which was published in the **Federal Register** at 72 FR 13586 on March 22, 2007, is adopted as a final rule without change.

[FR Doc. E7–24938 Filed 12–21–07; 8:45 am]
BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 32 and 52

[FAC 2005–23; FAR Case 2005–016; Item III; Docket 2007–0001; Sequence 13]

RIN 9000–AK64

Federal Acquisition Regulation; FAR Case 2005–016, Performance-Based Payments

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 implement recommendations to change the regulations related to performance-based payments.

DATES: *Effective Date:* January 25, 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 2005–23, FAR case 2005–016.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule amends the Federal Acquisition Regulation to increase the use of performance-based payments as the method of contract financing on Federal Government contracts and improve the efficiency of performance-based payments when used on these contracts. These changes originated from recommendations submitted by the Department of Defense Performance-Based Payments Working Group in their March 8, 2005, report.

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 71 FR 75186 on December 14, 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.

1. *Comment:* Two commenters addressed the issue of establishing performance-based payments at other than 90 percent of the contract price. One commenter recommended revising the rule to require contracting officers to document the rationale for soliciting or awarding contracts that limit performance-based payments to less than 90 percent of the contract price instead of when the performance-based payments effectively result in financing payments that are less than the payments that would be made with progress payments. The ability to receive contract financing payments at 90 percent of the contract price balances the risk associated with performance-based payments. If the performance-based payments are less than 90 percent of the contract costs, contractors will not agree to their use, which is problematic since performance-based payments are the preferred financing method. Another commenter said the requirement to document the rationale for establishing performance-based payments when the performance-based payments are less than 90 percent of the contract price, or delivered-item price, will likely result in contracting officers artificially inflating the value of the events to avoid having to document the rationale.

Response: Providing performance-based payments at or below the effective rate for progress payments does not facilitate the use of performance-based payments. However, performance-based payments must reflect prudent contract financing and are authorized only to the extent needed for contract performance. In addition, performance-based payment amounts must be commensurate with the value of the performance event or performance criterion. Therefore, the Councils see no reason to require contracting officers to document the rationale for establishing performance-based payments that are less than 90 percent of the contract price. In addition, the Councils believe the FAR requirements are sufficient to ensure performance-based payments are not artificially inflated simply to avoid having to document the rationale for establishing performance-based payments that are less than 90 percent of the contract price or delivered-item price.

2. *Comment:* Two commenters recommended eliminating the provision in the proposed rule that precluded limiting performance-based payments to the contractor's actual incurred costs because there can never be a need for contract financing payments in excess of the incurred costs.

Response: Such a prohibition could inhibit the contracting officer's flexibility in structuring and administering performance-based payments. Therefore, this provision has been omitted from the final rule.

3. *Comment:* One commenter recommended making performance-based payments the mandatory type of financing payments whenever a contractor requests this type of financing because some buying commands never authorize performance-based payments.

Response: Performance-based payments are the preferred Government financing method when the contracting officer finds them practical and the contractor agrees to their use. However, performance-based payments are not always practical. Therefore, the Government must retain the right to determine the proper financing method.

4. *Comment:* One commenter recommended revising the rule to permit contractors to submit contract financing payment requests on either a fiscal or calendar month basis as long as no more than 12 payment requests are made annually. The commenter said the lack of clear definition in the FAR clause at 52.232–32(b) as to what constitutes ''monthly'' payment requests has resulted in inconsistencies and confusion in enforcement. Contractors that use fiscal months accounting to bill contract financing payments should be allowed to submit two payment requests in the same calendar month to avoid negative fluctuations in working capital.

Response: Nothing in the FAR precludes payment on a fiscal month basis. The Councils are not aware of any payment issues relating to the use of the term ''monthly'' and note that the provision is unchanged by this rule. Therefore, the Councils believe the existing terminology is sufficient.

5. *Comment:* One commenter recommended deleting all reference to ''milestones'' from the FAR coverage on performance-based payments to eliminate confusion between performance-based financing and commercial financing. Instead of using the term ''milestones,'' the commenter recommended using the terms ''event'' or ''performance-based event.''

Response: The Councils are not aware of any issues related to the meaning of ''milestones'' and note that the terminology is unchanged by this rule. Therefore, the Councils believe the existing terminology is sufficient.

6. *Comment:* One commenter recommended revising the performance-based payment provisions to specify that payment offices will pay approved payment requests in the number of days specified in an agency's regulation if the contracting officer fails to prescribe the number of days the payment office will pay approved requests. The default 30th day could cause some DoD contracting officers to refuse to include the 14th day as prescribed in DoD regulations.

