a performance report using the SF 1420, Performance Evaluation (Construction Contracts), for each construction contract of—

(i) \$500,000 or more; or

(ii) More than \$10,000, if the contract was terminated for default.

(2) The report shall be prepared at the time of final acceptance of the work, at the time of contract termination, or at other times, as appropriate, in accordance with agency procedures. Ordinarily, the evaluating official who prepares the report should be the person responsible for monitoring contract performance.

(3) If the evaluating official concludes that a contractor’s overall performance was unsatisfactory, the contractor shall be advised in writing that a report of unsatisfactory performance is being prepared and the basis for the report. If the contractor submits any written comments, the evaluating official shall include them in the report, resolve any alleged factual discrepancies, and make appropriate changes in the report.

(4) The head of the contracting activity shall establish procedures which ensure that fully qualified personnel prepare and review performance reports.

(b) *Review of performance reports.* Each performance report shall be reviewed to ensure that it is accurate and fair. The reviewing official should have knowledge of the contractor’s performance and should normally be at an organizational level above that of the evaluating official.

(c) *Distribution and use of performance reports.* (1) Each performance report shall be distributed in accordance with agency procedures. One copy shall be included in the contract file. The contracting activity shall retain the report for at least six years after the date of the report.

(2) Before making a determination of responsibility in accordance with Subpart 9.1, the contracting officer may consider performance reports in accordance with agency instructions.

36.202 Specifications.

(a) Construction specifications shall conform to the requirements in Part 11 of this regulation.

(b) Whenever possible, contracting officers shall ensure that references in specifications are to widely recognized standards or specifications promulgated by governments, industries, or technical societies.

(c) When “brand name or equal” descriptions are necessary, specifications must clearly identify and describe the

particular physical, functional, or other characteristics of the brand-name items which are considered essential to satisfying the requirement.

(d) In accordance with Executive Order 13202 of February 17, 2001, Preservation of Open Competition and Government Neutrality Towards Government Contractors’ Labor Relations on Federal and Federally Funded Construction Projects, as amended on April 6, 2001—

(1) The Government, or any construction manager acting on behalf of the Government, must not—

(i) Require or prohibit offerors, contractors, or subcontractors to enter into or adhere to agreements with one or more labor organizations (as defined in 42 U.S.C. 2000e(d)) on the same or other related construction projects; or

(ii) Otherwise discriminate against offerors, contractors, or subcontractors for becoming, refusing to become, or remaining signatories or otherwise adhering to agreements with one or more labor organizations, on the same or other related construction projects.

(2) Nothing in this paragraph prohibits offerors, contractors, or subcontractors from voluntarily entering into project labor agreements.

(3) The head of the agency may exempt a construction project from this policy if the agency head finds that, as of February 17, 2001—

(i) The agency or a construction manager acting on behalf of the Government had issued or was a party to bid specifications, project agreements, agreements with one or more labor organizations, or other controlling documents with respect to that particular project, which contained any of the requirements or prohibitions in paragraph (d)(1) of this section; and

(ii) One or more construction contracts subject to such requirements or prohibitions had been awarded.

(4) The head of the agency may exempt a particular project, contract, or subcontract from this policy upon a finding that special circumstances require an exemption in order to avert an imminent threat to public health or safety, or to serve the national security. A finding of “special circumstances” may not be based on the possibility or presence of a labor dispute concerning the use of contractors or subcontractors who are nonsignatories to, or otherwise do not adhere to, agreements with one or more labor organizations, or concerning employees on the project who are not members of or affiliated with a labor organization.

36.203 Government estimate of construction costs.

(a) An independent Government estimate of construction costs shall be prepared and furnished to the contracting officer at the earliest practicable time for each proposed contract and for each contract modification anticipated to cost \$100,000 or more. The contracting officer may require an estimate when the cost of required work is anticipated to be

less than \$100,000. The estimate shall be prepared in as much detail as though the Government were competing for award.

(b) When two-step sealed bidding is used, the independent Government estimate shall be prepared when the contract requirements are definitized.

(c) Access to information concerning the Government estimate shall be limited to Government personnel whose official duties require knowledge of the estimate. An exception to this rule may be made during contract negotiations to allow the contracting officer to identify a specialized task and disclose the associated cost breakdown figures in the Government estimate, but only to the extent deemed necessary to arrive at a fair and reasonable price. The overall amount of the Government's estimate shall not be disclosed except as permitted by agency regulations.

36.204 Disclosure of the magnitude of construction projects.

Advance notices and solicitations shall state the magnitude of the requirement in terms of physical characteristics and estimated price range. In no event shall the statement of magnitude disclose the Government's estimate. Therefore, the estimated price should be described in terms of one of the following price ranges:

- (a) Less than \$25,000.
- (b) Between \$25,000 and \$100,000.
- (c) Between \$100,000 and \$250,000.
- (d) Between \$250,000 and \$500,000.
- (e) Between \$500,000 and \$1,000,000.
- (f) Between \$1,000,000 and \$5,000,000.
- (g) Between \$5,000,000 and \$10,000,000.
- (h) More than \$10,000,000.

36.205 Statutory cost limitations.

(a) Contracts for construction shall not be awarded at a cost to the Government—

(1) In excess of statutory cost limitations, unless applicable limitations can be and are waived in writing for the particular contract; or

(2) Which, with allowances for Government-imposed contingencies and overhead, exceeds the statutory authorization.

(b) Solicitations containing one or more items subject to statutory cost limitations shall state—

(1) The applicable cost limitation for each affected item in a separate schedule;

(2) That an offer which does not contain separately-priced schedules will not be considered; and

(3) That the price on each schedule shall include an approximate apportionment of all estimated direct costs, allocable indirect costs, and profit.

(c) The Government shall reject an offer if its prices exceed applicable statutory limitations, unless laws or agency procedures provide pertinent exemptions. However, if it is in the Government's interest, the contracting officer may include a provision in the solicitation which permits the award of separate contracts for individual items whose prices are within or subject to applicable statutory limitations.

(d) The Government shall also reject an offer if its prices are within statutory limitations only because it is materially unbalanced. An offer is unbalanced if its prices are significantly less than cost for some work, and overstated for other work.

36.206 Liquidated damages.

The contracting officer must evaluate the need for liquidated damages in a construction contract in accordance with 11.502 and agency regulations.

36.207 Pricing fixed-price construction contracts.

(a) Generally, firm-fixed-price contracts shall be used to acquire construction. They may be priced—

(1) On a lump-sum basis (when a lump sum is paid for the total work or defined parts of the work),

(2) On a unit-price basis (when a unit price is paid for a specified quantity of work units), or

(3) Using a combination of the two methods.

