

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 11, 23, 39, and 52**[FAC 2005–23; FAR Case 2006–030; Item
I; Docket 2007–0001, Sequence 9]

RIN 9000–AK85

**Federal Acquisition Regulation; FAR
Case 2006–030, Electronic Products
Environmental Assessment Tool
(EPEAT)****AGENCIES:** Department of Defense (DoD),
General Services Administration (GSA),
and National Aeronautics and Space
Administration (NASA).**ACTION:** Interim rule with request for
comments.**SUMMARY:** The Civilian Agency
Acquisition Council and the Defense
Acquisition Regulations Council
(Councils) have agreed on an interim
rule amending the Federal Acquisition
Regulation (FAR) to require use of
Electronic Products Environmental
Assessment Tool (EPEAT) when
acquiring personal computer products
such as desktops, notebooks (also
known as laptops), and monitors
pursuant to the Energy Policy Act of
2005 and Executive Order 13423,
“Strengthening Federal Environmental,
Energy, and Transportation
Management.”**DATES:** *Effective Date:* December 26,
2007.*Comment Date:* Interested parties
should submit written comments to the
FAR Secretariat on or before February
25, 2008 to be considered in the
formulation of a final rule.**ADDRESSES:** Submit comments
identified by FAC 2005–23, FAR case
2006–030, by any of the following
methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. To search for any document, first select under “Step 1,” “Documents with an Open Comment Period” and select under “Optional Step 2,” “Federal Acquisition Regulation” as the agency of choice. Under “Optional Step 3,” select “Rules”. Under “Optional Step 4,” from the drop down list, select “Document Title” and type the FAR case number “2006–030”. Click the “Submit” button. Please include your name and company name (if any) inside the document. You may also search for any document by clicking on the “Search for Documents” tab at the

top of the screen. Select from the agency field “Federal Acquisition Regulation”, and type “2006–030” in the “Document Title” field. Select the “Submit” button.

- *Fax:* 202–501–4067.
- *Mail:* General Services

Administration, Regulatory Secretariat
(VIR), 1800 F Street, NW., Room 4035,
ATTN: Laurieann Duarte, Washington,
DC 20405.*Instructions:* Please submit comments
only and cite FAC 2005–23, FAR case
2006–030, in all correspondence related
to this case. All comments received will
be posted without change to <http://www.regulations.gov>, including any
personal and/or business confidential
information provided.**FOR FURTHER INFORMATION CONTACT:** Mr.
William Clark, Procurement Analyst, at
(202) 219–1813 for clarification of
content. Please cite FAC 2005–23, FAR
case 2006–030. For information
pertaining to status or publication
schedules, contact the FAR Secretariat
at (202) 501–4755.**SUPPLEMENTARY INFORMATION:****A. Background**On January 24, 2007, President Bush
issued Executive Order 13423,
“Strengthening Federal Environmental,
Energy, and Transportation
Management.” Section 2(h) states that
the head of each Agency shall “ensure
that the agency * * * when acquiring
an electronic product to meet its
requirements, meets at least 95 percent
of those requirements with an Electronic
Product Environmental Assessment
Tool (EPEAT)-registered electronic
product, unless there is no EPEAT
standard for such product”.EPEAT is a system to help purchasers
in the public and private sectors
evaluate, compare, and select desktop
computers, notebooks and monitors
based on their environmental attributes.
EPEAT also provides a clear and
consistent set of performance criteria for
the design of products, and provides an
opportunity for manufacturers to secure
market recognition for efforts to reduce
the environmental impact of their
products.The National Technology Transfer
and Advancement Act of 1995 (NTTAA)
and the OMB Circular A–119, “Federal
Participation in the Development and
Use of Voluntary Consensus Standards
and in Conformity Assessment
Activities,” direct Federal agencies to
utilize voluntary consensus standards
for regulatory and procurement
activities, and to participate in the
development of these standards, unless
to do so would be inconsistent with law
or impractical. The Institute of Electricaland Electronics Engineers (IEEE) 1680
Standard for the Environmental
Assessment of Personal Computer
Products houses a set of environmental
performance criteria, which were
developed in an open consensus-based
process by an American National
Standards Institute (ANSI)-accredited
organization in accordance with the
NTTAA requirements. Most of the IEEE
1680 criteria refer to environmental
performance characteristics of the
specific product. EPEAT lists products
that comply with this IEEE standard.The interim rule amends the FAR to
require the use of the EPEAT Product
Registry and the IEEE 1680 Standard for
the Environmental Assessment of
Personal Computer Products in all
solicitations and contracts for personal
computer desktops, notebooks, and
monitors. A new clause is required to
effectively implement the above-
mentioned statute and Executive order.FAR Subpart 23.7 currently
implements the requirements for
acquiring environmentally preferable
products and services. The interim rule
revises Subpart 23.7, and prescribes a
new clause, FAR 52.223–16 (also
included in FAR 52.212–5 for
acquisition of commercial items) in all
solicitations and contracts for the
acquisition of personal computer
products, services that require
furnishing of personal computer
products for use by the Government,
and services for contractor operation of
Government-owned facilities. In
accordance with Section 7 of Executive
Order 13423, this requirement applies
only to contracts performed in the
United States, unless otherwise
authorized in agency procedures.The Councils have defined “personal
computer products” to mean notebook
computers, desktop computers, or
computer monitors, and all peripherals
that are integral to the operation of such
items, consistent with the IEEE 1680
standard. For example, the desktop
computer together with the keyboard,
the mouse, and the power cord would
be a personal computer product.
Printers, copiers, and fax machines are
not yet covered. To clarify application
of the clause, the interim rule defines
notebook computer, computer desktop
and computer monitor, using the
definitions in the IEEE 1680 standard.**Authorities**E.O. 13423 revoked E.Os. 13148,
13101, and 13123. These E.Os. have not
been eliminated from FAR 23.702 under
this case, as other conforming changes
will be required. A separate FAR case
will address these conforming changes.

