

agency chief acquisition officer. An attachment to the Administrator's May 31, 2007 memorandum entitled, *Enhancing Competition in Federal Acquisition*, contains a list of questions designed to assist competition advocates in assessing the quality of competitive practices at their agencies. The policy memorandum and attachment can be found at [http://www.whitehouse.gov/omb/procurement/comp\\_contracting/competition\\_memo\\_053107.pdf](http://www.whitehouse.gov/omb/procurement/comp_contracting/competition_memo_053107.pdf). This FAR case implements this policy change.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, *Regulatory Planning and Review*, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

### B. Regulatory Flexibility Act

The Regulatory Flexibility Act does not apply to this rule. This final rule does not constitute a significant FAR revision within the meaning of FAR 1.501 and Public Law 98-577, and publication for public comments is not required. However, the Councils will consider comments from small entities concerning the affected FAR Part 6 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (FAC 2005-27, FAR case 2007-007), in correspondence.

### C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

### List of Subjects in 48 CFR Part 6

Government procurement.

Dated: September 9, 2008.

Al Matera,

Director, Office of Acquisition Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR part 6 as set forth below:

### PART 6—COMPETITION REQUIREMENTS

1. The authority citation for 48 CFR part 6 continues to read as follows:

**Authority:** 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

2. Amend section 6.502 by—

- a. Revising the introductory text of paragraphs (b)(1) and (b)(2);
- b. Removing from the end of the paragraph (b)(2)(v) the word “and”;
- c. Adding to the end of paragraph (b)(2)(vi) the word “and”;

d. Adding a new paragraph (b)(2)(vii); and

e. Revising paragraphs (b)(3) and (b)(4) to read as follows:

#### 6.502 Duties and Responsibilities.

\* \* \* \* \*

(b) \* \* \*

(1) Review the contracting operations of the agency and identify and report to the agency senior procurement executive and the chief acquisition officer—

\* \* \* \* \*

(2) Prepare and submit an annual report to the agency senior procurement executive and the chief acquisition officer in accordance with agency procedures, describing—

\* \* \* \* \*

(vii) Initiatives that ensure task and delivery orders over \$1,000,000 issued under multiple award contracts are properly planned, issued, and comply with 8.405 and 16.505.

(3) Recommend goals and plans for increasing competition on a fiscal year basis to the agency senior procurement executive and the chief acquisition officer; and

(4) Recommend to the agency senior procurement executive and the chief acquisition officer a system of personal and organizational accountability for competition, which may include the use of recognition and awards to motivate program managers, contracting officers, and others in authority to promote competition in acquisition.

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## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Parts 12, 13, 32, 33, 36, 42, and 52

[FAC 2005-27; FAR Case 2005-018; Item Vi; Docket 2006-0020; Sequence 11]

RIN 9000-AK59

#### Federal Acquisition Regulation; FAR Case 2005-018, Contract Debts

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

**ACTION:** Final rule.

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense

Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to revise the policies and procedures for contract debts.

**DATES:** *Effective Date:* October 17, 2008

**FOR FURTHER INFORMATION CONTACT:** Ms. Meredith Murphy, Procurement Analyst, at (202) 208-6925 for clarification of content. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501-4755. Please cite FAC 2005-27, FAR case 2005-018.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

In 2003, the DoD Comptroller established the DoD Accounts Receivable Workgroup to evaluate the processes and procedures for reporting accounts receivables. This Workgroup concluded that contracting officers may not be properly reporting contract debts. Based on the Workgroup's recommendations, DoD established a Contract Debt Integrated Process Team (IPT).

The mission of the IPT was to evaluate the adequacy of DoD's existing controls and procedures for ensuring that contract debts are identified and recovered in a timely manner, properly accounted for in DoD's books and records, and properly coordinated with the appropriate Government officials. Contract debts result from compliance, or a failure to comply, with the terms of a contract and include debts identified by auditors, contracting officers, disbursing officials, and contractors. On May 26, 2005, a final report was issued that included a number of recommended FAR changes to improve contract debt controls and procedures, and to ensure consistency within/between existing regulations.

The Councils established this case to evaluate the DoD recommendations and apply them, where appropriate, Governmentwide. The rule makes the following changes:

1. *Reorganizes FAR 32.6.* Reorganizes FAR 32.6 to add clarity and provide a logical sequence. The section has been reorganized as follows:

- 32.600—Scope of subpart.
- 32.601—General.
- 32.602—Responsibilities.
- 32.603—Debt determination.
- 32.604—Demand for payment.
- 32.605—Final decisions.
- 32.606—Debt collection.
- 32.607—Installment payments and deferment of collection.
- 32.608—Interest.
- 32.609—Delays in receipt of notices or demands.

32.610—Compromising debts.

32.611—Contract clause.

2. *Scope of Subpart.* Revises FAR 32.600 to provide a more accurate description of the scope of this FAR subpart. FAR Subpart 32.6 prescribes policies and procedures for identifying, collecting, and deferring collection of contract debts (including interest, if applicable).

3. *Responsible Official.* Replaces the term “responsible official” with the specific individual/organization responsible for fulfilling the FAR requirement. Some of the responsibilities currently listed are assigned to one individual/organization (e.g., the Procuring Contracting Officer) and other responsibilities are assigned to another individual/organization (e.g., the payment office). To assure a clear understanding of the process and applicable duties, the rule specifies the responsible party for each required action (e.g., the Procuring Contracting Officer, the Administrative Contracting Officer, the payment office, etc.) rather than referring to all parties as “responsible officials.”

4. *Contract Debt—General.* Revises FAR 32.601 to specify what constitutes a contract debt, rather than how a contract debt may arise. In addition, this section is amended to include payments determined to be in excess of contract limitations for commercial financing, because such payments constitute a contract debt.

5. *Contract Debt Responsibilities—Identifying, Demanding Payment, Collecting, and Liquidating.* Adds a section to clearly define the responsibilities of the contracting officer and the payment officials to assure an efficient and non-duplicative process. Under the rule—

a. The contracting officer is responsible for identifying a contract debt and demanding payment of a contract debt. The contracting officer is prohibited from collecting contract debts or otherwise liquidating contract debts (e.g., offsetting the amount of the debt against existing unpaid bills due the contractor or allowing contractors to retain contract debts to cover amounts that may be payable to the contractor in the future); and

b. The payment office is responsible for collecting payment of the contract debt and liquidating the contract debt.

6. *Contract Debt Determinations.* Consolidates all discussions of contract debt determinations in FAR 32.603, Debt Determinations, including the responsibility of the contracting officer in making debt determinations.