Response: Concerns over compliance with individual agency regulations are beyond the scope of this case. However, the Councils are not aware of any instances where contracting officers have failed to include the number of days prescribed by their agency regulations.

7. *Comment:* One commenter recommended DoD partner with industry when it develops the training materials and guidance referenced in DoD's June 2, 2005, response to public input on performance-based payments (70 FR 32306) because dissemination of this information to both Government and industry personnel would facilitate a better understanding of the process.

Response: DoD training materials are beyond the scope of this case. DoD will consider whether input from industry is needed to develop the appropriate training.

8. *Comment:* One commenter recommended requiring the FAR or agency policy to require agency head approval when performance-based payments are less than 90 percent of the contract price on foreign military sales. Application of DoD's weighted guidelines generally results in FMS contracts having lower profit margins and FAR limitations typically provide less favorable financing than contracts negotiated on a direct basis with the foreign country.

Response: Foreign military sales and the DoD weighted guidelines are not addressed in the FAR because they are unique to DoD. DoD regulations are beyond the scope of this case.

9. *Comment:* One commenter recommended DoD consider revising DoD policy to permit direct billing for performance-based payments.

Response: DoD policy is beyond the scope of this case. However, DoD notes that direct billing is only authorized for payments that require Defense Contract Audit Agency (DCAA) provisional approval. Performance-based payments require the approval of the contracting officer and not DCAA. Contracting officer approval is a reasonable management control as it may be difficult to reconstruct when a milestone was completed.

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 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 this rule should reduce administrative costs for contractors and the Government, thus further encouraging the use of performance-based payments.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the rule does not impose any additional 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 32 and 52

Government procurement.

Dated: December 19, 2007.

Al Matera,

Director, Office of Acquisition Policy.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 32 and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 32 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 32—CONTRACT FINANCING

■ 2. Revise section 32.1000 to read as follows:

32.1000 Scope of subpart.

This subpart provides policy and procedures for performance-based payments under noncommercial purchases pursuant to Subpart 32.1.

■ 3. Amend section 32.1001 by—

■ a. Removing the second sentence in paragraph (c);

■ b. Removing paragraph (d);

■ c. Redesignating paragraph (e) as (d);

■ d. Revising newly redesignated paragraph (d); and

■ e. Adding new paragraph (e) to read as follows:

32.1001 Policy.

* * * * *

(d) Performance-based payments are contract financing payments and, therefore, are not subject to the interest-penalty provisions of prompt payment (see Subpart 32.9). These payments shall be made in accordance with agency policy.

(e) Performance-based payments shall not be used for—

(1) Payments under cost-reimbursement line items;

(2) Contracts for architect-engineer services or construction, or for shipbuilding or ship conversion, alteration, or repair, when the contracts provide for progress payments based upon a percentage or stage of completion; or

(3) Contracts awarded through sealed bid procedures.

■ 4. Revise section 32.1002 to read as follows:

32.1002 Bases for performance-based payments.

Performance-based payments may be made on any of the following bases:

(a) Performance measured by objective, quantifiable methods.

(b) Accomplishment of defined events.

(c) Other quantifiable measures of results.

■ 5. Revise section 32.1003 to read as follows:

32.1003 Criteria for use.

The contracting officer may use performance-based payments for individual orders and contracts provided—

(a) The contracting officer and offeror agree on the performance-based payment terms;

(b) The contract, individual order, or line item is a fixed-price type;

(c) For indefinite delivery contracts, the individual order does not provide for progress payments; and

(d) For other than indefinite delivery contracts, the contract does not provide for progress payments.

■ 6. Revise section 32.1004 to read as follows:

32.1004 Procedures.

Performance-based payments may be made either on a whole contract or on a deliverable item basis, unless otherwise prescribed by agency regulations. Financing payments to be made on a whole contract basis are applicable to the entire contract, and not to specific deliverable items. Financing payments to be made on a deliverable item basis are applicable to a specific individual deliverable item. (A deliverable item for these purposes is a separate item with a distinct unit price.

Thus, a contract line item for 10 airplanes, with a unit price of $1,000,000 each, has 10 deliverable items-the separate planes. A contract line item for 1 lot of 10 airplanes, with a lot price of $10,000,000, has only one deliverable item-the lot.)