Required vs. Optional Criteria

The IEEE 1680 Standard identifies both required criteria and optional criteria. EPEAT "Bronze" registered products must meet all required criteria. EPEAT "Silver" registered products must meet all required criteria and 50 percent of the optional criteria. EPEAT "Gold" registered products must meet all required criteria and 75 percent of the optional criteria. FAR clause 52.223-16 makes EPEAT Bronze registration the standard that contractors must meet. Office of Federal Environmental Executive guidance asks agencies to strive to procure EPEAT Silver registered products, and Alternate I to the clause makes EPEAT Silver registration the standard that contractors must meet, when agencies determine that standard appropriate. Agencies also may use EPEAT Silver or Gold registration in proposal evaluation.

The basic clause requires the contractor to furnish only personal computer products that at the time of submission of proposals were EPEAT Bronze registered or higher, the first level discussed in clause 1.4 of the IEEE 1680 Standard for the Environmental Assessment of Personal Computer Products. The contractor must furnish what it offered, even if the standard has changed between the offer and delivery. Alternate I provides the same conditions for EPEAT Silver registered products.

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 changes may 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 it mandates standards for personal computer products that will be offered for sale to the Government.

An Initial Regulatory Flexibility Act (IRFA) has been prepared. The analysis is summarized as follows:

As of January 2006, four of the thirteen vendors who have registered products on the EPEAT Product Registry are small businesses.

Data are not available on how many small businesses are reselling personal computer products to the Government, but according to the EPA's Office of Small Disadvantaged Business Utilization, there are approximately 613 Service Disabled Veteran Owned Small Businesses selling IT hardware to the Federal Government today. These small businesses are not manufacturers of IT hardware, but

resell IT hardware manufactured by other companies to the Federal Government. Many of the products these resellers sell will meet the IEEE 1680 Standard, and the manufacturers of these products will have the option of getting these products EPEAT-registered to verify that they do meet this standard.

The rule does not impose any new reporting, or recordkeeping requirements. The IEEE 1680 Standard sets forth required and optional criteria. The basic clause in the interim rule mandates compliance with all the required criteria, and the clause alternate requires that products must also meet 50 percent of the optional criteria.