7. *Tax Credit.* Deletes the current FAR 32.607 because the referenced tax credit

(Sec. 1481) was repealed on November 5, 1990, by Public Law 101–508.

8. *Demand for Payment.* Consolidates all discussions of the demand for payment in a single section, at FAR 32.604, Demand for payment, to include—

a. A requirement to issue the demand letter except in specific circumstances;

b. A requirement that the demand letter include accounting information to enable the payment office to correctly record the amounts in the proper accounts;

c. A requirement that the demand letter include the amount of interest owed under statutes that require interest assessments from the date of noncompliance to the date of repayment (CAS and TINA).

d. A paragraph implementing the requirements of 31 U.S.C. 3717(e)(1) and the Debt Collection Improvement Act of 1996; and

e. A paragraph addressing instances where overpayments exist but a demand for payment is not necessary.

9. *Final Decisions.* Consolidates all discussions of final decisions in a single section at FAR 32.605, Final Decisions, to include—

a. When a final decision must be issued;

b. A statement that the due date for a demand letter is not extended simply because a final decision is being issued; and

c. A need to obtain evidence of receipt by the contractor to establish the starting date for interest computations and the statute of limitations.

10. *Debt Collection.* Consolidates all discussions of debt collection in a single section, at FAR 32.606, Debt Collection, to include—

a. The current requirements at FAR 32.612;

b. The current requirements for transferring debts to the Department of Treasury; and

c. A requirement to assure the debt is being collected by maintaining communication between the contracting officer and the payment office.

11. *Installment Payments and Deferment of Collection.* Clarifies procedures for processing installment payments and deferment of collection requests.

12. *Interest.* Consolidates and simplifies all discussions of interest in a single section, at FAR 32.608, Interest, to include—

a. The substance of the current language at FAR 32.614; and

b. *Computing interest credits.* The discussion focuses on how to compute the interest, i.e., from the time of overcollection until the time the

overcollection is remitted to the contractor.

13. Revises FAR 12.215 and 32.008 to refer to the responsibilities of the contracting officer at 32.604 when notified by the contractor of an overpayment.

14. *FAR Contract Clauses—Payment.* Revises the contract clauses at FAR 52.212–4(i)(5) and (6); 52.232–25(d); 52.232–26(c); and FAR 52.232–27(l) to assure that the contractor remits payment to the payment office (rather than the contracting officer) and the payment office is able to properly account for the remittance. Also, revises Alternate I of the clause at FAR 52.212–4 to be consistent with the requirements of the basic clause.

15. *FAR 52.232–17, Interest.* Revises FAR 52.232–17 to conform with the other revisions.

16. FAR 52.212–4 and 52.232–17. Revises the subject clauses to be consistent with the policy at FAR Part 32:

a. The Government’s right to make a demand for payment and start the interest clock running under the contract is ensured by adding a procedure to the Interest Clause permitting a demand for payment.

b. The Government’s right to make a demand for payment without first issuing a final decision of the contracting officer is ensured by incorporating the procedure into the interest clause. A final decision is required only if the contractor disagrees with the demand for payment.

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 71 FR 62230, October 24, 2006. Comments were received from three respondents in response to the proposed rule. The Councils considered all of the comments and recommendations in developing the final rule. A discussion of the comments is provided below.

#### **B. Disposition of Comments:**

1. *Comment.* One commenter recommended deleting the requirement at FAR 32.607–2(a)(2) for contractors to provide contracting officers information on the advisability of debt deferment to avoid possible over-collections when the contractor is not disputing the debt. When the contractor does not dispute the debt, there can be no over-collection.

*Response.* Under the Contract Disputes Act of 1978, contractors have one year to file an appeal. While a contractor may not initially dispute the claim, a contractor can subsequently decide to file an appeal within the statutory time limits. Therefore, over-collections can occur when a contractor

does not initially dispute the claim but subsequently files a claim. However, the office designated in agency procedures is responsible for determining whether the deferment of collection should be granted to avoid possible over-collections. That determination does not require input from the contractor. Therefore, the Councils deleted the requirement as recommended. In addition, the proposed rule also required contractors to provide the same information when the contractor is disputing the debt. The Councils also deleted that requirement since the determination does not require input from the contractor.

2. *Comment.* One commenter recommended moving the requirement at FAR 32.607-2(c)(2) for contracting officers to consider any information necessary to develop a recommendation on a deferment request before the requirement for the contracting officer to forward the recommendation on the deferment request to the office designated in agency procedures since the contracting officer should consider the information before developing and sending the recommendation.

*Response.* The Councils agreed and revised the rule as recommended.

3. *Comment.* One commenter said the statement at FAR 32.607-2(d) that an agency is required to use current year unexpired funds to pay interest on over-collections is unnecessary since the information is related to a financial management matter, not a contracting matter.

*Response.* The rule requires contracting officers to provide a recommendation on the contractor's request for a deferment of collection, including the advisability of deferment to avoid possible over-collections. Contracting officers need to know the possible ramifications of over-collections to make an informed recommendation.

4. *Comment.* One commenter stated that "actions filed by contractors shall not suspend or delay collection" in the last paragraph at FAR 32.607-2(j), "deferment of collection," made no sense since the subsection provides the rule for processing a deferment to suspend or defer collection. The commenter recommended rewording the requirement to say "the filing of an action under the Disputes clause does not suspend or delay the need for collection of a debt" and moving the requirement to the beginning of the subsection.

*Response.* The Councils agree and revised the rule as recommended.

5. *Comment.* One commenter said the statement in FAR 32.607-2(j) that "until

the action is decided" was unnecessary and confusing since contractors do not have to file an "action" or appeal in order to be eligible for a deferment of collection.

*Response.* The Councils agree and deleted the statement.

6. *Comment.* One commenter recommended deleting the requirement at FAR 32.607-2(j) for contractors to present "a good and sufficient bond or other acceptable collateral in the amount of the claim" for a deferment of collection because the requirement conflicts with the requirements that allow deferment of collections when a claim is not filed. The contractor's financial condition and promise to pay are considered "other acceptable collateral." Also, the requirement for the contractor to present the collateral to the contracting officer within 30 days of filing a dispute makes no sense because there is no time limit requirement for filing a dispute.

*Response.* A contractor's financial condition and promise to pay are not "other acceptable collateral." Collateral is property pledged by a contractor to protect the interests of the Government. However, the office designated in agency procedure, not the contracting officer, is responsible for determining whether a bond or other acceptable collateral is needed. Therefore, the Councils deleted the statement as recommended.