(b) Lump-sum pricing shall be used in preference to unit pricing except when—

(1) Large quantities of work such as grading, paving, building outside utilities, or site preparation are involved;

(2) Quantities of work, such as excavation, cannot be estimated with sufficient confidence to permit a lump-sum offer without a substantial contingency;

(3) Estimated quantities of work required may change significantly during construction; or

(4) Offerors would have to expend unusual effort to develop adequate estimates.

(c) Fixed-price contracts with economic price adjustment may be used if such a provision is customary in contracts for the type of work being acquired, or when omission of an adjustment provision would preclude a significant number of firms from submitting offers or would result in offerors including unwarranted contingencies in proposed prices.

36.208 Concurrent performance of firm-fixed-price and other types of construction contracts.

In view of potential labor and administrative problems, cost-plus-fixed-fee, price-incentive, or other types of contracts with cost variation or cost adjustment features shall not be permitted concurrently, at the same work site, with firm-fixed-price, lump sum, or unit price contracts except with the prior approval of the head of the contracting activity.

ican Act—North American Free Trade Agreement—Israeli Trade Act”:

NAFTA Country or Israeli End Products:

LINE ITEM NO.	COUNTRY OF ORIGIN
_____	_____
_____	_____
_____	_____

[List as necessary]

(c) The offeror shall list those supplies that are foreign end products (other than those listed in paragraph (b) of this provision) as defined in the clause of this solicitation entitled “Buy American Act—North American Free Trade Agreement—Israeli Trade Act.” The offeror shall list as other foreign end products those end products manufactured in the United States that do not qualify as domestic end products.

Other Foreign End Products:

LINE ITEM NO.	COUNTRY OF ORIGIN
_____	_____
_____	_____
_____	_____

[List as necessary]

(d) The Government will evaluate offers in accordance with the policies and procedures of Part 25 of the Federal Acquisition Regulation.

(End of provision)

Alternate I (May 2002). As prescribed in 25.1101(b)(2)(ii), substitute the following paragraph (b) for paragraph (b) of the basic provision:

(b) The offeror certifies that the following supplies are Canadian end products as defined in the clause of this solicitation entitled “Buy American Act—North American Free Trade Agreement—Israeli Trade Act”:

Canadian End Products:

Line Item No.

[List as necessary]

Alternate II (May 2002). As prescribed in 25.1101(b)(2)(iii), substitute the following paragraph (b) for paragraph (b) of the basic provision:

(b) The offeror certifies that the following supplies are Canadian end products or Israeli end products as defined in the clause of this solicitation entitled “Buy American Act—North American Free Trade Agreement—Israeli Trade Act”:

CANADIAN OR ISRAELI END PRODUCTS:

LINE ITEM NO.	COUNTRY OF ORIGIN
_____	_____
_____	_____
_____	_____

[List as necessary]

52.225-5 Trade Agreements.

As prescribed in 25.1101(c)(1), insert the following clause:

TRADE AGREEMENTS (NOV 2002)

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

“Caribbean Basin country” means any of the following countries: Antigua and Barbuda, Aruba, Bahamas, Barbados, Belize, British Virgin Islands, Costa Rica, Dominica, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Montserrat, Netherlands Antilles, Nicaragua, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Trinidad and Tobago.

“Caribbean Basin country end product”—

(1) Means an article that—

(i)(A) Is wholly the growth, product, or manufacture of a Caribbean Basin country; or

(B) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in a Caribbean Basin country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed; and

(ii) Is not excluded from duty-free treatment for Caribbean countries under 19 U.S.C. 2703(b).

(A) For this reason, the following articles are not Caribbean Basin country end products:

(1) Tuna, prepared or preserved in any manner in airtight containers;

(2) Petroleum, or any product derived from petroleum;

(3) Watches and watch parts (including cases, bracelets, and straps) of whatever type including, but not limited to, mechanical, quartz digital, or quartz analog, if such watches or watch parts contain any material that is the product of any country to which the Harmonized Tariff Schedule of the United States (HTSUS) column 2 rates of duty apply (*i.e.*, Afghanistan, Cuba, Laos, North Korea, and Vietnam); and

(4) Certain of the following: textiles and apparel articles; footwear, handbags, luggage, flat goods, work gloves, and leather wearing apparel; or handloomed, handmade, and folklore articles;

(B) Access to the HTSUS to determine duty-free status of articles of these types is available at <http://www.cus->

toms.ustreas.gov/impoexpo/impoexpo.htm. In particular, see the following:

(1) General Note 3(c), Products Eligible for Special Tariff treatment.

(2) General Note 17, Products of Countries Designated as Beneficiary Countries under the United States-Caribbean Basin Trade Partnership Act of 2000.

(3) Section XXII, Chapter 98, Subchapter II, Articles Exported and Returned, Advanced or Improved Abroad, U.S. Note 7(b).

(4) Section XXII, Chapter 98, Subchapter XX, Goods Eligible for Special Tariff Benefits under the United States-Caribbean Basin Trade Partnership Act; and

(2) Refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the acquisition, includes services (except transportation services) incidental to the article, provided that the value of those incidental services does not exceed that of the article itself.

“Designated country” means any of the following countries:

Aruba	Kiribati
Austria	Korea, Republic of
Bangladesh	Lesotho
Belgium	Liechtenstein
Benin	Luxembourg
Bhutan	Malawi
Botswana	Maldives
Burkina Faso	Mali
Burundi	Mozambique
Canada	Nepal
Cape Verde	Netherlands
Central African Republic	Niger
Chad	Norway
Comoros	Portugal
Denmark	Rwanda
Djibouti	Sao Tome and Principe
Equatorial Guinea	Sierra Leone
Finland	Singapore
France	Somalia
Gambia	Spain
Germany	Sweden
Greece	Switzerland
Guinea	Tanzania U.R.
Guinea-Bissau	Togo
Haiti	Tuvalu
Hong Kong	Uganda
Iceland	United Kingdom
Ireland	Vanuatu
Israel	Western Samoa
Italy	Yemen
Japan	

“Designated country end product” means an article that—

(1) Is wholly the growth, product, or manufacture of a designated country; or

(2) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in a designated country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to the article, provided that the value of those incidental services does not exceed that of the article itself.

“End product” means those articles, materials, and supplies to be acquired under the contract for public use.

“North American Free Trade Agreement country” means Canada or Mexico.

“North American Free Trade Agreement country end product” means an article that—

(1) Is wholly the growth, product, or manufacture of a North American Free Trade Agreement (NAFTA) country; or

(2) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in a NAFTA country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to the article, provided that the value of those incidental services does not exceed that of the article itself.

“United States” means the 50 States and the District of Columbia, U.S. territories and possessions, Puerto Rico, the Northern Mariana Islands, and any other place subject to U.S. jurisdiction, but does not include leased bases.