The EPEAT Product Registry has been designed to encourage small business manufacturer participation. There is a sliding scale for the annual EPEAT registration fee vendors pay to have their products EPEAT-registered based on the annual revenue of the vendor. The vendors with the smallest annual revenue pay the smallest annual registration fee of \$1,000, for which the company may register all products. A summary of the standard is available on the EPEAT website, but a copy of the standard costs \$70. There have been no indications from small business vendors to date that the IEEE 1680 Standard or the EPEAT Product Registry is a hindrance to doing business with the Federal Government.

Because manufacturers are the parties responsible for determining if their products meet the IEEE 1680 Standard, there will be little to no impact on small businesses selling IT products to the Federal Government, who are selling EPEAT-registered products.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no practical alternatives that will accomplish the objectives of the interim rule.

The FAR Secretariat has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. Interested parties may obtain a copy from the FAR Secretariat. The Councils will consider comments from small entities concerning the affected FAR Parts 11, 23, 39, and 52 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 2005-23, FAR case 2006-030), 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.

D. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space

Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary because Executive Order 13423, Strengthening Federal Environmental, Energy, and Transportation Management, effective on January 26, 2007, requires the Government to require use of Electronic Products Environmental Assessment Tool (EPEAT) when acquiring personal computer products such as desktops, notebooks (also known as laptops), and monitors. However, pursuant to Public Law 98-577 and FAR 1.501, the Councils will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Parts 11, 23, 39, and 52

Government procurement.

Dated: December 19, 2007.

Al Matera,

Director, Office of Acquisition Policy.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 11, 23, 39, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 11, 23, 39, 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 11—DESCRIBING AGENCY NEEDS

■ 2. Amend section 11.101 by revising paragraph (b) to read as follows:

11.101 Order of precedence for requirements documents.

* * * * *

(b) In accordance with OMB Circular A-119, "Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities," and Section 12(d) of the National Technology Transfer and Advancement Act of 1995, Pub. L. 104-113 (15 U.S.C. 272 note), agencies must use voluntary consensus standards, when they exist, in lieu of Government-unique standards, except where inconsistent with law or otherwise impractical. The private sector manages and administers voluntary consensus standards. Such standards are not mandated by law (e.g., industry standards such as ISO 9000, and IEEE 1680).

PART 23—ENVIRONMENT, ENERGY AND WATER EFFICIENCY, RENEWABLE ENERGY TECHNOLOGIES, OCCUPATIONAL SAFETY, AND DRUG-FREE WORKPLACE

■ 3. Add section 23.701 to read as follows:

23.701 Definitions.

As used in this subpart—

Computer monitor means a video display unit used with a computer.

Desktop computer means a computer designed for use on a desk or table.

Notebook computer means a portable-style or laptop-style computer system.

Personal computer product means a notebook computer, a desktop computer, or a computer monitor, and any peripheral equipment that is integral to the operation of such items. For example, the desktop computer together with the keyboard, the mouse, and the power cord would be a personal computer product. Printers, copiers, and fax machines are not included in peripheral equipment, as used in this definition.

■ 4. Amend section 23.702 by adding paragraphs (h) and (i) to read as follows:

23.702 Authorities.

* * * * *

(h) Executive Order 13221 of July 31, 2001, Energy Efficient Standby Power Devices.

(i) Executive Order 13423 of January 24, 2007, Strengthening Federal Environmental, Energy, and Transportation Management.

■ 5. Redesignate section 23.705 as 23.706; and add a new section 23.705 to read as follows:

23.705 Electronic products environmental assessment tool.

(a) *General.* As required by E.O. 13423, agencies must ensure that they meet at least 95 percent of their annual acquisition requirement for electronic products with Electronic Product Environmental Assessment Tool (EPEAT)-registered electronic products, unless there is no EPEAT standard for such products. This policy applies to contracts performed in the United States, unless otherwise provided by agency procedures.

(b) *Personal computer products.* Personal computer products is a category of EPEAT-registered electronic products.