7. *Comment.* One commenter said the statement at FAR 32.607-2(j) that "any amount collected by the Government in excess of the amount found to be due on appeal shall be refunded to the contractor with interest" was misplaced since there can be no excess collection if payment is deferred. Also, this requirement would apply to cases where there is no deferment of collection but including it only in the subpart on deferment of collection means it would only apply to cases with deferments of collection. The requirement should be addressed in subsection FAR 32.608-2 on "interest credits." Further, the requirement says interest will be refunded to the contractor for any amounts collected by the Government in excess of the amount found due on appeal from "the date of collection" conflicts with the requirements in the subsection on "interest credits" that says the interest will be computed from the "date specified in the first demand for payment." If the requirement is addressed in the subsection on "interest credits," the last sentence of subpart FAR 32.607-2(j) that includes additional requirements for calculating interest on excess amounts collected by

the Government becomes unnecessary and should be deleted.

*Response.* The requirements of the subpart apply to all contractor requests for deferment of collections, not just to deferments granted by the Government. Therefore, there can be over-collections when the Government does not grant the deferment of collections. In addition, the requirements apply to all Government over-collections, not just those involving deferment of collections. Therefore, the coverage was relocated to the subsection on interest credits, and the last sentence of subpart 32.607-2(j) was deleted as recommended. Also, the methodology for calculating interest in the subpart did conflict with the methodology in the subpart on "interest credits." Therefore, the rule was revised to make the requirements consistent. Interest on Government over-collections begins on the date of over-collection, not the date of the first demand for payment.

8. *Comment.* One commenter recommending deleting the methodology for computing interest charges from 32.608-1(a)(2) because it duplicates coverage in the clause at FAR 52.232-7, Interest.

*Response.* The Councils agree the language is redundant and deleted the text as recommended.

9. *Comment.* One commenter recommended adding the requirement for making interest on contract debts part of the required elements for deferment agreements at 32.608-2(g) and deleting the requirement at 32.608-1(b) because it duplicates coverage at 32.607(c) on installment payments and deferment of collection.

*Response.* The Councils agree and revised the rule as recommended.

10. *Comment.* One commenter recommended revising the coverage at 32.608-2(b)(1) on interest credits to say interest "to be credited" instead of interest "to be charged" since the subsection deals with "interest credits."

*Response.* The Councils disagree and leave the rule as is.

11. *Comment.* One commenter said including information such as lines of accounting in the demand for payment is excessive and not particularly relevant to the contractor. Instead, require the contracting officer to provide the distribution of the debt by line of accounting and "additional information" to allow the payment or finance office to identify the affected lines of accounting, appropriations, and contracts, when the demand for payment is forwarded to the payment office. Finance offices have procedures for debt collection or other recovery of monies owed that are in accordance

with Department of Treasury regulations and policy. Most payment offices also know how to apply payments. Some of these procedures may overlap other policy or regulations such as those issued by the Department of Treasury.

*Response.* The lines of accounting are required for agency finance or payment offices to properly record the debt. If the lines of accounting are not readily available, the rule authorizes issuing the demand for payment without the lines of accounting. The Councils see no reason to require contracting officers to separately report the lines of accounting if the information is readily available when the demand for payment is made. In addition, the Councils are unaware of any conflict with Treasury or other agency's policy or regulations.

12. *Comment.* One commenter recommended combining the requirements of FAR 32.604(b)(4)(iii) and (i).

*Response.* The Councils believe the commenter is recommending combining the requirements at FAR 32.604(b)(4)(iii) and FAR 32.604(b)(4)(i). Both references discuss the methodology for calculating interest on contract debts that result from specific contract terms. The Councils agree and have revised the rule as recommended.

13. *Comment.* One commenter said the rule should also allow contractors to remit checks "payable to the agency," instead of requiring that the checks be "payable to the Treasurer of the United States" because payments due an agency are made payable to the agency.

*Response.* Section 2015 of the Treasury Financial Manual (TFM) says checks should be made payable to the organization maintaining the account to be credited, not to the Department of Treasury. Therefore, the Councils revised the rule to be consistent with the TFM.

14. *Comment.* One commenter asked whether the required notification at 32.604(b)(6) that the payment office may offset the debt against any payments otherwise due the contractor means any payment owed to the contractor by any Federal agency under any contract or only payments under the cognizant contract or other contracts awarded by the agency issuing the demand for payment.

*Response.* For the first 180 days after the demand for payment, the agency issuing the demand for payment will attempt to offset the debt against any payments otherwise due from the agency to the contractor. If an agency is unable to recover the debt within 180 days, agencies are required to transfer the debt to the Department of Treasury in accordance with the Debt Collection

Improvement Act of 1996. The Department of Treasury will then offset the debt against any payment made by a Federal agency under any contract and other Federal payments to the delinquent debt holder under the cognizant contract or other contracts awarded by the agency issuing the demand letter.

15. *Comment.* One commenter recommended including a statement in the required notice at FAR 32.604(b)(8) that requests for installment payments or deferment of collection must be written, provided to the contracting officer, and include "any information required."

*Response.* The commenter did not provide rationale for the change; however, the rule already requires that requests for installment payments or deferment of collection be written (see 32.607-1 and 32.607-2(a)). The rule also identifies to whom the contractor should submit its request, *i.e.*, payment office for installment payments and contracting officer for deferment of collections. Finally, nothing in the rule precludes agencies from requiring contractors to provide additional information to make a decision on a request for installment payments or deferment.

16. *Comment.* One commenter asked if there was a point in time that the contracting officer is expected to do more than follow up with the payment office to determine whether the debt has been collected and credited to the correct appropriations.

*Response.* The payment office is responsible for collecting debts identified by the contracting officer. As discussed above, agencies are required to transfer any debt that is delinquent more than 180 days to the Department of Treasury for collection. The Department of Treasury then offsets the debt against any payment made by a Federal agency under any contract and other Federal payments to the delinquent debt holder. As stated in the rule, contracting officers are not authorized to collect contract debts or otherwise agree to liquidate contract debts.

17. *Comment.* One commenter said the requirement at 32.607(a) that the contracting officer cannot approve or deny a contractor's request for installment payments or deferment of collections appears to contradict the requirement at FAR 32.605(a)(3) for the contracting officer to issue a final decision if the contractor requests a deferment of collection on a debt previously demanded by the contracting officer.

*Response.* Approving or denying a contractor's request for installment payments or deferment of collections is not the same as issuing a final decision. The contracting officer is required to issue a demand for payment as soon as the contracting officer has determined the existence and amount of a debt. In most cases, contractors willingly repay the debt after receiving the demand for payment. If a contractor instead requests a deferment of collection or otherwise does not repay the debt in accordance with the demand for payment, the Government is required to initiate a claim against the contractor to ensure the debt is repaid. Government claims require a contracting officer's final decision under the Contract Disputes Act.