(a) *Establishing performance bases.* (1) The basis for performance-based payments may be either specifically described events (e.g., milestones) or some measurable criterion of performance. Each event or performance criterion that will trigger a finance payment shall be an integral and necessary part of contract performance and shall be identified in the contract, along with a description of what constitutes successful performance of the event or attainment of the performance criterion. The signing of contracts or modifications, the exercise of options, the passage of time, or other such occurrences do not represent meaningful efforts or actions and shall not be identified as events or criteria for performance-based payments. An event need not be a critical event in order to trigger a payment, but the Government must be able to readily verify successful performance of each such event or performance criterion.

(2) Events or criteria may be either severable or cumulative. The successful completion of a severable event or criterion is independent of the accomplishment of any other event or criterion. Conversely, the successful accomplishment of a cumulative event or criterion is dependent upon the previous accomplishment of another event. A contract may provide for more than one series of severable and/or cumulative performance events or criteria performed in parallel. The contracting officer shall include the following in the contract:

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

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

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

(iv) Because performance-based payments are contract financing, events or criteria shall not serve as a vehicle to reward the contractor for completion of performance levels over and above what is required for successful completion of the contract.

(v) If payment of performance-based finance amounts is on a deliverable item basis, each event or performance criterion shall be part of the performance necessary for that deliverable item and shall be identified to a specific contract line item or subline item.

(b) *Establishing performance-based finance payment amounts.*

(1) The contracting officer shall establish a complete, fully defined schedule of events or performance criteria and payment amounts when negotiating contract terms. If a contract action significantly affects the price, or event or performance criterion, the contracting officer responsible for pricing the contract modification shall adjust the performance-based payment schedule appropriately.

(2) Total performance-based payments shall—

(i) Reflect prudent contract financing provided only to the extent needed for contract performance (see 32.104(a)); and

(ii) Not exceed 90 percent of the contract price if on a whole contract basis, or 90 percent of the delivery item price if on a delivery item basis.

(3) The contract shall specifically state the amount of each performance-based payment either as a dollar amount or as a percentage of a specifically identified price (e.g., contract price or unit price of the deliverable item). The payment of contract financing has a cost to the Government in terms of interest paid by the Treasury to borrow funds to make the payment. Because the contracting officer has wide discretion as to the timing and amount of the performance-based payments, the contracting officer shall ensure that—

(i) The total contract price is fair and reasonable, all factors considered; and

(ii) Performance-based payment amounts are commensurate with the value of the performance event or performance criterion and are not expected to result in an unreasonably low or negative level of contractor investment in the contract. To confirm sufficient investment, the contracting officer may request expenditure profile information from offerors, but only if other information in the proposal, or information otherwise available to the contracting officer, is expected to be insufficient.

(4) Unless agency procedures prescribe the bases for establishing performance-based payment amounts, contracting officers may establish them on any rational basis, including (but not limited to)—

(i) Engineering estimates of stages of completion;

(ii) Engineering estimates of hours or other measures of effort to be expended in performance of an event or achievement of a performance criterion; or

(iii) The estimated projected cost of performance of particular events.

(5) When subsequent contract modifications are issued, the contracting officer shall adjust the performance-based payment schedule as necessary to reflect the actions required by those contract modifications.

(c) *Instructions for multiple appropriations.* If there is more than one appropriation account (or subaccount) funding payments on the contract, the contracting officer shall provide instructions to the Government payment office for distribution of financing payments to the respective funds accounts. Distribution instructions shall be consistent with the contract's liquidation provisions.

(d) *Liquidating performance-based finance payments.* Performance-based amounts shall be liquidated by deducting a percentage or a designated dollar amount from the delivery payments. The contracting officer shall specify the liquidation rate or designated dollar amount in the contract. The method of liquidation shall ensure complete liquidation no later than final payment.

(1) If the contracting officer establishes the performance-based payments on a delivery item basis, the liquidation amount for each line item is the percent of that delivery item price that was previously paid under performance-based finance payments or the designated dollar amount.

(2) If the performance-based finance payments are on a whole contract basis, liquidation is by predesignated liquidation amounts or liquidation percentages.

(e) *Competitive negotiated solicitations.* (1) If a solicitation requests offerors to propose performance-based payments, the solicitation shall specify—

(i) What, if any, terms shall be included in all offers; and

(ii) The extent to which and how offeror-proposed performance-based payment terms will be evaluated. Unless agencies prescribe other evaluation procedures, if the contracting officer anticipates that the cost of providing performance-based payments would have a significant impact on determining the best value offer, the solicitation should state that the evaluation of the offeror's proposed prices will include an adjustment to reflect the estimated cost to the Government of providing each offeror's proposed performance-based payments (see Alternate I to the provision at 52.232–28).

