

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 32 and 52**

[FAC 2001–13; FAR Case 2001–006; Item IV]

RIN 9000–AJ23

**Federal Acquisition Regulation;
Progress Payment Requests Under
Indefinite-Delivery Contracts**

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 require, under indefinite-delivery contracts, the contractor to account for and submit progress payment requests under individual orders as if each order constitutes a separate contract, unless otherwise specified in the contract.

DATES: Effective Date: April 17, 2003.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC, 20405, (202) 501–4755, for information pertaining to status or publication schedules. For clarification of content, contact Mr. Ralph De Stefano, at (202) 501–1758. Please cite FAC 2001–13, FAR case 2001–006.

SUPPLEMENTARY INFORMATION:**A. Background**

The Councils have agreed to amend the Federal Acquisition Regulation (FAR) to require, under indefinite-delivery contracts, the contractor to account for and submit progress payment requests under individual orders as if each order constitutes a separate contract, unless otherwise specified in the contract.

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 66 FR 57294, November 14, 2001. Eight respondents submitted public comments. These comments are discussed below. The Councils concluded that the proposed rule should be converted to a final rule, with only minor editorial changes made to the proposed rule.

1. *Time requirement.* One respondent asked if the proposed rule change would have a time requirement other than 60 days, and if so, how that change would effect outside agencies. This question referenced an existing policy addressing progress schedules and reports.

Councils' response: No change. The proposed change focuses on how progress payments will be billed and processed on delivery orders under indefinite-delivery type contracts. It does not impact any existing timeframes.

2. *Statement of work.* One respondent asserted that the proposed change would increase the difficulty in preparing a statement of work to quantify a technical assistance contract.

Councils' response: No change. The proposed change would not impact the preparation of statements of work.

3. *Effect on costs.* Two respondents disagreed with the proposed change on the basis that existing FAR language contains the necessary flexibility, and that the proposed language would reduce latitude of the contracting officer, increase the costs of doing business with the government, and generate more paper. Other points made were that the inconsistency between FAR 32.503–5(c) and FAR 52.232–16 does not obtain the desired effect because many offices follow single billing for each task order, and that single billing for the entire contract is preferable to keep costs lower.

Councils' response: No change. The proposed change would have minimal impact on efficiency. The FAR currently requires that contracting officers administer indefinite-delivery type contracts on a delivery order basis. The vast majority of contractors comply with this guidance; so adding this requirement to the clause will simply eliminate an inconsistency between FAR guidance to contracting officers and the contract clause. Furthermore, the existing requirement for administering progress payments on a delivery-order basis is necessary to maintain proper control over payment processing and liquidations. Permitting progress payments on a whole contract basis would create inefficiencies in payment approval and processing, making it more difficult to ensure that progress payments are paid from the proper appropriations, and add complexity to surveillance.

4. *No inconsistency.* One respondent stated that there is not an inconsistency in the FAR between the coverage in FAR 32.503–5(c) and FAR 52.232–16; that if there is a perceived inconsistency it does not merit a revision to the Progress Payment clause; and that if any revision

to the FAR is necessary to resolve this perceived inconsistency, then the FAR should be revised to delete all references that imply that individual orders (under a contract) are to be treated as separate contracts.

Councils' response: No change. The inconsistency between the coverage in FAR 32.503–5(c) and the Progress Payment clause is clear. FAR 32.503–5(c) provides that under indefinite delivery contracts the contracting officer should administer progress payments made under each individual order as if the order constituted a separate contract, unless agency procedures provide otherwise. However, there is no related language in the clause at FAR 52.232–16, so the contractor is not currently required by contract to request progress payments on a delivery order basis. Although contractors almost always comply with the contracting officer's instructions regarding separation of progress payments by order, a contractor may erroneously contend that it incurred additional costs in complying with direction to prepare progress payments on an indefinite-delivery contract as if each delivery order were a separate contract. The Councils recommend adding the proposed language to the clause to preclude future misunderstandings.

With regard to the comment that FAR references implying that individual orders should be treated as separate contracts should be deleted, the Councils regard the existing requirements as necessary. The necessity is borne of the need to recognize that funds are typically obligated on the individual orders, and that individual orders must be treated as if they were separate contracts in order to effectively administer progress payments; and monitor production, payment requests, delivery payments and liquidations.

5. *Invoices.* One respondent expressed concern that the proposed changes would require submission of individual requests for payment of invoices on indefinite-delivery service contracts. Currently, some contractors submit single requests for payment under several task orders.

Councils' response: No change. The proposed rule addresses progress payment requests, not invoices. The rule does not address the submission of invoices and does not prohibit agencies from permitting their contractors to submit single invoices for multiple tasks. To the extent that progress payments are involved, existing contract coverage at 52.232–16, Progress Payments, acts to protect the Government's interests.