(1) The IEEE 1680 standard for personal computer products—

(i) Was issued by the Institute of Electrical and Electronics Engineers on April 28, 2006;

(ii) Is a voluntary consensus standard consistent with Section 12(d) of Pub. L. 104–113, the “National Technology Transfer and Advancement Act of 1995”, (see 11.102(c));

(iii) Meets EPA-issued guidance on environmentally preferable products and services; and

(iv) Is described in more detail at <http://www.epeat.net>.

(2) A list of EPEAT-registered products that meet the IEEE 1680 standard can be found at <http://www.epeat.net>.

(3) The IEEE 1680 standard sets forth required and optional criteria. EPEAT “Bronze” registered products must meet all required criteria. EPEAT “Silver” registered products meet all required criteria and 50 percent of the optional criteria. EPEAT “Gold” registered products meet all required criteria and 75 percent of the optional criteria. These are the levels discussed in clause 1.4 of the IEEE 1680 standard. The clause at 52.223–16, IEEE 1680 Standard for the Environmental Assessment of Personal Computer Products, makes EPEAT Bronze registration the standard that contractors must meet. In accordance with guidance from the Office of the Federal Environmental Executive encouraging agencies to procure EPEAT Silver registered products, Alternate I of the clause makes EPEAT Silver registration the standard that contractors must meet. Agencies also may use EPEAT Silver or Gold registration in the evaluation of proposals.

(c) The agency shall establish procedures for granting exceptions to the requirement in paragraph (a) of this section, with the goal that the dollar value of exceptions granted will not exceed 5 percent of the total dollar value of electronic products acquired by the agency, for which EPEAT-registered products are available. For example, agencies may grant an exception if the agency determines that no EPEAT-registered product meets agency requirements, or that the EPEAT-registered product will not be cost effective over the life of the product.

■ 6. Revise the newly designated section 23.706 to read as follows:

23.706 Contract clauses.

(a) Insert the clause at 52.223–10, Waste Reduction Program, in all solicitations and contracts for contractor operation of Government-owned or -leased facilities and all solicitations and contracts for support services at Government-owned or -operated facilities.

(b)(1) Unless an exception has been approved in accordance with 23.705(c), insert the clause at 52.223–16, IEEE

1680 Standard for the Environmental Assessment of Personal Computer Products, in all solicitations and contracts for—

(i) Personal computer products;

(ii) Services that require furnishing of personal computer products for use by the Government; or

(iii) Contractor operation of Government-owned facilities.

(2) Agencies may use the clause with its Alternate I when there are sufficient EPEAT Silver registered products available to meet agency needs.

PART 39—ACQUISITION OF INFORMATION TECHNOLOGY

■ 7. Amend section 39.101 by revising paragraph (b) to read as follows:

39.101 Policy.

* * * * *

(b)(1) In acquiring information technology, agencies shall identify their requirements pursuant to—

(i) OMB Circular A–130, including consideration of security of resources, protection of privacy, national security and emergency preparedness, accommodations for individuals with disabilities, and energy efficiency; and

(ii) Standards for environmental assessment of personal computer products (see 23.705).

(2) When developing an acquisition strategy, contracting officers should consider the rapidly changing nature of information technology through market research (see Part 10) and the application of technology refreshment techniques.

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 8. Amend section 52.212–5 by—

■ a. Revising the date of the clause; and

■ b. Redesignating paragraphs (b)(27) through (b)(39) as (b)(28) through (b)(40), respectively, and adding a new paragraph (b)(27).

The added text reads as follows:

52.212–5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

* * * * *

CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES OR EXECUTIVE ORDERS—COMMERCIAL ITEMS (DEC 2007)

(b) * * *

(27)(i) 52.223–16, IEEE 1680 Standard for the Environmental Assessment of Personal Computer Products (DEC 2007) (E.O. 13423).

__ (ii) Alternate I (DEC 2007) of 52.223–16.

* * * * *

52.223–10 [Amended]

■ 9. Amend section 52.223–10 by removing from the introductory text “23.705” and adding “23.706(a)” in its place.

■ 10. Add section 52.223–16 to read as follows:

52.223–16 IEEE 1680 Standard for the Environmental Assessment of Personal Computer Products.