“U.S.-made end product” means an article that is mined, produced, or manufactured in the United States or that is substantially transformed in the United States into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed.

(b) *Implementation.* This clause implements the Trade Agreements Act (19 U.S.C. 2501, *et seq.*) and the North American Free Trade Agreement Implementation Act of 1993 (NAFTA) (19 U.S.C. 3301 note), by restricting the acquisition of end products that are not U.S.-made, designated country, Caribbean Basin country, or NAFTA country end products.

(c) *Delivery of end products.* The Contracting Officer has determined that the Trade Agreements Act and NAFTA apply to this acquisition. Unless otherwise specified, these trade agreements apply to all items in the Schedule. The Contractor

FAC 2001-10 FILING INSTRUCTIONS

NOTE: The following pages reflect FAR final rule amendments.
**Please do not file until their effective date of
December 23, 2002:**

Remove Pages

Part 4 TOC
pp 4-1 and 4-2
4.7-1 and 4.7-2

32.5-7 and 32.5-8
32.10-1 and 32.10-2

52.2-65 and 52.2-66
52.2-81 and 52.2-82
52.2-193 and 52.2-194
52.2-203 and 52.2-204

Insert Pages

Part 4 TOC
pp 4-1 and 4-2
4.7-1 and 4.7-2

32.5-7 and 32.5-8
32.10-1 and 32.10-2

52.2-65 and 52.2-66
52.2-81 and 52.2-82
52.2-193 and 52.2-194
52.2-203 and 52.2-204

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FAC 2001–10 DECEMBER 23, 2002

PART 4—ADMINISTRATIVE MATTERS

Sec.

- 4.000 Scope of part.
 - Subpart 4.1—Contract Execution**
 - 4.101 Contracting officer’s signature.
 - 4.102 Contractor’s signature.
 - 4.103 Contract clause.
 - Subpart 4.2—Contract Distribution**
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Subpart 4.7—Contractor Records Retention

4.700 Scope of subpart.

This subpart provides policies and procedures for retention of records by contractors to meet the records review requirements of the Government. In this subpart, the terms “contracts” and “contractors” include “subcontracts” and “subcontractors.”

4.701 Purpose.

The purpose of this subpart is to generally describe records retention requirements and to allow reductions in the retention period for specific classes of records under prescribed circumstances.

4.702 Applicability.

(a) This subpart applies to records generated under contracts that contain one of the following clauses:

- (1) Audit and Records—Sealed Bidding (52.214-26).
- (2) Audit and Records—Negotiation (52.215-2).

(b) This subpart is not mandatory on Department of Energy contracts for which the Comptroller General allows alternative records retention periods. Apart from this exception, this subpart applies to record retention periods under contracts that are subject to Chapter 137, Title 10, U.S.C., and the Federal Property and Administrative Services Act of 1949, as amended, 40 U.S.C. 471, *et seq.*

4.703 Policy.

(a) Except as stated in 4.703(b), contractors shall make available records, which includes books, documents, accounting procedures and practices, and other data, regardless of type and regardless of whether such items are in written form, in the form of computer data, or in any other form, and other supporting evidence to satisfy contract negotiation, administration, and audit requirements of the contracting agencies and the Comptroller General for—

- (1) 3 years after final payment or, for certain records;
- (2) The period specified in 4.705 through 4.705-3, whichever of these periods expires first.

(b) Contractors shall make available the foregoing records and supporting evidence for a longer period of time than is required in 4.703(a) if—

- (1) A retention period longer than that cited in 4.703(a) is specified in any contract clause; or
- (2) The contractor, for its own purposes, retains the foregoing records and supporting evidence for a longer period. Under this circumstance, the retention period shall be the period of the contractor’s retention or 3 years after final payment, whichever period expires first.

(3) The contractor does not meet the original due date for submission of final indirect cost rate proposals specified in paragraph (d)(2) of the clause at 52.216-7, Allowable Cost and Payment, and paragraph (c)(2) of the clause at 52.216-13, Allowable Cost and Payment—Facilities. Under these circumstances, the retention periods in 4.705 shall be automatically extended one day for each day the proposal is not submitted after the original due date.

(c) Nothing in this section shall be construed to preclude a contractor from duplicating or storing original records in electronic form unless they contain significant information not shown on the record copy. Original records need not be maintained or produced in an audit if the contractor or subcontractor provides photographic or electronic images of the original records and meets the following requirements:

(1) The contractor or subcontractor has established procedures to ensure that the imaging process preserves accurate images of the original records, including signatures and other written or graphic images, and that the imaging process is reliable and secure so as to maintain the integrity of the records.

(2) The contractor or subcontractor maintains an effective indexing system to permit timely and convenient access to the imaged records.

(3) The contractor or subcontractor retains the original records for a minimum of one year after imaging to permit periodic validation of the imaging systems.

(d) If the information described in paragraph (a) of this section is maintained on a computer, contractors shall retain the computer data on a reliable medium for the time periods prescribed. Contractors may transfer computer data in machine readable form from one reliable computer medium to another. Contractors’ computer data retention and transfer procedures shall maintain the integrity, reliability, and security of the original computer data. Contractors shall also retain an audit trail describing the data transfer. For the record retention time periods prescribed, contractors shall not destroy, discard, delete, or write over such computer data.

4.704 Calculation of retention periods.

(a) The retention periods in 4.705 are calculated from the end of the contractor’s fiscal year in which an entry is made charging or allocating a cost to a Government contract or subcontract. If a specific record contains a series of entries, the retention period is calculated from the end of the contractor’s fiscal year in which the final entry is made. The contractor should cut off the records in annual blocks and retain them for block disposal under the prescribed retention periods.

(b) When records generated during a prior contract are relied upon by a contractor for cost or pricing data in negoti-

ating a succeeding contract, the prescribed periods shall run from the date of the succeeding contract.

(c) If two or more of the record categories described in 4.705 are interfiled and screening for disposal is not practical, the contractor shall retain the entire record series for the longest period prescribed for any category of records.

4.705 Specific retention periods.

The contractor shall retain the records identified in 4.705-1 through 4.705-3 for the periods designated, provided retention is required under 4.702. Records are identified in this subpart in terms of their purpose or use and not by specific name or form number. Although the descriptive identifications may not conform to normal contractor usage or filing practices, these identifications apply to all contractor records that come within the description.

4.705-1 Financial and cost accounting records.

(a) Accounts receivable invoices, adjustments to the accounts, invoice registers, carrier freight bills, shipping orders, and other documents which detail the material or services billed on the related invoices: Retain 4 years.

(b) Material, work order, or service order files, consisting of purchase requisitions or purchase orders for material or services, or orders for transfer of material or supplies: Retain 4 years.