18. *Comment.* One commenter said the proposed coverage at 32.607(b)(1) on the circumstances that might justify debt deferment or installment payments when the contractor has not appealed the debt or filed an action under the disputes clause appears to be information necessary for agency financing offices, not contracting officers, since the office designed to approve or deny these actions is probably the payment or finance office. The commenter questioned the purpose of and need for its inclusion in the FAR.

*Response.* Contracting officers are required to provide the office designated in agency procedures for a decision on a deferment request a recommendation on the requests. Therefore, contracting officers need to understand the circumstances that might justify a deferment of collection. In addition, if the contractor's operations under national defense contracts will be seriously impaired by immediate repayment, the contracting officer should provide the payment or finance office information that will be considered for an installment payment agreement or debt deferment. The Councils note the subject requirements are not changed by this rule.

19. *Comment.* One commenter questioned the need for the deferment/installment agreement requirements at 32.607(b)(2) in the FAR since contracting officers are not authorized to approve or deny requests for deferments or installment payments.

*Response.* The Councils note the subject requirements are not changed by this rule. The Councils believe it is appropriate to include the language so contracting officers and contractors understand what will be required if an agreement is reached. While the contracting officers do not approve or deny these requests, contracting officers

routinely provide contractors assistance when preparing the requests.

20. *Comment.* One commenter questioned how the requirement for the contracting officer to forward to the office designated in agency procedures for a decision (a) a copy of the contractor's request for a deferment of collection, (b) a recommendation on that request, (c) a statement as to whether the contractor has an appeal pending or action filed under the disputes clause, and (d) a copy of the contracting officer's final decision (see 32.607–2(c)(1)) is different from the contracting officer's final decision.

*Response.* The contracting officer's final decision is one of the four items the contracting officer is required to forward to the office designated in agency procedure for a decision on the deferment request. The other required items provide additional information used by the office designated in agency procedure for a decision on the deferment request. Finally, a contracting officer has sole authority to determine the existence and amount of contract debts and to issue the final decision. That contracting officer's final decision is not subject to any other office's decision.

21. *Comment.* One commenter said the coverage at 32.607–2(f) that states contracts and arrangements for deferment shall not provide that a claim of the Government will not become due and payable pending mutual agreement on the amount of the claim or, in the case of dispute, until a decision is reached is confusing and unclear as to its meaning.

*Response.* The Councils note that the coverage is not changed by this rule. However, the Councils believe stating 'contracts and arrangements for deferments' could be confusing since deferment agreements are binding contracts between the contractor and the Government. Therefore, the Councils deleted the reference to "contracts" and changed "arrangements for deferment" to "deferment agreements" to clarify the requirement. The remaining coverage says that the Government retains the right to collect the debt at any time. The Councils are unaware of any problems with this coverage.

22. *Comment.* One commenter asked if the deferment agreement is a contract or whether the agreement should be incorporated into the contract to ensure the agreement is legally binding.

*Response.* There is no need to incorporate the agreements into the affected contracts because the agreements themselves are legally binding contracts between the contractor and the Government.

23. *Comment.* One commenter recommended revising the coverage on "compromise" at 32.610 because the contracting officer has the authority to settle any Government claim under the Contract Disputes Act at any time except for claims pending litigation, which are the responsibility of the Attorney General. While the term "compromise" is not defined in the Federal Claims Collection Act or the implementing regulations at 31 CFR 900.2, Black's Law Dictionary defines "compromise" as settlement. The commenter recommended revising the coverage to allow contracting officers to "compromise" debt claims that fall under the Contract Disputes Act to be consistent with FAR 33.204 and 33.210.

*Response.* Contracting officers have the authority to resolve all contractual issues in controversy. Contracting officers do not have the authority to compromise any resulting debt after the controversial issues have been resolved.

24. *Comment.* One commenter recommended requiring contracting officers to attempt to resolve any disputes over the existence of a debt or the amount through negotiations as part of the initial debt determination at FAR 32.605(a) to be consistent with the requirements at FAR 33.204.

*Response.* The rule is consistent with FAR 33.204, which requires contracting officers to use reasonable efforts to resolve controversies prior to the submission of a claim. Making a debt determination does not constitute submission of a claim. A Government claim is submitted when the contracting officer issues a final decision on the claim. Nothing in the rule prevents the Government from attempting to resolve controversies prior to the contracting officer's final decision.

25. *Comment.* One commenter said the coverage on final decisions at FAR 32.605 duplicates the coverage on contracting officer's decisions at FAR 33.211. The commenter also said all coverage on final decisions should be addressed in one FAR section and that section should be FAR Subpart 33.2, Disputes and Appeals.

*Response.* FAR 32.6 prescribes the policies and procedures for identifying, collecting, and deferring contract debts. Part 33 prescribes policies and procedures for processing contract disputes and appeals. Contracting officer's final decisions are key to both processes. Therefore, the Councils believe it is appropriate to include coverage in both subparts.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and

Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

### C. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the regulatory changes are predominantly internal operating procedures for contracting officers and will not significantly change duties of small entities under their contract.

### D. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

### List of Subjects in 48 CFR Parts 12, 13, 32, 33, 36, 42, and 52

Government procurement.

Dated: September 9, 2008.

Al Matera,

Director, Office of Acquisition Policy.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 12, 13, 32, 33, 36, 42, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 12, 13, 32, 33, 36, 42, and 52 continues to read as follows:

**Authority:** 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

### PART 12—ACQUISITION OF COMMERCIAL ITEMS

■ 2. Revise section 12.215 to read as follows:

#### 12.215 Notification of overpayment.

If the contractor notifies the contracting officer of a duplicate payment or that the Government has otherwise overpaid, the contracting officer shall follow the procedures at 32.604.

### PART 13—SIMPLIFIED ACQUISITION PROCEDURES

■ 3. Amend section 13.401 by revising paragraph (b) to read as follows:

#### 13.401 General.

\* \* \* \* \*

(b) The contracting officer shall be primarily responsible for determining the amount of debts resulting from failure of contractors to properly

replace, repair, or correct supplies lost, damaged, or not conforming to purchase requirements (see 32.602 and 32.603).

#### **PART 32—CONTRACT FINANCING**

■ 4. Revise section 32.008 to read as follows:

##### **32.008 Notification of overpayment.**

If the contractor notifies the contracting officer of a duplicate payment or that the Government has otherwise overpaid, the contracting officer shall follow the procedures at 32.604.