As prescribed in 23.706(b)(1), insert the following clause:

IEEE 1680 STANDARD FOR THE ENVIRONMENTAL ASSESSMENT OF PERSONAL COMPUTER PRODUCTS (DEC 2007)

(a) *Definitions.* As used in this clause—
Computer monitor means a video display unit used with a computer.

Desktop computer means a computer designed for use on a desk or table.

Notebook computer means a portable-style or laptop-style computer system.

Personal computer product means a notebook computer, a desktop computer, or a computer monitor, and any peripheral equipment that is integral to the operation of such items. For example, the desktop computer together with the keyboard, the mouse, and the power cord would be a personal computer product. Printers, copiers, and fax machines are not included in peripheral equipment, as used in this definition.

(b) Under this contract, the Contractor shall deliver, furnish for Government use, or furnish for contractor use at a Government-owned facility, only personal computer products that at the time of submission of proposals were EPEAT Bronze registered or higher. Bronze is the first level discussed in clause 1.4 of the IEEE 1680 Standard for the Environmental Assessment of Personal Computer Products.

(c) For information about the standard, see <http://www.epeat.net>.
(End of clause)

Alternate I (DEC 2007)

As prescribed in 23.706(b)(2), substitute the following paragraph (b) for paragraph (b) of the basic clause:

(b) Under this contract, the Contractor shall deliver, furnish for Government use, or furnish for contractor use at a Government-owned facility, only personal computer products that at the time of submission of proposals were EPEAT Silver registered or higher. Silver is the second level discussed in clause 1.4 of the IEEE 1680 Standard for the Environmental Assessment of Personal Computer Products.

[FR Doc. E7–24937 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 22 and 52

[FAC 2005–23; FAR Case 2006–019; Item II; Docket 2007–0001; Sequence 12]

RIN 9000–AK66

Federal Acquisition Regulation; FAR Case 2006–019, Contracts With Religious Entities

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 adopted as final, without change, an interim rule amending the Federal Acquisition Regulation (FAR) to implement Executive Order (E.O.) 11246, as amended, Equal Employment Opportunity, to incorporate the exemption for religious entities prescribed in E.O. 13279.

DATES: *Effective Date:* December 26, 2007.

FOR FURTHER INFORMATION CONTACT: Mr. Ernest Woodson, Procurement Analyst, at (202) 501–3775 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 2006–019.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule amends the FAR to incorporate the exemption for religious entities prescribed in E.O. 13279. Executive Order 11246, as amended, prohibits Government contractors and subcontractors, and federally assisted construction contractors and subcontractors from discriminating in employment, and requires these contractors to take affirmative action to ensure that employees and applicants are treated without regard to race, color, religion, sex, or national origin. Section 4 of E.O. 13279 amended Section 204 of E.O. 11246 to exempt religious corporations, associations, educational institutions and societies from certain nondiscrimination requirements. Executive Order 11246, as amended, permits religious entities to consider

employment of individuals of a particular religion to perform work connected with carrying on the entity's activities. Religious entities are not exempt from other requirements of the E.O. 11246.

DoD, GSA, and NASA published an interim rule with request for comments in the **Federal Register** at 72 FR 13586, March 22, 2007. No public comments were received on the rule. The Councils have determined to adopt the interim rule as final, without change.

This 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 the rule only aligns the FAR with the Department of Labor implementation of the exemption for consistency and clarity. The Department of Labor stated in its **Federal Register** notice of September 30, 2003, that the rule will not have a significant economic impact on a substantial number of small business entities. The rule is expected to have a small positive impact on small business entities, as the rule eases hiring restrictions for religious entities. The rule does not impose new requirements that impose a burden on contractors. No comments were received with regard to an impact on small business.

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 Parts 22 and 52

Government procurement.

Dated: December 19, 2007.

Al Matera,

Director, Office of Acquisition Policy.

Interim Rule Adopted as Final Without Change

■ Accordingly, the interim rule amending 48 CFR parts 22 and 52,

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. * * *

* * * * *

[FR Doc. E7–24939 Filed 12–21–07; 8:45 am]

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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.