(c) Cash advance recapitulations, prepared as posting entries to accounts receivable ledgers for amounts of expense vouchers prepared for employees' travel and related expenses: Retain 4 years.

(d) Paid, canceled, and voided checks, other than those issued for the payment of salary and wages: Retain 4 years.

(e) Accounts payable records to support disbursements of funds for materials, equipment, supplies, and services, containing originals or copies of the following and related documents: remittance advices and statements, vendors' invoices, invoice audits and distribution slips, receiving and inspection reports or comparable certifications of receipt and inspection of material or services, and debit and credit memoranda: Retain 4 years.

(f) Labor cost distribution cards or equivalent documents: Retain 2 years.

(g) Petty cash records showing description of expenditures, to whom paid, name of person authorizing payment, and date, including copies of vouchers and other supporting documents: Retain 2 years.

4.705-2 Pay administration records.

(a) Payroll sheets, registers, or their equivalent, of salaries and wages paid to individual employees for each payroll period; change slips; and tax withholding statements: Retain 4 years.

(b) Clock cards or other time and attendance cards: Retain 2 years.

(c) Paid checks, receipts for wages paid in cash, or other evidence of payments for services rendered by employees: Retain 2 years.

4.705-3 Acquisition and supply records.

(a) Store requisitions for materials, supplies, equipment, and services: Retain 2 years.

(b) Work orders for maintenance and other services: Retain 4 years.

(c) Equipment records, consisting of equipment usage and status reports and equipment repair orders: Retain 4 years.

(d) Expendable property records, reflecting accountability for the receipt and use of material in the performance of a contract: Retain 4 years.

(e) Receiving and inspection report records, consisting of reports reflecting receipt and inspection of supplies, equipment, and materials: Retain 4 years.

(f) Purchase order files for supplies, equipment, material, or services used in the performance of a contract; supporting documentation and backup files including, but not limited to, invoices, and memoranda; *e.g.*, memoranda of negotiations showing the principal elements of subcontract price negotiations (see 52.244-2): Retain 4 years.

(g) Production records of quality control, reliability, and inspection: Retain 4 years.

(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 other clauses, as follows:

(1) The clause at 52.245-17, Special Tooling, for special tooling.

(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 for loss, theft, destruction, or damage to property affected by 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 item 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 item 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 subcon-

tract 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 item purchase financing, the subcontract must include a contract financing clause structured in accordance with 32.206.

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. This subpart does not apply to—

- (a) Payments under cost-reimbursement contracts;
- (b) 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
- (c) Contracts awarded through sealed bid procedures.

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. Except as provided in 32.1003(c), the contracting officer must not use performance-based payments when other forms of contract financing are provided.

(d) For Government accounting purposes, the Government should treat performance-based payments like progress payments based on costs under Subpart 32.5.

(e) Performance-based payments are contract financing payments and, therefore, are not subject to the interest-penalty provisions of prompt payment (see Subpart 32.9). However, each agency must make these payments in accordance with the agency's policy for prompt payment of contract financing payments.

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; or
- (c) Other quantifiable measures of results.

32.1003 Criteria for use.

The contracting officer may use performance-based payments only if the following conditions are met:

- (a) The contracting officer and offeror are able to agree on the performance-based payment terms;
- (b) The contract is a fixed-price type contract; and
- (c) The contract does not provide for other methods of contract financing, except that advance payments in accordance with Subpart 32.4, or guaranteed loans in accordance with Subpart 32.3 may be used.

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 contract line item for 10 airplanes, with a unit price of \$1,000,000 each, has 10 deliverable items—the separate planes. A contract 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 must be an integral and necessary part of contract performance and must 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, or other such actions must not be 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 must include the following in the contract:

(i) The contract must not permit payment for a cumulative event or criterion until the dependent event or criterion has been successfully completed.

(ii) The contract must specifically identify severable events or criteria.

(iii) The contract must identify which events or criteria are preconditions for the successful achievement of each cumulative event or criterion.

(iv) Because performance-based payments are contract financing, events or criteria must 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 must be part of the performance necessary for that deliverable item and must be identified to a specific contract line item or subline item.

(b) *Establishing performance-based finance payment amounts.* (1) The contracting officer must 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 must adjust the performance-based payment schedule appropriately.

(2) Total performance-based payments must—

(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 must 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 must 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 must 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 must provide instructions to the Government payment office for distribution of financing payments to the respective funds accounts. Distribution instructions must be consistent with the contract's liquidation provisions.

(d) *Liquidating performance-based finance payments.* Performance-based amounts must be liquidated by deducting a percentage or a designated dollar amount from the delivery payments. The contracting officer must specify the liquidation rate or designated dollar amount in the contract. The method of liquidation must 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 must specify—

(i) What, if any, terms must 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 include an adjustment of proposed prices 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 must—

(i) Review the proposed terms to ensure they comply with this section; and

(ii) Use the adjustment method in 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, with the description of the basis for payment and liquidation as required in 32.1004 in—

by agreement, this decision shall be treated as an executed contract modification. Pending final settlement, price redetermination for subsequent periods, if any, shall continue to be negotiated as provided in this clause.

(k) *Termination.* If this contract is terminated, prices shall continue to be established in accordance with this clause for (1) completed supplies and services accepted by the Government and (2) those supplies and services not terminated under a partial termination. All other elements of the termination shall be resolved in accordance with other applicable clauses of this contract.

(End of clause)

NOTES:

- (1) Express in terms of units delivered, or as a date; but in either case the period should end on the last day of a month.
- (2) Insert the number of days chosen so that the Contractor's submission will be late enough to reflect recent cost experience (taking into account the Contractor's accounting system), but early enough to permit review, audit (if necessary), and negotiation before the start of the prospective period.
- (3) Insert "first," except that "second" may be inserted if necessary to achieve compatibility with the Contractor's accounting system.

52.216-6 Price Redetermination—Retroactive.

As prescribed in 16.206-4, insert the following clause:

PRICE REDETERMINATION—RETROACTIVE (OCT 1997)

(a) *General.* The unit price and the total price stated in this contract shall be redetermined in accordance with this clause, but in no event shall the total amount paid under this contract exceed _____ [*insert dollar amount of ceiling price*].

(b) *Definition.* "Costs," as used in this clause, means allowable costs in accordance with Part 31 of the Federal Acquisition Regulation (FAR) in effect on the date of this contract.

(c) *Data submission.* (1) Within _____ [*Contracting Officer insert number of days*] days after delivery of all supplies to be delivered and completion of all services to be performed under this contract, the Contractor shall submit—

- (i) Proposed prices;
- (ii) A statement in the format of Table 15-2, FAR 15.408, or in any other form on which the parties may agree, of all costs incurred in performing the contract; and
- (iii) Any other relevant data that the Contracting Officer may reasonably require.