■ 5. Revise Subpart 32.6 to read as follows:

*Sec.*

32.600 Scope of subpart.

32.601 General.

32.602 Responsibilities.

32.603 Debt determination.

32.604 Demand for payment.

32.605 Final decisions.

32.606 Debt collection.

32.607 Installment payments and deferment of collection.

32.607-1 Installment payments.

32.607-2 Deferment of collection.

32.608 Interest.

32.608-1 Interest charges.

32.608-2 Interest credits.

32.609 Delays in receipt of notices or demands.

32.610 Compromising debts.

32.611 Contract clause.

#### **Subpart 32.6—Contract Debts**

##### **32.600 Scope of subpart.**

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

##### **32.601 General.**

(a) Contract debts are amounts that—

- (1) Have been paid to a contractor to which the contractor is not currently entitled under the terms and conditions of the contract; or
- (2) Are otherwise due from the contractor under the terms and conditions of the contract.

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

- (1) Billing and price reductions resulting from contract terms for price redetermination or for determination of prices under incentive type contracts.
- (2) Price or cost reductions for defective cost or pricing data.
- (3) Financing payments determined to be in excess of the contract limitations at 52.232-16(a)(7), Progress Payments, or 52.232-32(d)(2), Performance—Based

Payments, or any contract clause for commercial item financing.

- (4) Increases to financing payment liquidation rates.
- (5) Overpayments disclosed by quarterly statements required under price redetermination or incentive contracts.
- (6) Price adjustments resulting from Cost Accounting Standards (CAS) noncompliances or changes in cost accounting practice.
- (7) Reinspection costs for nonconforming supplies or services.
- (8) Duplicate or erroneous payments.
- (9) Damages or excess costs related to defaults in performance.
- (10) Breach of contract obligations concerning progress payments, performance-based payments, advance payments, commercial item financing, or Government-furnished property.
- (11) Government expense of correcting defects.
- (12) Overpayments related to errors in quantity or billing or deficiencies in quality.
- (13) Delinquency in contractor payments due under agreements or arrangements for deferral or postponement of collections.
- (14) Reimbursement of amounts due under 33.102(b)(3) and 33.104(h)(8).

Payments, or any contract clause for commercial item financing.

(4) Increases to financing payment liquidation rates.

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

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

(7) Reinspection costs for nonconforming supplies or services.

(8) Duplicate or erroneous payments.

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

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

(11) Government expense of correcting defects.

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

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

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

##### **32.602 Responsibilities.**

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

(b) The payment office has primary responsibility for—

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

(2) Identifying and collecting duplicate and erroneous payments; and

(3) Authorizing the liquidation of contract debts in accordance with agency procedures.

##### **32.603 Debt determination.**

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

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

(2) Increased difficulty in collecting the debt; or

(3) Actual monetary loss to the Government.

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

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

(2) Is consistent with the contract terms.

##### **32.604 Demand for payment.**

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

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

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

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

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

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

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

- (A) Consider the affected departments or agencies, years of appropriations, and the predominant types of appropriations; and
- (B) Not distribute to any line of accounting an amount of the principal in excess of the total obligation for the line of accounting; and
- (iii) Include the lines of accounting even if the associated funds are expired or cancelled. While cancelled funds will be deposited in a miscellaneous receipt account of the Treasury if collected, the funds are tracked under the closed year appropriation(s) to comply with the Anti-Deficiency Act.
- (iv) If the debt affects multiple contracts and the lines of accounting are not readily available, the contracting officer shall—

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

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

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

- (A) Consider the affected departments or agencies, years of appropriations, and the predominant types of appropriations; and
- (B) Not distribute to any line of accounting an amount of the principal in excess of the total obligation for the line of accounting; and
- (iii) Include the lines of accounting even if the associated funds are expired or cancelled. While cancelled funds will be deposited in a miscellaneous receipt account of the Treasury if collected, the funds are tracked under the closed year appropriation(s) to comply with the Anti-Deficiency Act.
- (iv) If the debt affects multiple contracts and the lines of accounting are not readily available, the contracting officer shall—

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

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

- (A) Consider the affected departments or agencies, years of appropriations, and the predominant types of appropriations; and
- (B) Not distribute to any line of accounting an amount of the principal in excess of the total obligation for the line of accounting; and
- (iii) Include the lines of accounting even if the associated funds are expired or cancelled. While cancelled funds will be deposited in a miscellaneous receipt account of the Treasury if collected, the funds are tracked under the closed year appropriation(s) to comply with the Anti-Deficiency Act.
- (iv) If the debt affects multiple contracts and the lines of accounting are not readily available, the contracting officer shall—

- (A) Consider the affected departments or agencies, years of appropriations, and the predominant types of appropriations; and
- (B) Not distribute to any line of accounting an amount of the principal in excess of the total obligation for the line of accounting; and
- (iii) Include the lines of accounting even if the associated funds are expired or cancelled. While cancelled funds will be deposited in a miscellaneous receipt account of the Treasury if collected, the funds are tracked under the closed year appropriation(s) to comply with the Anti-Deficiency Act.
- (iv) If the debt affects multiple contracts and the lines of accounting are not readily available, the contracting officer shall—

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

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

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

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

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

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

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

(ii) For all other contract debts, a notification stating that any amounts not paid within 30 days from the date of the demand for payment will bear interest. Interest shall be computed from the date of the demand for payment until repayment by the contractor. The interest rate shall be the interest rate established by the Secretary of the Treasury, as provided in Section 611 of the Contract Disputes Act of 1978 (Public Law 95-563), which is applicable to the period in which the amount becomes due, and then at the rate applicable for each six-month period as established by the Secretary until the amount is paid.

(5) A statement advising the contractor—

(i) To contact the contracting officer if the contractor believes the debt is invalid or the amount is incorrect; and

(ii) If the contractor agrees, to remit a check payable to the agency's payment office annotated with the contract number along with a copy of the demand for payment to the payment office identified in the contract or as otherwise specified in the demand letter in accordance with agency procedures.

(6) Notification that the payment office may initiate procedures, in

accordance with the applicable statutory and regulatory requirements, to offset the debt against any payments otherwise due the contractor.

(7) Notification that the debt may be subject to administrative charges in accordance with the requirements of 31 U.S.C. 3717(e) and the Debt Collection Improvement Act of 1996.

(8) Notification that the contractor may submit a request for installment payments or deferment of collection if immediate payment is not practicable or if the amount is disputed.