(2) The contracting officer shall—

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

(ii) Use the adjustment method at 32.205(c) if the price is to be adjusted for evaluation purposes in accordance with paragraph (e)(1)(ii) of this section.

■ 7. Revise section 32.1005 to read as follows:

32.1005 Solicitation provision and contract clause.

(a) Insert the clause at 52.232–32, Performance-Based Payments, in—

(1) Solicitations that may result in contracts providing for performance-based payments; and

(2) Fixed-price contracts under which the Government will provide performance-based payments.

(b)(1) Insert the solicitation provision at 52.232–28, Invitation to Propose Performance-Based Payments, in negotiated solicitations that invite offerors to propose performance-based payments.

(2) Use the provision with its Alternate I in competitive negotiated solicitations if the Government intends to adjust proposed prices for proposal evaluation purposes (see 32.1004(e)).

■ 8. Revise section 32.1007 to read as follows:

32.1007 Administration and payment of performance-based payments.

(a) *Responsibility.* The contracting officer responsible for administering performance-based payments (see 42.302(a)(12)) for the contract shall review and approve all performance-based payments for that contract.

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

(1) The contracting officer shall be responsible for receiving, approving, and transmitting all performance-based payment requests to the appropriate payment office; and

(2) Each approval shall specify the amount to be paid, necessary contractual information, and the appropriation account(s) (see 32.1004(c)) to be charged for the payment.

(c) *Reviews.* The contracting officer is responsible for determining what reviews are required for protection of the Government's interests. The contracting officer should consider the contractor's experience, performance record, reliability, financial strength, and the adequacy of controls established by the contractor for the administration of performance-based payments. Based upon the risk to the Government, post-payment reviews and verifications should normally be arranged as considered appropriate by the contracting officer. If considered necessary by the contracting officer, pre-payment reviews may be required.

(d) *Incomplete performance.* The contracting officer shall not approve a performance-based payment until the specified event or performance criterion has been successfully accomplished in accordance with the contract. If an event is cumulative, the contracting officer shall not approve the performance-based payment unless all identified preceding events or criteria are accomplished.

(e) *Government-caused delay.* Entitlement to a performance-based payment is solely on the basis of successful performance of the specified events or performance criteria. However, if there is a Government-caused delay, the contracting officer may renegotiate the performance-based payment schedule to facilitate contractor billings for any successfully accomplished portions of the delayed event or criterion.

32.1009 [Amended]

■ 9. Amend section 32.1009 by removing from the first sentence in paragraph (a) the word ''must'' and adding ''shall'' in its place.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 10. Amend section 52.232–32 by—

■ a. Revising the clause date;

■ b. Revising the second sentence of paragraph (c)(2); and

■ c. Removing from the first sentence of paragraph (f)(5) the word ''must'' and adding ''shall'' in its place.

52.232–32 Performance-based payments.

* * * * *

PERFORMANCE–BASED PAYMENTS (JAN 2008)

(c) * * *

(2) * * * The designated payment office will pay approved requests on the _____ [*Contracting Officer insert day as prescribed by agency head; if not prescribed, insert ''30th''*] day after receipt of the request for performance-based payment by the designated payment office. * * *

* * * * *

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket FAR–2007–0002, Sequence 9]

Federal Acquisition Regulation; Federal Acquisition Circular 2005–23; Small Entity Compliance Guide

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

ACTION: Small Entity Compliance Guide.

SUMMARY: This document is issued under the joint authority of the Secretary of Defense, the Administrator of General Services and the Administrator of the National Aeronautics and Space Administration. This *Small Entity Compliance Guide* has been prepared in accordance with Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. It consists of a summary of rules appearing in Federal Acquisition Circular (FAC) 2005–23 which amend the FAR. An asterisk (*) next to a rule indicates that a regulatory flexibility analysis has been prepared. Interested parties may obtain further information regarding these rules by referring to FAC 2005–23 which precedes this document. These documents are also available via the Internet at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Diedra Wingate, FAR Secretariat, (202) 208–4052. For clarification of content, contact the analyst whose name appears in the table below.

LIST OF RULES IN FAC 2005–23

Item	Subject	FAR case	Analyst
I*	Electronic Products Environmental Assessment Tool (EPEAT) (Interim)	2006–030	Clark.
II	Contracts with Religious Entities	2006–019	Woodson.
III	Performance-Based Payments	2005–016	Murphy.