(2) If the Contractor fails to submit the data required by paragraph (c)(1) of this section within the time specified, the Contracting Officer may suspend payments under this contract until the data are furnished. If it is later determined that the Government has overpaid the Contractor, the excess shall

be repaid to the Government immediately. Unless repaid within 30 days after the end of the data submittal period, the amount of the excess shall bear interest, computed from the date the data were due to the date of repayment, at the rate established in accordance with the Interest clause.

(d) *Price determination.* Upon the Contracting Officer's receipt of the data required by paragraph (c) of this section, the Contracting Officer and the Contractor shall promptly negotiate to redetermine fair and reasonable prices for supplies delivered and services performed by the Contractor under this contract.

(e) *Contract modification.* The negotiated redetermination of price shall be evidenced by a modification to this contract, signed by the Contractor and the Contracting Officer.

(f) *Adjusting billing prices.* Pending execution of the contract modification (see paragraph (e) of this section), the Contractor shall submit invoices or vouchers in accordance with billing prices stated in this contract. If at any time it appears that the then-current billing prices will be substantially greater than the estimated final prices, or if the Contractor submits data showing that the redetermined prices will be substantially greater than the current billing prices, the parties shall negotiate an appropriate decrease or increase in billing prices. Any billing price adjustment shall be reflected in a contract modification and shall not affect the redetermination of prices under this clause. After the contract modification for price redetermination is executed, the total amount paid or to be paid on all invoices or vouchers shall be adjusted to reflect the agreed-upon prices, and any resulting additional payments, refunds, or credits shall be made promptly.

(g) *Quarterly limitation on payments statement.* This paragraph (g) shall apply until final price redetermination under this contract has been completed.

(1) Within 45 days after the end of the quarter of the Contractor's fiscal year in which a delivery is first made (or services are first performed) and accepted by the Government under this contract, and for each quarter thereafter, the Contractor shall submit to the contract administration office (with a copy to the contracting office and the cognizant contract auditor), a statement, cumulative from the beginning of the contract, showing—

- (i) The total contract price of all supplies delivered (or services performed) and accepted by the Government and for which final prices have been established;
- (ii) The total costs (estimated to the extent necessary) reasonably incurred for, and properly allocable solely to, the supplies delivered (or services performed) and accepted by the Government and for which final prices have not been established;
- (iii) The portion of the total interim profit (used in establishing the initial contract price or agreed to for the purpose of this paragraph (g)) that is in direct proportion to the supplies delivered (or services performed) and accepted by

the Government and for which final prices have not been established; and

(iv) The total amount of all invoices or vouchers for supplies delivered (or services performed) and accepted by the Government (including amounts applied or to be applied to liquidate progress payments).

(2) Notwithstanding any provision of this contract authorizing greater payments, if on any quarterly statement the amount under subdivision (g)(1)(iv) of this section exceeds the sum due the Contractor, as computed in accordance with subdivisions (g)(1)(i), (ii), and (iii) of this section, the Contractor shall immediately refund or credit to the Government the amount of this excess. The Contractor may, when appropriate, reduce this refund or credit by the amount of any applicable tax credits due the contractor under 26 U.S.C. 1481 and by the amount of previous refunds or credits effected under this clause. If any portion of the excess has been applied to the liquidation of progress payments, then that portion may, instead of being refunded, be added to the unliquidated progress payment account, consistent with the Progress Payments clause. The Contractor shall provide complete details to support any claimed reduction in refunds.

(3) If the Contractor fails to submit the quarterly statement within 45 days after the end of each quarter and it is later determined that the Government has overpaid the Contractor, the Contractor shall repay the excess to the Government immediately. Unless repaid within 30 days after the end of the statement submittal period, the amount of the excess shall bear interest, computed from the date the quarterly statement was due to the date of repayment, at the rate established in accordance with the Interest clause.

(h) *Subcontracts.* No subcontract placed under this contract may provide for payment on a cost-plus-a-percentage-of-cost basis.

(i) *Disagreements.* If the Contractor and the Contracting Officer fail to agree upon redetermined prices within 60 days (or within such other period as the parties agree) after the date on which the data required by paragraph (c) of this section are to be submitted, the Contracting Officer shall promptly issue a decision in accordance with the Disputes clause. For the purpose of paragraphs (e), (f), and (g) of this section, and pending final settlement of the disagreement on appeal, by failure to appeal, or by agreement, this decision shall be treated as an executed contract modification.

(j) *Termination.* If this contract is terminated before price redetermination, prices shall be established in accordance with this clause for completed supplies and services not terminated. All other elements of the termination shall be resolved in accordance with other applicable clauses of this contract.

(End of clause)

52.216-7 Allowable Cost and Payment.

As prescribed in 16.307(a), insert the following clause:

ALLOWABLE COST AND PAYMENT (DEC 2002)

(a) *Invoicing.* (1) The Government will make payments to the Contractor when requested as work progresses, but (except for small business concerns) not more often than once every 2 weeks, in amounts determined to be allowable by the Contracting Officer in accordance with Federal Acquisition Regulation (FAR) Subpart 31.2 in effect on the date of this contract and the terms of this contract. The Contractor may submit to an authorized representative of the Contracting Officer, in such form and reasonable detail as the representative may require, an invoice or voucher supported by a statement of the claimed allowable cost for performing this contract.

(2) Contract financing payments are not subject to the interest penalty provisions of the Prompt Payment Act. Interim payments made prior to the final payment under the contract are contract financing payments, except interim payments if this contract contains Alternate I to the clause at 52.232-25.

(3) The designated payment office will make interim payments for contract financing on the _____ [*Contracting Officer insert day as prescribed by agency head; if not prescribed, insert "30th"*] day after the designated billing office receives a proper payment request. In the event that the Government requires an audit or other review of a specific payment request 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.

(b) *Reimbursing costs.* (1) For the purpose of reimbursing allowable costs (except as provided in paragraph (b)(2) of this clause, with respect to pension, deferred profit sharing, and employee stock ownership plan contributions), the term "costs" includes only—

(i) Those recorded costs that, at the time of the request for reimbursement, the Contractor has paid by cash, check, or other form of actual payment for items or services purchased directly for the contract;

(ii) When the Contractor is not delinquent in paying costs of contract performance in the ordinary course of business, costs incurred, but not necessarily paid, for—

(A) Supplies and services purchased directly for the contract and associated financing payments to subcontractors, provided payments determined due will be made—

(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 payment request to the Government;

(B) Materials issued from the Contractor's inventory and placed in the production process for use on the contract;

PAYMENTS OF ALLOWABLE COSTS BEFORE
DEFINITIZATION (DEC 2002)

(a) *Reimbursement rate.* Pending the placing of the definitive contract referred to in this letter contract, the Government will promptly reimburse the Contractor for all allowable costs under this contract at the following rates:

(1) One hundred percent of approved costs representing financing payments to subcontractors under fixed-price subcontracts, provided that the Government's payments to the Contractor will not exceed 80 percent of the allowable costs of those subcontractors.