(c) Except as provided in paragraph (d) of this section, the contracting officer should not issue a demand for payment if the contracting officer only becomes aware of the debt when the contractor—

(1) Provides a lump sum payment or submits a credit invoice. (A credit invoice is a contractor's request to liquidate the debt against existing unpaid bills due the contractor); or

(2) Notifies the contracting officer that the payment office overpaid on an invoice payment. When the contractor provides the notification, the contracting officer shall notify the payment office of the overpayment.

(d) If a demand for payment was not issued as provided for in paragraph (c) of this section, the contracting officer shall issue a demand for payment no sooner than 30 days after the contracting officer becomes aware of the debt unless—

(1) The contractor has liquidated the debt;

(2) The contractor has requested an installment payment agreement; or

(3) The payment office has issued a demand for payment.

(e) The contracting officer shall—

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

(2) Forward a copy of the demand to the payment office.

### 32.605 Final decisions.

(a) The contracting officer shall issue a final decision as required by 33.211 if—

(1) The contracting officer and the contractor are unable to reach agreement on the existence or amount of a debt in a timely manner;

(2) The contractor fails to liquidate a debt previously demanded by the contracting officer within the timeline specified in the demand for payment unless the amounts were not repaid because the contractor has requested an installment payment agreement; or

(3) The contractor requests a deferment of collection on a debt

previously demanded by the contracting officer (see 32.607-2).

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

(c) The contracting officer shall—

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

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

### 32.606 Debt collection.

(a) If the contractor has not liquidated the debt within 30 days of the date due or requested installment payments or deferment of collection, the payment office shall initiate withholding of principal, interest, penalties, and administrative charges. In the event the contract is assigned under the Assignment of Claims Act of 1940 (31 U.S.C. 3727 and 41 U.S.C. 15), the rights of the assignee will be scrupulously respected and withholding of payments shall be consistent with those rights. For additional information on assignment of claims, see Subpart 32.8.

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

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

### 32.607 Installment payments and deferment of collection.

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

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

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



securities and should be limited to the shortest practicable maturity; and

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

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

#### **32.607-1 Installment payments.**

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

#### **32.607-2 Deferment of collection.**

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

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

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

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

- (i) Financial condition.
- (ii) Contract backlog.
- (iii) Projected cash receipts and requirements.
- (iv) The feasibility of immediate payment of the debt.
- (v) The probable effect on operations of immediate payment in full.

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

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

(2) The contracting officer shall forward the following to the office

designated in agency procedures for a decision:

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

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

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

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

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

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

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

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

- (1) A description of the debt.
- (2) The date of first demand for payment.

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

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

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

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

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

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

(1) Diligently prosecute the appeal; and

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

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

#### **32.608 Interest.**

##### **32.608-1 Interest charges.**

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

(a) The contract is a kind excluded under 32.611; or

(b) The contract or debt has been exempted from interest charges under agency procedures.

##### **32.608-2 Interest credits.**

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

(1) When the amount of debt initially determined is subsequently reduced; *e.g.*, through a successful appeal.

(2) When any amount collected by the Government is in excess of the amount found to be due on appeal under the Disputes Clause of the contract.

(3) When the collection procedures followed in a given case result in an overcollection of the debt due.

(4) When the responsible official determines that the Government has unduly delayed payments to the contractor on the same contract at some time during the period to which the interest charge applied, provided an interest penalty was not paid for such late payment.

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

(1) Interest at the rate under 52.232-17 shall be charged on the reduced debt from the date of collection by the Government until the date the monies are remitted to the contractor.

(2) Interest may not be reduced for any time between the due date under the demand and the period covered by a deferment of collection, unless the contract includes an interest clause; *e.g.*, the clause prescribed in 32.611.

(3) Interest shall not be credited in an amount that, when added to other amounts refunded or released to the contractor, exceeds the total amount



that has been collected, or withheld for the purpose of collecting the debt. This limitation shall be further reduced by the amount of any limitation applicable under paragraph (b)(2) of this subsection.

**32.609 Delays in receipt of notices or demands.**

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

**32.610 Compromising debts.**

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

**32.611 Contract clause.**

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

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

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

**PART 33—PROTESTS, DISPUTES, AND APPEALS**

**33.208 [Amended]**

■ 6. Amend section 33.208 by removing from paragraph (b) “32.614” and adding “the clause at 52.232-17” in its place.

**33.211 [Amended]**

■ 7. Amend section 33.211 by removing from paragraph (a)(4)(vi) “32.610(b)”

and adding “32.604 and 32.605” in its place.

**PART 36—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS**

**36.608 [Amended]**

■ 8. Amend section 36.608 in the fourth sentence by removing “collect” and adding “issue a demand for payment of” in its place.

**PART 42—CONTRACT ADMINISTRATION AND AUDIT SERVICES**

■ 9. Amend section 42.302 by revising paragraph (a)(17) to read as follows:

**42.302 Contract administration functions.**

(a) \* \* \*

(17) Analyze quarterly limitation on payments statements and take action in accordance with Subpart 32.6 to recover overpayments from the contractor.

\* \* \* \* \*

**PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

- 10. Amend section 52.212-4 by—
  - a. Revising the date of the clause;
  - b. Revising paragraph (i)(5);
  - c. Adding paragraph (i)(6); and
  - d. Amending Alternate I as follows:
    - 1. Revising the date of Alternate I;
    - 2. Revising paragraph (i)(5); and
    - 3. Redesignating paragraphs (i)(6) through (i)(9) as (i)(7) through (i)(10), respectively, and adding a new paragraph (i)(6).

The revised and added text reads as follows:

**52.212-4 Contract Terms and Conditions—Commercial Items.**

\* \* \* \* \*

**CONTRACT TERMS AND CONDITIONS—COMMERCIAL ITEMS (OCT 2008)**

\* \* \* \* \*

(i) \* \* \*

(5) *Overpayments.* If the Contractor becomes aware of a duplicate contract financing or invoice payment or that the Government has otherwise overpaid on a contract financing or invoice payment, the Contractor shall—

- (i) Remit the overpayment amount to the payment office cited in the contract along with a description of the overpayment including the—
  - (A) Circumstances of the overpayment (e.g., duplicate payment, erroneous payment, liquidation errors, date(s) of overpayment);
  - (B) Affected contract number and delivery order number, if applicable;
  - (C) Affected contract line item or subline item, if applicable; and
  - (D) Contractor point of contact.
- (ii) Provide a copy of the remittance and supporting documentation to the Contracting Officer.

