Subpart 32.1 - Financing for Other Than a Commercial Purchase

Parent topic: Part 32 - Contract Financing

32.100 Scope of subpart.

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

32.101 Authority.

The basic authority for the contract financing described in this part is contained in 41 U.S.C. chapter 45, Contract Financing, 10 U.S.C. chapter 277, and TitleIII of the Defense Production Act of l950 (50 U.S.C. App.2091).

32.102 Description of contract financing methods.

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

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

(1) Payments based on the percentage or stage of completion accomplished;

(2) Payments for partial deliveries accepted by the Government;

(3) Partial payments for a contract termination proposal; or

(4) Performance-based payments.

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

(d) Payments for accepted *supplies* and services that are only a part of the contract requirements (*i.e.,* partial deliveries) are authorized under 41 U.S.C. chapter 45 and 10 U.S.C. chapter 277. In accordance with 5 CFR 1315.4(k), agencies *must* pay for partial delivery of *supplies* or partial performance of services unless specifically prohibited by the contract. Although payments for partial

deliveries generally are treated as a method of payment and not as a method of contract financing, using partial *delivery payments* can assist contractors to participate in contracts without, or with minimal, contract financing. When appropriate, contract statements of work and *pricing* arrangements *must* permit acceptance and payment for discrete portions of the work, as soon as accepted (see 32.906(c)).

(e)

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

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

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

(1) Performance measured by objective, quantifiable methods;

(2) Accomplishment of defined events; or

(3) Other quantifiable measures of results.

32.103 Progress payments under construction contracts.

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

32.104 Providing contract financing.

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

(1) Provide Government financing only to the extent actually needed for prompt and efficient performance, considering the availability of private financing and the probable impact on working capital of the predelivery expenditures and production lead-times associated with the contract, or

groups of contracts or orders (*e.g.,* issued under indefinite-delivery contracts, basic ordering agreements, or their equivalent);

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

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

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

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

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

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

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

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

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

(1) The contractor-

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

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

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

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

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

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

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

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

32.105 Uses of contract financing.

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

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

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

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

32.106 Order of preference.

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

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

(1) At unreasonable terms; or

(2) From other agencies.

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

(c) Loan guarantees.

(d) *Unusual contract financing* (see 32.114).

(e) Advance payments (see exceptions in 32.402(b)).

32.107 Need for contract financing not a deterrent.

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

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

32.108 Financial consultation.

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

(a) The financial capability of an *offeror* or contractor to perform a contract, or

(b) What form of contract financing is appropriate in a given case, the *contracting officer should* consult the appropriate contract financing office.

32.109 Termination financing.

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

32.110 Payment of subcontractors under cost-reimbursement prime contracts.

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

(a) The payments are made under the criteria in subpart 32.5 for customary progress payments based on costs, 32.202-1 for *commercial product* or *commercial service* purchase financing, or 32.1003 for performance-based payments, as applicable.

(b) If customary progress payments are made, the payments do not exceed the progress payment rate in 32.501-1, unless unusual progress payments to the subcontractor have been approved in accordance with 32.501-2.

(c) If customary progress payments are made, the subcontractor complies with the liquidation principles of 32.503-8, 32.503-9, and 32.503-10.

(d) If performance-based payments are made, the subcontractor complies with the liquidation principles of 32.1004(d).

(e) The subcontract contains financing payments terms as prescribed in this part.

32.111 Contract clauses for non-commercial purchases.

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

(1) The clause at 52.232-1, Payments, in *solicitations* and contracts when a fixed-price supply contract, a fixed-price service contract, or a contract for nonregulated communication services is contemplated;

(2) The clause at 52.232-2, Payment under Fixed-Price Research and Development Contracts, in *solicitations* and contracts when a fixed-price research and development contract is contemplated;

(3) The clause at 52.232-3, Payments under *Personal Services Contracts*, in *solicitations* and contracts for personal services;

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

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

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

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

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

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

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

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

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

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

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

32.112-1 Subcontractor assertions of nonpayment.

(a) In accordance with Section 806(a)(4) of Pub.L.102-190, as amended by Sections2091 and 8105 of Pub.L.103-355 (10 U.S.C. 4601 note prec.), upon the assertion by a subcontractor or supplier of a Federal contractor that the subcontractor or supplier has not been paid in accordance with the payment terms of the subcontract, *purchase order*, or other agreement with the prime contractor, the *contracting officer may* determine-

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

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

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

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

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

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

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

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

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

32.112-2 Subcontractor requests for information.

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

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

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

prime contractor.

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

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

(2) Properly classified pursuant to such Executive order.

32.113 Customary contract financing.

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

(a) Financing of shipbuilding, or ship conversion, alteration, or repair, when agency regulations provide for progress payments based on a percentage or stage of completion.

(b) Financing of *construction* or *architect-engineer services* purchased under the authority of part 36.

(c) Financing of contracts for *supplies* or services awarded under the sealed bid method of *procurement* in accordance with part 14 through progress payments based on costs in accordance with subpart 32.5.

(d) Financing of contracts for *supplies* or services awarded under the competitive negotiation method of *procurement* in accordance with part 15, through either progress payments based on costs in accordance with subpart 32.5, or performance-based payments in accordance with subpart 32.10 (but not both).

(e) Financing of contracts for *supplies* or services awarded under a sole-source *acquisition* as defined in 2.101 and using the procedures of part 15, through either progress payments based on costs in accordance with subpart 32.5, or performance-based payments in accordance with subpart 32.10 (but not both).

(f) Financing of contracts for *supplies* or services through advance payments in accordance with subpart 32.4.

(g) Financing of contracts for *supplies* or services through guaranteed loans in accordance with subpart 32.3.

(h) Financing of contracts for *supplies* or services through any appropriate combination of advance payments, guaranteed loans, and either performance-based payments or progress payments (but not both) in accordance with their respective subparts.

32.114 Unusual contract financing.

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

provided for in agency regulations.