(2) One hundred percent of approved costs representing cost-reimbursement subcontracts; *provided*, that the Government's payments to the Contractor shall not exceed 85 percent of the allowable costs of those subcontractors.

(3) Eighty-five percent of all other approved costs.

(b) *Limitation of reimbursement.* To determine the amounts payable to the Contractor under this letter contract, the Contracting Officer shall determine allowable costs in accordance with the applicable cost principles in Part 31 of the Federal Acquisition Regulation (FAR). The total reimbursement made under this paragraph shall not exceed 85 percent of the maximum amount of the Government's liability, as stated in this contract.

(c) *Invoicing.* Payments shall be made promptly to the Contractor when requested as work progresses, but (except for small business concerns) not more often than every 2 weeks, in amounts approved by the Contracting Officer. The Contractor may submit to an authorized representative of the Contracting Officer, in such form and reasonable detail as the representative may require, an invoice or voucher supported by a statement of the claimed allowable cost incurred by the Contractor in the performance of this contract.

(d) *Allowable costs.* For the purpose of determining allowable costs, the term "costs" includes—

(1) Those recorded costs that result, at the time of the request for reimbursement, from payment by cash, check, or other form of actual payment for items or services purchased directly for the contract;

(2) When the Contractor is not delinquent in payment of costs of contract performance in the ordinary course of business, costs incurred, but not necessarily paid, for—

(i) Supplies and services purchased directly for the contract and associated financing payments to subcontractors, provided payments determined due will be made—

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

(B) Ordinarily within 30 days of the submission of the Contractor's payment request to the Government;

(ii) Materials issued from the Contractor's stores inventory and placed in the production process for use on the contract;

(iii) Direct labor;

(iv) Direct travel;

(v) Other direct in-house costs; and

(vi) Properly allocable and allowable indirect costs as shown on the records maintained by the Contractor for purposes of obtaining reimbursement under Government contracts; and

(3) The amount of financing payments that the Contractor has paid by cash, check, or other forms of payment to subcontractors.

(e) *Small business concerns.* A small business concern may receive more frequent payments than every 2 weeks.

(f) *Audit.* At any time before final payment, the Contracting Officer may have the Contractor's invoices or vouchers and statements of costs audited. Any payment may be—

(1) Reduced by any amounts found by the Contracting Officer not to constitute allowable costs; or

(2) Adjusted for overpayments or underpayments made on preceding invoices or vouchers.

(End of clause)

52.216-27 Single or Multiple Awards.

As prescribed in 16.506(f), insert the following provision:

SINGLE OR MULTIPLE AWARDS (OCT 1995)

The Government may elect to award a single delivery order contract or task order contract or to award multiple delivery order contracts or task order contracts for the same or similar supplies or services to two or more sources under this solicitation.

(End of provision)

52.216-28 Multiple Awards for Advisory and Assistance Services.

As prescribed in 16.506(g), insert the following provision:

MULTIPLE AWARDS FOR ADVISORY AND ASSISTANCE
SERVICES (OCT 1995)

The Government intends to award multiple contracts for the same or similar advisory and assistance services to two or more sources under this solicitation unless the Government determines, after evaluation of offers, that only one offeror is capable of providing the services at the level of quality required.

(End of provision)

be required of the assignee if the Contractor's claim to amounts payable under this contract has been assigned under the Assignment of Claims Act of 1940 (31 U.S.C. 3727 and 41 U.S.C. 15).

(i) *Limitation because of undefinitized work.* Notwithstanding any provision of this contract, progress payments shall not exceed 80 percent on work accomplished on undefinitized contract actions. A "contract action" is any action resulting in a contract, as defined in FAR Subpart 2.1, including contract modifications for additional supplies or services, but not including contract modifications that are within the scope and under the terms of the contract, such as contract modifications issued pursuant to the Changes clause, or funding and other administrative changes.

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

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

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

(End of clause)

52.232-6 Payment under Communication Service Contracts with Common Carriers.

As prescribed in 32.111(a)(6), insert the following clause, appropriately modified with respect to payment due dates in accordance with agency regulations, in solicitations and contracts for regulated communication services by common carriers:

PAYMENT UNDER COMMUNICATION SERVICE CONTRACTS WITH COMMON CARRIERS (APR 1984)

The Government shall pay the Contractor, in arrears, upon submission of invoices for services and facilities furnished in accordance with the terms of CSAs issued under this contract, the rates and charges for the services and facilities as set forth in the clause entitled "Rates, Charges and Services."

(End of clause)

52.232-7 Payments under Time-and-Materials and Labor-Hour Contracts.

As prescribed in 32.111(b), insert the following clause:

PAYMENTS UNDER TIME-AND-MATERIALS AND LABOR-HOUR CONTRACTS (DEC 2002)

The Government will pay the Contractor as follows upon the submission of invoices or vouchers approved by the Contracting Officer:

(a) *Hourly rate.* (1) The amounts shall be computed by multiplying the appropriate hourly rates prescribed in the Schedule by the number of direct labor hours performed. The rates shall include wages, indirect costs, general and administrative expense, and profit. Fractional parts of an hour shall be payable on a prorated basis. Vouchers may be submitted once each month (or at more frequent intervals, if approved by the Contracting Officer), to the Contracting Officer or designee. The Contractor shall substantiate vouchers by evidence of actual payment and by individual daily job timecards, or other substantiation approved by the Contracting Officer. Promptly after receipt of each substantiated voucher, the Government shall, except as otherwise provided in this contract, and subject to the terms of (e) of this section, pay the voucher as approved by the Contracting Officer.

(2) Unless otherwise prescribed in the Schedule, the Contracting Officer shall withhold 5 percent of the amounts due under this paragraph (a), but the total amount withheld shall not exceed \$50,000. The amounts withheld shall be retained until the execution and delivery of a release by the Contractor as provided in paragraph (f) of this section.

(3) Unless the Schedule prescribes otherwise, the hourly rates in the Schedule shall not be varied by virtue of the Contractor having performed work on an overtime basis. If no overtime rates are provided in the Schedule and overtime work is approved in advance by the Contracting Officer, overtime rates shall be negotiated. Failure to agree upon these overtime rates shall be treated as a dispute under the Disputes clause of this contract. If the Schedule provides rates for overtime, the premium portion of those rates will be reimbursable only to the extent the overtime is approved by the Contracting Officer.