(6) *Interest.* (i) All amounts that become payable by the Contractor to the Government under this contract shall bear simple interest from the date due until paid unless paid within 30 days of becoming due. The interest rate shall be the interest rate established by the Secretary of the Treasury as provided in Section 611 of the Contract Disputes Act of 1978 (Public Law 95-563), which is applicable to the period in which the amount becomes due, as provided in (i)(6)(v) of this clause, and then at the rate applicable for each six-month period as fixed by the Secretary until the amount is paid.

(ii) The Government may issue a demand for payment to the Contractor upon finding a debt is due under the contract.

(iii) *Final decisions.* The Contracting Officer will issue a final decision as required by 33.211 if—

(A) The Contracting Officer and the Contractor are unable to reach agreement on the existence or amount of a debt within 30 days;

(B) The Contractor fails to liquidate a debt previously demanded by the Contracting Officer within the timeline specified in the demand for payment unless the amounts were not repaid because the Contractor has requested an installment payment agreement; or

(C) The Contractor requests a deferment of collection on a debt previously demanded by the Contracting Officer (see 32.607-2).

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

(v) Amounts shall be due at the earliest of the following dates:

- (A) The date fixed under this contract.
- (B) The date of the first written demand for payment, including any demand for payment resulting from a default termination.

(vi) The interest charge shall be computed for the actual number of calendar days involved beginning on the due date and ending on—

- (A) The date on which the designated office receives payment from the Contractor;
- (B) The date of issuance of a Government check to the Contractor from which an amount otherwise payable has been withheld as a credit against the contract debt; or
- (C) The date on which an amount withheld and applied to the contract debt would otherwise have become payable to the Contractor.

(vii) The interest charge made under this clause may be reduced under the procedures prescribed in 32.608-2 of the Federal Acquisition Regulation in effect on the date of this contract.

\* \* \* \* \*  
Alternate I (OCT 2008). \* \* \*

\* \* \* \* \*

(i) \* \* \*

(5) *Overpayments/Underpayments.* Each payment previously made shall be subject to reduction to the extent of amounts, on preceding invoices, 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. The Contractor shall

promptly pay any such reduction within 30 days unless the parties agree otherwise. The Government within 30 days will pay any such increases, unless the parties agree otherwise. The Contractor's payment will be made by check. If the Contractor becomes aware of a duplicate invoice payment or that the Government has otherwise overpaid on an invoice payment, the Contractor shall—

(i) Remit the overpayment amount to the payment office cited in the contract along with a description of the overpayment including the—

(A) Circumstances of the overpayment (e.g., duplicate payment, erroneous payment, liquidation errors, date(s) of overpayment);

(B) Affected contract number and delivery order number, if applicable;

(C) Affected contract line item or subline item, if applicable; and

(D) Contractor point of contact.

(ii) Provide a copy of the remittance and supporting documentation to the Contracting Officer.

(6)(i) All amounts that become payable by the Contractor to the Government under this contract shall bear simple interest from the date due until paid unless paid within 30 days of becoming due. The interest rate shall be the interest rate established by the Secretary of the Treasury, as provided in section 611 of the Contract Disputes Act of 1978 (Public Law 95-563), which is applicable to the period in which the amount becomes due, and then at the rate applicable for each six month period as established by the Secretary until the amount is paid.

(ii) The Government may issue a demand for payment to the Contractor upon finding a debt is due under the contract.

(iii) *Final Decisions.* The Contracting Officer will issue a final decision as required by 33.211 if—

(A) The Contracting Officer and the Contractor are unable to reach agreement on the existence or amount of a debt in a timely manner;

(B) The Contractor fails to liquidate a debt previously demanded by the Contracting Officer within the timeline specified in the demand for payment unless the amounts were not repaid because the Contractor has requested an installment payment agreement; or

(C) The Contractor requests a deferment of collection on a debt previously demanded by the Contracting Officer (see FAR 32.607-2).

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

(v) Amounts shall be due at the earliest of the following dates:

(A) The date fixed under this contract.

(B) The date of the first written demand for payment, including any demand for payment resulting from a default termination.

(vi) The interest charge shall be computed for the actual number of calendar days involved beginning on the due date and ending on—

(A) The date on which the designated office receives payment from the Contractor;

(B) The date of issuance of a Government check to the Contractor from which an

amount otherwise payable has been withheld as a credit against the contract debt; or

(C) The date on which an amount withheld and applied to the contract debt would otherwise have become payable to the Contractor.

(vii) The interest charge made under this clause may be reduced under the procedures prescribed in 32.608-2 of the Federal Acquisition Regulation in effect on the date of this contract.

(viii) Upon receipt and approval of the invoice designated by the Contractor as the "completion invoice" and supporting documentation, and upon compliance by the Contractor with all terms of this contract, any outstanding balances will be paid within 30 days unless the parties agree otherwise. The completion invoice, and supporting documentation, 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.

\* \* \* \* \*

■ 11. Amend section 52.213-4 by revising the date of the clause and paragraph (a)(2)(iv) to read as follows:

**52.213-4 Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items).**

\* \* \* \* \*

**TERMS AND CONDITIONS—SIMPLIFIED ACQUISITIONS (OTHER THAN COMMERCIAL ITEMS) (OCT 2008)**

\* \* \* \* \*

(a) \* \* \*

(2) \* \* \*

(iv) 52.232-25, Prompt Payment (OCT 2008).

\* \* \* \* \*

■ 12. Revise section 52.232-17 to read as follows:

**52.232-17 Interest.**

As prescribed in 32.611(a) and (b), insert the following clause:

**INTEREST (OCT 2008)**

(a) Except as otherwise provided in this contract under a Price Reduction for Defective Cost or Pricing Data clause or a Cost Accounting Standards clause, all amounts that become payable by the Contractor to the Government under this contract shall bear simple interest from the date due until paid unless paid within 30 days of becoming due. The interest rate shall be the interest rate established by the Secretary of the Treasury as provided in Section 611 of the Contract Disputes Act of 1978 (Public Law 95-563), which is applicable to the period in which the amount becomes due, as provided in paragraph (e) of this clause, and then at the rate applicable for each six-month period as fixed by the Secretary until the amount is paid.

(b) The Government may issue a demand for payment to the Contractor upon finding a debt is due under the contract.

(c) *Final Decisions.* The Contracting Officer will issue a final decision as required by 33.211 if—

(1) The Contracting Officer and the Contractor are unable to reach agreement on the existence or amount of a debt in a timely manner;

(2) The Contractor fails to liquidate a debt previously demanded by the Contracting Officer within the timeline specified in the demand for payment unless the amounts were not repaid because the Contractor has requested an installment payment agreement; or

(3) The Contractor requests a deferment of collection on a debt previously demanded by the Contracting Officer (see 32.607-2).