(b) *Materials and subcontracts.* (1) The Contracting Officer will determine allowable costs of direct materials in accordance with Subpart 31.2 of the Federal Acquisition Regulation (FAR) in effect on the date of this contract. Direct materials, as used in this clause, are those materials that enter directly into the end product, or that are used or consumed directly in connection with the furnishing of the end product.

(2) The Contractor may include reasonable and allocable material handling costs in the charge for material to the extent they are clearly excluded from the hourly rate. Material handling costs are comprised of indirect costs, including, when appropriate, general and administrative expense allocated to direct materials in accordance with the Contractor's usual accounting practices consistent with Subpart 31.2 of the FAR.

(3) The Government will reimburse the Contractor for supplies and services purchased directly for the contract when the Contractor—

- (i) Has made payments of cash, checks, or other forms of payment for these purchased supplies or services; or
- (ii) Will make these payments determined due—

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

(B) Ordinarily within 30 days of the submission of the Contractor's payment request to the Government.

(4)(i) The Government will reimburse the Contractor for costs of subcontracts that are authorized under the subcontracts clause of this contract, provided that the costs are consistent with paragraph (b)(5) of this clause.

(ii) The Government will limit reimbursable costs in connection with subcontracts to the amounts paid for supplies and services purchased directly for the contract when the Contractor has made or will make payments determined due of cash, checks, or other forms of payment to the subcontractor—

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

(B) Ordinarily within 30 days of the submission of the Contractor's payment request to the Government.

(iii) The Government will not reimburse the Contractor for any costs arising from the letting, administration, or supervision of performance of the subcontract, if the costs are included in the hourly rates payable under paragraph (a)(1) of this clause.

(5) To the extent able, the Contractor shall—

(i) Obtain materials at the most advantageous prices available with due regard to securing prompt delivery of satisfactory materials; and

(ii) Take all cash and trade discounts, rebates, allowances, credits, salvage, commissions, and other benefits. When unable to take advantage of the benefits, the Contractor shall promptly notify the Contracting Officer and give the reasons. The Contractor shall give credit to the Government for cash and trade discounts, rebates, scrap, commissions, and other amounts that have accrued to the benefit of the Contractor, or would have accrued except for the fault or neglect of the Contractor. The Contractor shall not deduct from gross costs the benefits lost without fault or neglect on the part of the Contractor, or lost through fault of the Government.

(c) *Total cost.* It is estimated that the total cost to the Government for the performance of this contract shall not exceed the ceiling price set forth in the Schedule and the Contractor agrees to use its best efforts to perform the work specified in the Schedule and all obligations under this contract within such ceiling price. If at any time the Contractor has reason to believe that the hourly rate payments and material costs that will accrue in performing this contract in the next succeeding 30 days, if added to all other payments and costs previously accrued, will exceed 85 percent of the ceiling price in the Schedule, the Contractor shall notify the Contracting Officer giving a revised estimate of the total price to the Government for performing this contract with supporting reasons and documentation. If at any time during performing this contract, the Contractor has reason to believe that the total price to the Government for performing this contract will be substantially greater or less than the then stated ceiling price, the Contractor shall so notify the Contracting Officer, giving a revised

estimate of the total price for performing this contract, with supporting reasons and documentation. If at any time during performing this contract, the Government has reason to believe that the work to be required in performing this contract will be substantially greater or less than the stated ceiling price, the Contracting Officer will so advise the Contractor, giving the then revised estimate of the total amount of effort to be required under the contract.

(d) *Ceiling price.* The Government shall not be obligated to pay the Contractor any amount in excess of the ceiling price in the Schedule, and the Contractor shall not be obligated to continue performance if to do so would exceed the ceiling price set forth in the Schedule, unless and until the Contracting Officer shall have notified the Contractor in writing that the ceiling price has been increased and shall have specified in the notice a revised ceiling that shall constitute the ceiling price for performance under this contract. When and to the extent that the ceiling price set forth in the Schedule has been increased, any hours expended and material costs incurred by the Contractor in excess of the ceiling price before the increase shall be allowable to the same extent as if the hours expended and material costs had been incurred after the increase in the ceiling price.

(e) *Audit.* At any time before final payment under this contract the Contracting Officer may request audit of the invoices or vouchers and substantiating material. Each payment previously made shall be subject to reduction to the extent of amounts, on preceding invoices or vouchers, that are found by the Contracting Officer not to have been properly payable and shall also be subject to reduction for overpayments or to increase for underpayments. Upon receipt and approval of the voucher or invoice designated by the Contractor as the "completion voucher" or "completion invoice" and substantiating material, and upon compliance by the Contractor with all terms of this contract (including, without limitation, terms relating to patents and the terms of (f) and (g) of this section), the Government shall promptly pay any balance due the Contractor. The completion invoice or voucher, and substantiating material, shall be submitted by the Contractor as promptly as practicable following completion of the work under this contract, but in no event later than 1 year (or such longer period as the Contracting Officer may approve in writing) from the date of completion.

(f) *Assignment.* The Contractor, and each assignee under an assignment entered into under this contract and in effect at the time of final payment under this contract, shall execute and deliver, at the time of and as a condition precedent to final payment under this contract, a release discharging the Government, its officers, agents, and employees of and from all liabilities, obligations, and claims arising out of or under this contract, subject only to the following exceptions:

(1) Specified claims in stated amounts, or in estimated amounts if the amounts are not susceptible of exact statement by the Contractor.

tional security satisfactory to the administering office, to the extent that the security is available.

(l) *Representations.* The Contractor represents the following:

(1) The balance sheet, the profit and loss statement, and any other supporting financial statements furnished to the administering office fairly reflect the financial condition of the Contractor at the date shown or the period covered, and there has been no subsequent materially adverse change in the financial condition of the Contractor.

(2) No litigation or proceedings are presently pending or threatened against the Contractor, except as shown in the financial statements.

(3) The Contractor has disclosed all contingent liabilities, except for liability resulting from the renegotiation of defense production contracts, in the financial statements furnished to the administering office.

(4) None of the terms in this clause conflict with the authority under which the Contractor is doing business or with the provision of any existing indenture or agreement of the Contractor.

(5) The Contractor has the power to enter into this contract and accept advance payments, and has taken all necessary action to authorize the acceptance under the terms of this contract.

(6) The assets of the Contractor are not subject to any lien or encumbrance of any character except for current taxes not delinquent, and except as shown in the financial statements furnished by the Contractor. There is no current assignment of claims under any contract affected by these advance payment provisions.

(7) All information furnished by the Contractor to the administering office in connection with each request for advance payments is true and correct.

(8) These representations shall be continuing and shall be considered to have been repeated by the submission of each invoice for advance payments.

(m) *Covenants.* To the extent the Government considers it necessary while any advance payments made under this contract remain outstanding, the Contractor, without the prior written consent of the administering office, shall not—

(1) Mortgage, pledge, or otherwise encumber or allow to be encumbered, any of the assets of the Contractor now owned or subsequently acquired, or permit any preexisting mortgages, liens, or other encumbrances to remain on or attach to any assets of the Contractor which are allocated to performing this contract and with respect to which the Government has a lien under this contract;

(2) Sell, assign, transfer, or otherwise dispose of accounts receivable, notes, or claims for money due or to become due;

(3) Declare or pay any dividends, except dividends payable in stock of the corporation, or make any other distribution on account of any shares of its capital stock, or purchase, redeem, or otherwise acquire for value any of its stock, except as required by sinking fund or redemption arrangements

reported to the administering office incident to the establishment of these advance payment provisions;

(4) Sell, convey, or lease all or a substantial part of its assets;

(5) Acquire for value the stock or other securities of any corporation, municipality, or Governmental authority, except direct obligations of the United States;

(6) Make any advance or loan or incur any liability as guarantor, surety, or accommodation endorser for any party;

(7) Permit a writ of attachment or any similar process to be issued against its property without getting a release or bonding the property within 30 days after the entry of the writ of attachment or other process;

(8) Pay any remuneration in any form to its directors, officers, or key employees higher than rates provided in existing agreements of which notice has been given to the administering office, accrue excess remuneration without first obtaining an agreement subordinating it to all claims of the Government, or employ any person at a rate of compensation over \$_____ a year;

(9) Change substantially the management, ownership, or control of the corporation;

(10) Merge or consolidate with any other firm or corporation, change the type of business, or engage in any transaction outside the ordinary course of the Contractor's business as presently conducted;

(11) Deposit any of its funds except in a bank or trust company insured by the Federal Deposit Insurance Corporation or a credit union insured by the National Credit Union Administration;

(12) Create or incur indebtedness for advances, other than advances to be made under the terms of this contract, or for borrowings;

(13) Make or covenant for capital expenditures exceeding \$_____ in total;

(14) Permit its net current assets, computed in accordance with generally accepted accounting principles, to become less than \$_____; or

(15) Make any payments on account of the obligations listed below, except in the manner and to the extent provided in this contract:

[List the pertinent obligations]

52.232-13 Notice of Progress Payments.

As prescribed in 32.502-3(a), insert the following provision in invitations for bids and requests for proposals that include a Progress Payments clause:

NOTICE OF PROGRESS PAYMENTS (APR 1984)

The need for customary progress payments conforming to the regulations in Subpart 32.5 of the Federal Acquisition Regulation (FAR) will not be considered as a handicap or adverse factor in the award of the contract. The Progress Payments clause included in this solicitation will be included in

any resulting contract, modified or altered if necessary in accordance with subsection 52.232-16 and its Alternate I of the FAR. Even though the clause is included in the contract, the clause shall be inoperative during any time the contractor's accounting system and controls are determined by the Government to be inadequate for segregation and accumulation of contract costs.

(End of provision)

52.232-14 Notice of Availability of Progress Payments Exclusively for Small Business Concerns.

As prescribed in 32.502-3(b)(2), insert the following provision in invitations for bids if it is anticipated that (a) both small business concerns and others may submit bids in response to the same invitation and (b) only the small business bidders would need progress payments:

NOTICE OF AVAILABILITY OF PROGRESS PAYMENTS
EXCLUSIVELY FOR SMALL BUSINESS CONCERNS
(APR 1984)

The Progress Payments clause will be available only to small business concerns. Any bid conditioned upon inclusion of a progress payment clause in the resulting contract will be rejected as nonresponsive if the bidder is not a small business concern.

(End of provision)

52.232-15 Progress Payments Not Included.

As prescribed in 32.502-3(c), insert the following provision in invitations for bids if the solicitation will not contain one of the provisions prescribed in 32.502-3(a) and (b):

PROGRESS PAYMENTS NOT INCLUDED (APR 1984)

A progress payments clause is not included in this solicitation, and will not be added to the resulting contract at the time of award. Bids conditioned upon inclusion of a progress payment clause in the resulting contract will be rejected as nonresponsive.

(End of provision)

52.232-16 Progress Payments.

As prescribed in 32.502-4(a), insert the following clause:

PROGRESS PAYMENTS (DEC 2002)

The Government will make progress payments to the Contractor when requested as work progresses, but not more frequently than monthly, in amounts of \$2,500 or more approved by the Contracting Officer, under the following conditions:

(a) *Computation of amounts.* (1) Unless the Contractor requests a smaller amount, the Government will compute each progress payment as 80 percent of the Contractor's total costs incurred under this contract whether or not actually

paid, plus financing payments to subcontractors (see paragraph (j) of this clause), less the sum of all previous progress payments made by the Government under this contract. The Contracting Officer will consider cost of money that would be allowable under FAR 31.205-10 as an incurred cost for progress payment purposes.

(2) The amount of financing and other payments for supplies and services purchased directly for the contract are limited to the amounts that have been paid by cash, check, or other forms of payment, or that are determined due and will be paid to subcontractors—

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

(ii) Ordinarily within 30 days of the submission of the Contractor's payment request to the Government.

(3) The Government will exclude accrued costs of Contractor contributions under employee pension plans until actually paid unless—

(i) The Contractor's practice is to make contributions to the retirement fund quarterly or more frequently; and

(ii) The contribution does not remain unpaid 30 days after the end of the applicable quarter or shorter payment period (any contribution remaining unpaid shall be excluded from the Contractor's total costs for progress payments until paid).

(4) The Contractor shall not include the following in total costs for progress payment purposes in paragraph (a)(1) of this clause:

(i) Costs that are not reasonable, allocable to this contract, and consistent with sound and generally accepted accounting principles and practices.

(ii) Costs incurred by subcontractors or suppliers.

(iii) Costs ordinarily capitalized and subject to depreciation or amortization except for the properly depreciated or amortized portion of such costs.

(iv) Payments made or amounts payable to subcontractors or suppliers, except for—

(A) Completed work, including partial deliveries, to which the Contractor has acquired title; and

(B) Work under cost-reimbursement or time-and-material subcontracts to which the Contractor has acquired title.

(5) The amount of unliquidated progress payments may exceed neither (i) the progress payments made against incomplete work (including allowable unliquidated progress payments to subcontractors) nor (ii) the value, for progress payment purposes, of the incomplete work. Incomplete work shall be considered to be the supplies and services required by this contract, for which delivery and invoicing by the Contractor and acceptance by the Government are incomplete.

(6) The total amount of progress payments shall not exceed 80 percent of the total contract price.