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

(e) Amounts shall be due at the earliest of the following dates:

(1) The date fixed under this contract.

(2) The date of the first written demand for payment, including any demand for payment resulting from a default termination.

(f) The interest charge shall be computed for the actual number of calendar days involved beginning on the due date and ending on—

(1) The date on which the designated office receives payment from the Contractor;

(2) The date of issuance of a Government check to the Contractor from which an amount otherwise payable has been withheld as a credit against the contract debt; or

(3) The date on which an amount withheld and applied to the contract debt would otherwise have become payable to the Contractor.

(g) The interest charge made under this clause may be reduced under the procedures prescribed in 32.608-2 of the Federal Acquisition Regulation in effect on the date of this contract.

(End of clause)

■ 13. Amend section 52.232-25 by revising the date of the clause and paragraph (d) to read as follows:

**52.232-25 Prompt Payment.**

\* \* \* \* \*

**PROMPT PAYMENT (OCT 2008)**

\* \* \* \* \*

(d) *Overpayments.* If the Contractor becomes aware of a duplicate contract financing or invoice payment or that the Government has otherwise overpaid on a contract financing or invoice payment, the Contractor shall—

(1) Remit the overpayment amount to the payment office cited in the contract along with a description of the overpayment including the—

(i) Circumstances of the overpayment (e.g., duplicate payment, erroneous payment, liquidation errors, date(s) of overpayment);

(ii) Affected contract number and delivery order number if applicable;

(iii) Affected contract line item or subline item, if applicable; and

(iv) Contractor point of contact.

(2) Provide a copy of the remittance and supporting documentation to the Contracting Officer.

(End of clause)

\* \* \* \* \*

■ 14. Amend section 52.232–26 by revising the date of the clause and paragraph (c) to read as follows:

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

\* \* \* \* \*

**PROMPT PAYMENT FOR FIXED-PRICE ARCHITECT-ENGINEER CONTRACTS (OCT 2008)**

\* \* \* \* \*

(c) *Overpayments.* If the Contractor becomes aware of a duplicate contract financing or invoice payment or that the Government has otherwise overpaid on a contract financing or invoice payment, the Contractor shall—

(1) Remit the overpayment amount to the payment office cited in the contract along with a description of the overpayment including the—

(i) Circumstances of the overpayment (*e.g.*, duplicate payment, erroneous payment, liquidation errors, date(s) of overpayment);

(ii) Affected contract number and delivery order number if applicable;

(iii) Affected contract line item or subline item, if applicable; and

(iv) Contractor point of contact.

(2) Provide a copy of the remittance and supporting documentation to the Contracting Officer.

(End of clause)

■ 15. Amend section 52.232–27 by revising the date of the clause and paragraph (l) to read as follows:

**52.232–27 Prompt Payment for Construction Contracts.**

\* \* \* \* \*

**PROMPT PAYMENT FOR CONSTRUCTION CONTRACTS (OCT 2008)**

\* \* \* \* \*

(l) *Overpayments.* If the Contractor becomes aware of a duplicate contract financing or invoice payment or that the Government has otherwise overpaid on a contract financing or invoice payment, the Contractor shall—

(1) Remit the overpayment amount to the payment office cited in the contract along with a description of the overpayment including the—

(i) Circumstances of the overpayment (*e.g.*, duplicate payment, erroneous payment, liquidation errors, date(s) of overpayment);

(ii) Affected contract number and delivery order number if applicable;

(iii) Affected contract line item or subline item, if applicable; and

(iv) Contractor point of contact.

(2) Provide a copy of the remittance and supporting documentation to the Contracting Officer.

(End of clause)

[FR Doc. E8–21382 Filed 9–16–08; 8:45 am]

BILLING CODE 6820-EP-S

**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Part 12**

[FAC 2005–27; FAR Case 2007–022; Item VII; Docket 2008–0001; Sequence 13]

RIN 9000–AL03

**Federal Acquisition Regulation; FAR Case 2007–022, Subcontractor Requests for Bonds**

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

**ACTION:** Final rule.

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to clarify that the clause “Prospective Subcontractor Requests for Bonds” does not apply to commercial items.

**DATES:** *Effective Date:* September 17, 2008.

**FOR FURTHER INFORMATION CONTACT:** Mr. Michael Jackson, Procurement Analyst, at (202) 208–4949 for clarification of content. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755. Please cite FAC 2005–27, FAR case 2007–022.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

The FAR clause at FAR 52.228–12, Prospective Subcontractor Requests for Bonds, implemented Section 806(a)(3) of Public Law 102–190, as amended, which specifies that, upon the request of a prospective subcontractor or supplier offering to furnish labor or material for the performance of a construction contract for which a payment bond has been furnished to the United States pursuant to the Miller Act, the contractor shall promptly provide a copy of such payment bond to the requestor. In conjunction with performance bonds, payment bonds are used in Government construction contracts to secure fulfillment of the contractor’s obligations under the contract and to assure that the contractor makes all payments, as required by law, to persons furnishing labor or material in performance of the contract. The FAR clause at 52.228–12,

which has an effective date of October 1, 1995, reflects the addition of Section 806(a)(3) of Pub L. 102–190, as amended by Sections 2091 and 8105 of Pub. L. 103–355, at FAR 12.503(a) and 12.504(a). When the implementation of FAR 28.106–4 occurred, the appropriate incorporation of the FAR clause at 52.228–12, Prospective Subcontractor Requests for Bonds, was accomplished, but not the incorporation of the associated statutory citation in FAR 12.503 and 12.504.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

**B. Regulatory Flexibility Act**

The Regulatory Flexibility Act does not apply to this rule. This final rule does not constitute a significant FAR revision within the meaning of FAR 1.501 and Pub. L. 98–577, and publication for public comments is not required. However, the Councils will consider comments from small entities concerning the affected FAR Part 12 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (FAC 2005–27, FAR case 2007–022), in correspondence.

**C. Paperwork Reduction Act**

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

**List of Subjects in 48 CFR Part 12**

Government procurement.

Dated: September 9, 2008.

Al Matera,

Director, Office of Acquisition Policy.

■ Therefore, DoD, GSA, and NASA amend 48 CFR part 12 as set forth below:

**PART 12—ACQUISITION OF COMMERCIAL ITEMS**

■ 1. The authority citation for 48 CFR part 12 continues to read as follows:

**Authority:** 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

■ 2. Amend section 12.503 by revising the section heading and adding paragraph (a)(7) to read as follows: