

**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Chapter 1**

[Docket FAR 2009-0001, Sequence 4]

**Federal Acquisition Regulation; Federal Acquisition Circular 2005-33; Introduction**

**AGENCIES:** Department of Defense (DoD), General Services Administration (GSA),

and National Aeronautics and Space Administration (NASA).

**ACTION:** Summary presentation of rules.

**SUMMARY:** This document summarizes the Federal Acquisition Regulation (FAR) rules agreed to by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council in this Federal Acquisition Circular (FAC) 2005-33. A companion document, the Small Entity Compliance Guide (SECG), follows this FAC. The FAC, including the SECG, is available via the Internet at <http://www.regulations.gov>.

**DATES:** For effective dates and comment dates, see separate documents, which follow.

**FOR FURTHER INFORMATION CONTACT:** The analyst whose name appears in the table below in relation to each FAR case. Please cite FAC 2005-33 and the specific FAR case numbers. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501-4755.

**LIST OF RULES IN FAC 2005-33**

Item	Subject	FAR case	Analyst
I .....	Trade Agreements—Costa Rica, Oman, and Peru (Interim) .....	2008-036	Murphy.
II .....	Contractor's Request for Progress Payments .....	2005-032	Murphy.

**SUPPLEMENTARY INFORMATION:**

Summaries for each FAR rule follow. For the actual revisions and/or amendments to these FAR cases, refer to the specific item number and subject set forth in the documents following these item summaries.

FAC 2005-33 amends the FAR as specified below:

**Item I—Trade Agreements—Costa Rica, Oman, and Peru (FAR Case 2008-036) (Interim)**

This interim rule allows contracting officers to purchase the goods and services of Costa Rica, Oman, and Peru without application of the Buy American Act if the acquisition is subject to the applicable trade agreements. The free trade agreements with Costa Rica, Oman, and Peru join the North American Free Trade Agreement (NAFTA), the Australia, Bahrain, Chile, Morocco, and Singapore Free Trade Agreements, and the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR) with respect to the Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua, which are already in the FAR.

The threshold for supplies and services is \$67,826 for the CAFTA-DR and \$194,000 for the Oman and Peru FTAs. The threshold for construction is \$7,443,000 for the CAFTA-DR and the Peru FTA and \$8,817,449 for the Oman FTA.

**Item II—Contractor's Request for Progress Payments (FAR Case 2005-032)**

This final rule converts the proposed rule published at 73 FR 19035 on April 8, 2008, to a final rule with one editorial change. This final rule incorporates improvements related to requests for progress payments and the Standard Form (SF) 1443, Contractor's Request for Progress Payments, used to request those progress payments.

Dated: June 9, 2009.  
**Al Matera,**  
*Director, Office of Acquisition Policy.*

**Federal Acquisition Circular**

Federal Acquisition Circular (FAC) 2005-33 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator for the National Aeronautics and Space Administration.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 2005-33 is effective June 15, 2009 except for Item II, which is effective July 15, 2009.

Dated: June 9, 2009.  
**Shay D. Assad,**  
*Director of Defense Procurement and Acquisition Policy.*

Dated: June 5, 2009.  
**Rodney P. Lantier,**  
*Acting Senior Procurement Executive, Office of the Chief Acquisition Officer, U.S. General Services Administration.*

Dated: June 8, 2009.  
**William P. McNally,**  
*Assistant Administrator for Procurement, National Aeronautics and Space Administration.*  
 [FR Doc. E9-13979 Filed 6-12-09; 8:45 am]  
**BILLING CODE 6820-EP-S**

**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Parts 25 and 52**

[FAC 2005-33; FAR Case 2008-036; Item I; Docket 2009-0019, Sequence 1]

**RIN 9000-AL23**

**Federal Acquisition Regulation; FAR Case 2008-036, Trade Agreements—Costa Rica, Oman, and Peru**

**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 implement the Dominican Republic—Central America—United States Free Trade Agreement with respect to Costa Rica, the United States-Oman Free Trade Agreement, and the United States-Peru Trade Promotion Agreement.

**DATES:** *Effective Date:* June 15, 2009.

*Comment Date:* Interested parties should submit written comments to the Regulatory Secretariat on or before August 14, 2009 to be considered in the formulation of a final rule.

**ADDRESSES:** Submit comments identified by FAC 2005–33, FAR case 2008–036, by any of the following methods:

- Regulations.gov: <http://www.regulations.gov>.

Submit comments via the Federal eRulemaking portal by inputting “FAR Case 2008–036” under the heading “Comment or Submission”. Select the link “Send a Comment or Submission” that corresponds with FAR Case 2008–036. Follow the instructions provided to complete the “Public Comment and Submission Form”. Please include your name, company name (if any), and “FAR Case 2008–036” on your attached document.

- Fax: 202–501–4067.

- Mail: General Services

Administration, Regulatory Secretariat (VPR), 1800 F Street, NW., Room 4041, ATTN: Hada Flowers, Washington, DC 20405.

*Instructions:* Please submit comments only and cite FAC 2005–33, FAR case 2008–036, 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:** For clarification of content, contact Ms. Meredith Murphy, Procurement Analyst, at (202) 208–6925. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755. Please cite FAC 2005–33, FAR case 2008–036.

#### **SUPPLEMENTARY INFORMATION:**

##### **A. Background**

This rule amends FAR Part 25 and the corresponding clauses in Part 52 to implement the Dominican Republic—Central America—United States Free Trade Agreement (CAFTA–DR) with respect to Costa Rica, the United States-

Oman Free Trade Agreement, and the United States-Peru Trade Promotion Agreement.

Congress approved these trade agreements in the Dominican Republic—Central America—United States Free Trade Agreement Implementation Act (Pub. L. 109–53), the United States-Oman Free Trade Agreement Implementation Act (Pub. L. 109–283) (19 U.S.C. 3805 note), and the United States-Peru Trade Promotion Agreement Implementation Act (Pub. L. 110–138) (19 U.S.C. 3805 note). These Acts waive the applicability of the Buy American Act for some foreign supplies and construction materials from Costa Rica, Oman, and Peru and specify procurement procedures designed to ensure fairness in the acquisition of supplies and services.

This interim rule adds Costa Rica, Oman, and Peru to the definition of “Free Trade Agreement country.” The rule also deletes Costa Rica from the definition of “Caribbean Basin country” because, in accordance with Section 201(a)(3) of Pub. L. 109–53, when the CAFTA–DR agreement enters into force with respect to a country, that country is no longer designated as a beneficiary country for purposes of the Caribbean Basin Economic Recovery Act.

The excluded services for the Oman and Peru FTAs are the same as for the Bahrain FTA, CAFTA–DR, Chile FTA, and NAFTA. Costa Rica has the same thresholds as the other CAFTA–DR countries.

The threshold for supply and service contracts of the Oman and Peru FTAs is \$194,000. Like the Morocco and Bahrain FTAs, the Oman and Peru FTA thresholds for supplies and services is higher than the thresholds for the other FTAs. Therefore, Omani and Peruvian end products are not covered by the Buy American Act—Free Trade Agreements—Israeli Trade Act provision and clause (FAR 52.225–3 and 52.225–4).

For construction contracts, the Oman FTA threshold is \$8,817,449 and the Peru FTA threshold is \$7,443,000. Like NAFTA and the Bahrain FTA, the Omani threshold for construction is higher than the thresholds of the other FTAs. Therefore Omani construction material, along with Bahrainian and Mexican construction material, is excluded from coverage under the Buy American Act—Construction Materials under the Trade Agreements provision and clause for acquisitions less than \$8,817,449 (52.225–11 Alternate I and 52.225–12 Alternate II, respectively). Canadian construction material is not excluded, because it is covered under

the World Trade Organization Government Procurement Agreement.

This is a significant regulatory action and, therefore, was 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**

This interim rule is not expected to 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.* Although the rule opens up Government procurement to the goods and services of Costa Rica, Oman, and Peru, the Councils do not anticipate any significant economic impact on U.S. small businesses. The Department of Defense only applies the trade agreements to the non-defense items listed at DFARS 225.401–70, and acquisitions that are set aside for small businesses are exempt. Therefore, the Councils have not performed an Initial Regulatory Flexibility Analysis. The Councils invite comments from small business concerns and other interested parties on this issue. The Councils will also consider comments from small entities concerning the affected FAR parts 25 and 52 in accordance with 5 U.S.C. 610. Interested parties should submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (FAR Case 2008–036), in correspondence.

##### **C. Paperwork Reduction Act**

The Paperwork Reduction Act does apply, because the interim rule affects the certification and information collection requirements in the provisions at FAR 52.212–3, 52.225–4, 52.225–6, and 52.225–11 currently approved under OMB clearances 9000–0136 (Commercial Item Acquisition: FAR Sections Affected: Part 12; 52.212–1, and 52.212–3), 9000–0130 (Buy America Act, Trade Agreements Act Certificate: FAR Sections Affected: 52.225–4), 9000–0025 (Buy American Act, Trade Agreements Act Certificate: FAR Sections Affected: 52.225–6), and 9000–0141 (Buy America Act—Construction: FAR Sections Affected: Subpart 25.2, 52.225–9, and 52.225–11) respectively. While the FAR Secretariat believes this impact to be negligible, comments are invited on the burden and number of entities affected as part of this rulemaking.

##### **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 these free trade agreements all took effect on January 1, 2009. However, pursuant to Pub. L. 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 25 and 52**

Government procurement.

Dated: June 9, 2009.

**Al Matera,**

*Director, Office of Acquisition Policy.*

Therefore, DoD, GSA, and NASA amend 48 CFR parts 25 and 52 as set forth below:

1. The authority citation for 48 CFR parts 25 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 25—FOREIGN ACQUISITION**

2. Amend section 25.003 by—

a. Removing from the definition “Caribbean Basin country” the words “Costa Rica,”;

b. Revising paragraph (2) of the definition “Designated country”; and removing from paragraph (4) the words “Costa Rica”; and

c. Removing from the definition “Free Trade Agreement country” the words “Chile, Dominican” and adding “Chile,

Costa Rica, Dominican” in their place, and removing the word “Nicaragua, or” and adding “Nicaragua, Oman, Peru, or” in its place.

The revised text reads as follows:

**25.003 Definitions.**

\* \* \* \* \*  
*Designated country* \* \* \*

(2) A Free Trade Agreement country (Australia, Bahrain, Canada, Chile, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Mexico, Morocco, Nicaragua, Oman, Peru, or Singapore);

\* \* \* \* \*

3. Amend section 25.400 by revising paragraphs (a)(2)(iii) through (a)(2)(vii), and adding paragraphs (a)(2)(viii) and (a)(2)(ix) to read as follows:

**25.400 Scope of Subpart.**

(a) \* \* \*

(2) \* \* \*

(iii) Singapore FTA (the United States-Singapore Free Trade Agreement, as approved by Congress in the United States-Singapore Free Trade Agreement Implementation Act (Pub. L. 108-78) (19 U.S.C. 3805 note));

(iv) Australia FTA (the United States-Australia Free Trade Agreement, as approved by Congress in the United States-Australia Free Trade Agreement Implementation Act (Pub. L. 108-286) (19 U.S.C. 3805 note));

(v) Morocco FTA (The United States—Morocco Free Trade Agreement, as approved by Congress in the United States—Morocco Free Trade Agreement Implementation Act (Pub. L. 108-302) (19 U.S.C. 3805 note));

(vi) CAFTA-DR (The Dominican Republic-Central America-United States Free Trade Agreement, as approved by Congress in the Dominican Republic-Central America-United States Free Trade Agreement Implementation Act (Pub. L. 109-53) (19 U.S.C. 4001 note));

(vii) Bahrain FTA (the United States-Bahrain Free Trade Agreement, as approved by Congress in the United States-Bahrain Free Trade Agreement Implementation Act (Pub. L. 109-169) (19 U.S.C. 3805 note));

(viii) Oman FTA (the United States-Oman Free Trade Agreement, as approved by Congress in the United States-Oman Free Trade Agreement Implementation Act (Pub. L. 109-283) (19 U.S.C. 3805 note)); and

(ix) Peru FTA (the United States-Peru Trade Promotion Agreement, as approved by Congress in the United States-Peru Trade Promotion Agreement Implementation Act (Pub. L. 110-138) (19 U.S.C. 3805 note));

\* \* \* \* \*

**25.401 [Amended]**

4. Amend section 25.401 in paragraph (b), in the table heading, by removing from the fourth column “Bahrain, FTA, CAFTA-DR, Chile FTA, and NAFTA” and adding “Bahrain FTA, CAFTA-DR, Chile FTA, NAFTA, Oman FTA and Peru FTA” in its place.

5. Amend section 25.402 by revising the table following paragraph (b) to read as follows:

**25.402 General.**

\* \* \* \* \*

(b) \* \* \*

Trade Agreement	Supply Contract (equal to or exceeding)	Service Contract (equal to or exceeding)	Construction Contract (equal to or exceeding)
WTO GPA .....	\$194,000	\$194,000	\$7,443,000
FTAs			
Australia FTA .....	67,826	67,826	7,443,000
Bahrain FTA .....	194,000	194,000	8,817,449
CAFTA-DR (Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua) .....	67,826	67,826	7,443,000
Chile FTA .....	67,826	67,826	7,443,000
Morocco FTA .....	194,000	194,000	7,443,000
NAFTA			
-Canada .....	25,000	67,826	8,817,449
-Mexico .....	67,826	67,826	8,817,449
Oman FTA .....	194,000	194,000	8,817,449
Peru FTA .....	194,000	194,000	7,443,000
Singapore FTA .....	67,826	67,826	7,443,000
Israeli Trade Act .....	50,000	—	—

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

**52.212–3 [Amended]**

■ 6. Amend section 52.212–3 by revising the date of the provision to read “(JUN 2009)”; and by removing from paragraphs (g)(1)(i) and (g)(1)(ii) “Bahrainian or Moroccan” and adding “Bahrainian, Moroccan, Omani, or Peruvian” in its place each time it appears (three times).

■ 7. Amend section 52.212–5 by revising the date of the clause, and paragraphs (b)(32)(i) and (b)(33) to read 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 (JUN 2009)**

\* \* \* \* \*

(b) \* \* \*

\_\_\_\_ (32)(i) 52.225–3, Buy American Act—Free Trade Agreements—Israeli Trade Act (JUN 2009) (41 U.S.C. 10a–10d, 19 U.S.C. 3301 note, 19 U.S.C. 2112 note, 19 U.S.C. 3805 note, Pub. L. 108–77, 108–78, 108–286, 108–302, 109–53, 109–169, 109–283, and 110–138).

\* \* \* \* \*

\_\_\_\_ (33) 52.225–5, Trade Agreements (JUN 2009) (19 U.S.C. 2501, *et seq.*, 19 U.S.C. 3301 note).

\* \* \* \* \*

■ 8. Amend section 52.225–3 by—

■ a. Revising the date of the clause;

■ b. Revising the definitions

“Bahrainian or Moroccan end product” and “Free Trade Agreement country”; and

■ c. Removing from paragraph (c) “the Bahrain and Morocco FTAs” and adding “the Bahrain, Morocco, Oman, and Peru FTAs” in its place, and removing “other than a Bahrainian or Moroccan” and adding “other than a Bahrainian, Moroccan, Omani, or Peruvian” in its place each time it appears (twice).

■ The revised text reads as follows:

**52.225–3 Buy American Act—Free Trade Agreements—Israeli Trade Act.**

\* \* \* \* \*

**Buy American Act—Free Trade Agreements—Israeli Trade Act (JUN 2009)**

\* \* \* \* \*

(a) \* \* \*

*Bahrainian, Moroccan, Omani, or Peruvian end product* means an article that—

(1) Is wholly the growth, product, or manufacture of Bahrain, Morocco, Oman, or Peru; or

(2) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in Bahrain, Morocco, Oman, or Peru into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to the article, provided that the value of those incidental services does not exceed that of the article itself.

\* \* \* \* \*

*Free Trade Agreement country* means Australia, Bahrain, Canada, Chile, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Mexico, Morocco, Nicaragua, Oman, Peru, or Singapore.

\* \* \* \* \*

**52.225–4 [Amended]**

■ 9. Amend section 52.225–4 by—

■ a. Revising the date of the provision to read “(JUN 2009)”; and

■ b. Removing from paragraphs (a) and (b) “Bahrainian or Moroccan” and adding “Bahrainian, Moroccan, Omani, or Peruvian” in its place each time it appears (three times).

■ 10. Amend section 52.225–5 by—

■ a. Revising the date of the clause; and

■ b. Revising paragraph (2) in the definition “Designated country”; and removing from paragraph (4) of that definition the words “Costa Rica,”.

■ The revised text reads as follows:

**52.225–5 Trade Agreements.**

\* \* \* \* \*

**Trade Agreements (JUN 2009)**

(a) \* \* \*

*Designated country* \* \* \*

(2) A Free Trade Agreement country (Australia, Bahrain, Canada, Chile, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Mexico, Morocco, Nicaragua, Oman, Peru, or Singapore);

\* \* \* \* \*

■ 11. Amend section 52.225–11 by—

■ a. Revising the date of the clause;

■ b. Amending paragraph (a) in the definition “Designated country” by—

■ 1. Revising paragraph (2); and

■ 2. Removing from paragraph (4)

“Costa Rica,”;

■ c. Amending Alternate I, by—

■ 1. Revising the date of Alternate I;

■ 2. Removing from the introductory paragraph text and in the definition “Bahrainian or Mexican construction material” “Bahrainian or Mexican” and adding “Bahrainian, Mexican, or Omani” in its place (twice);

■ 3. Removing from the definition “Bahrainian or Mexican construction material” in paragraphs (1) and (2) “Bahrain or Mexico” and adding

“Bahrain, Mexico, or Oman” in its place (twice);

■ 4. Revising paragraph (b)(1); and

■ 5. Removing from paragraph (b)(2) “other than Bahrainian or Mexican” and adding “other than Bahrainian, Mexican, or Omani” in its place.

■ The revised text reads as follows:

**52.225–11 Buy American Act—Construction Materials Under Trade Agreements.**

\* \* \* \* \*

**Buy American Act—Construction Materials Under Trade Agreements (JUN 2009)**

(a) *Definitions.* \* \* \*

\* \* \* \* \*

*Designated country* \* \* \*

(2) A Free Trade Agreement country (Australia, Bahrain, Canada, Chile, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Mexico, Morocco, Nicaragua, Oman, Peru, or Singapore);

\* \* \* \* \*

*Alternate I (JUN 2009).* \* \* \*

\* \* \* \* \*

(b) *Construction materials.* (1) This clause implements the Buy American Act (41 U.S.C. 10a–10d) by providing a preference for domestic construction material. In accordance with 41 U.S.C. 431, the component test of the Buy American Act is waived for construction material that is a COTS item (See FAR 12.505(a)(2)). In addition, the Contracting Officer has determined that the WTO GPA and all the Free Trade Agreements except the Bahrain FTA, NAFTA, and the Oman FTA apply to this acquisition. Therefore, the Buy American Act restrictions are waived for designated country construction materials other than Bahrainian, Mexican, or Omani construction materials.

\* \* \* \* \*

■ 12. Amend section 52.225–12 in Alternate II by—

■ a. Revising the date of Alternate II;

■ b. Removing from the introductory paragraph text “Bahrainian or Mexican” and adding “Bahrainian, Mexican, or Omani” in its place;

■ c. Revising paragraph (d)(1); and

■ d. Removing from paragraph (d)(3) “Bahrainian or Mexican” and adding “Bahrainian, Mexican, or Omani” in its place.

**52.225–12 Notice of Buy American Act Requirement—Construction Materials Under Trade Agreements.**

\* \* \* \* \*

*Alternate II (JUN 2009)* \* \* \*

(d) *Alternate offers.* (1) When an offer includes foreign construction material, except foreign construction material from a designated country other than Bahrain, Mexico, or Oman that is not listed by the Government in this solicitation in paragraph (b)(3) of FAR clause 52.225–11, the offeror also may submit an alternate offer based on

use of equivalent domestic or designated country construction material other than Bahrainian, Mexican, or Omani construction material.

\* \* \* \* \*

[FR Doc. E9-13978 Filed 6-12-09; 8:45 am]

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## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Parts 32, 43, 52, and 53

[FAC 2005-33; FAR Case 2005-032; Item II; Docket 2008-0002; Sequence 1]

RIN 9000-A147

#### Federal Acquisition Regulation; FAR Case 2005-032, Contractor's Request for Progress 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 incorporate improvements related to requests for progress payments and the Standard Form (SF) 1443, Contractor's Request for Progress Payments, used to request those progress payments. Changes made to the Standard Form as published in the proposed rule include correction of misspellings, and an editorial change made at Item 4 to better describe the order number.

**DATES:** *Effective Date:* July 15, 2009.

**FOR FURTHER INFORMATION CONTACT:** For clarification of content, contact Ms. Meredith Murphy, Procurement Analyst, at (202) 208-6925. For information pertaining to status or publication schedules, contact the Regulatory Secretariat, 1800 F Street, NW, Room 4041, Washington, DC 20405, (202) 501-4755. Please cite FAC 2005-33, FAR case 2005-032.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

The Councils published a proposed rule in the **Federal Register** at 73 FR 19035 on April 8, 2008, to (1) address revisions necessary to implement the paid-cost rule and (2) simplify the SF 1443 and related regulations and instructions to improve clarity.

No comments were received by the close of the public comment period on June 9, 2008. Subsequently, one comment was received from one commenter. The commenter specifically took no issue with the proposed FAR changes, but objected to the costs that would be incurred by its member companies to make programming changes that ensue from altering the SF 1443. The commenter reasoned that "(s)ince DOD's goal is to significantly expand the use of performance based payments, it would appear to be more cost effective not to incur significant expenditures on changes to a form (i.e., SF 1443) that is part of a system (progress payments) that is no longer the preferred system for providing financing payments."

The Councils were puzzled at the commenter's cost estimate of \$87,000 to update software to use the new SF 1443 because the changes incorporated into the SF 1443 by this case were, generally, necessitated by prior changes to the paid-cost rule and other changes to FAR Part 32. These changes had been in effect for some time, so contractors using SF 1443 to request progress payments have already made changes to their software to conform their progress payment requests to the updated FAR text.

The commenter, an association representing large defense aerospace corporations, was requested to provide the cost analysis upon which it based its estimate of the cost to reprogram software in order to enable electronic generation and submittal of the SF 1443 to request a progress payment. The commenter subsequently provided data supporting its estimate of approximately \$87,000 per contractor. This estimate and the supporting data were forwarded to the Small Business Administration (SBA) Office of Advocacy for review specifically to determine the impact of modifying the SF 1443 on small businesses. Two independent reviews were conducted, one by the SBA's regulatory economist and one by an outside small business expert selected by the SBA. Neither of these reviews discovered a substantial economic impact on a significant number of small entities.

Further, the Councils did not find the commenter's rationale regarding performance-based payments convincing. While it is the goal of Federal Government agencies, not just DoD, to use performance-based payments wherever possible, there remain many circumstances in which progress payments are an important financing mechanism. Therefore, the

Councils approved this case as a final rule.

During a final review by the Councils' Acquisition Finance Team, it was discovered that the last item in the "INSTRUCTIONS" section of the form on page 2 was labeled in error as pertaining to "Item 26." However, the instruction actually refers to paragraph (f) of the "CERTIFICATION" section. That correction has been made to the form. In addition, a sentence was added to the SF 1443 instructions for Items 14a-14e to clarify that the "financing payments" to be included do not include interim payments under a cost reimbursement contract.

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 the changes are designed to simplify the form and improve clarity. (See also, the Background section above for a thorough discussion of lack of impact on small entities.)

##### C. Paperwork Reduction Act

The Paperwork Reduction Act does apply; however, these changes to the FAR do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Number 9000-0010.

##### List of Subjects in 48 CFR Parts 32, 43, 52, and 53

Government procurement.

Dated: June 9, 2009.

**Al Matera,**

*Director, Office of Acquisition Policy.*

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 32, 43, 52, and 53 as set forth below:

■ 1. The authority citation for 48 CFR parts 32, 43, 52, and 53 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. Amend section 32.001 by adding, in alphabetical order, the definition “Liquidate” to read as follows:

**32.001 Definitions.**

\* \* \* \* \*

*Liquidate* means to decrease a payment for an accepted supply item or service under a contract for the purpose of recouping financing payments previously paid to the contractor.

\* \* \* \* \*

■ 3. Amend section 32.501–3 by revising paragraph (a)(1) and the first sentence of paragraph (a)(3) to read as follows:

**32.501–3 Contract price.**

(a) \* \* \*

(1) Under firm-fixed price contracts, the contract price is the current amount fixed by the contract plus the not-to-exceed amount for any unpriced modifications.

\* \* \* \* \*

(3) Under a fixed-price incentive contract, the contract price is the target price plus the not-to-exceed amount of unpriced modifications. \* \* \*

\* \* \* \* \*

**32.503–1 [Removed and Reserved]**

■ 4. Remove and reserve section 32.503–1.

■ 5. Amend section 32.503–6 by revising paragraphs (a)(3), (f), and (g)(1)(i) to read as follows:

**32.503–6 Suspension or reduction of payments.**

(a) \* \* \*

(3) In all cases, the contracting officer shall—

(i) Act fairly and reasonably;

(ii) Base decisions on substantial evidence; and

(iii) Document the contract file. Findings made under paragraph (c) of

the Progress Payments clause shall be in writing.

\* \* \* \* \*

(f) *Fair value of undelivered work.* Progress payments must be commensurate with the fair value of work accomplished in accordance with contract requirements. The contracting officer must adjust progress payments when necessary to ensure that the fair value of undelivered work equals or exceeds the amount of unliquidated progress payments. On loss contracts, the application of a loss ratio as provided at paragraph (g) of this subsection constitutes this adjustment.

(g) \* \* \*

(1) \* \* \*

(i) Revise the current contract price used in progress payment computations (the current ceiling price under fixed-price incentive contracts) to include the not-to-exceed amount for any pending change orders and unpriced orders.

\* \* \* \* \*

**PART 43—CONTRACT MODIFICATIONS**

**43.102 [Amended]**

■ 6. Amend section 43.102 by removing from paragraph (b) the word “maximum” and adding the word “ceiling” in its place.

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

■ 7. Amend section 52.232–16 by revising the date of the clause; adding paragraph (a)(9); and revising paragraphs (c)(5) and (g) to read as follows:

**52.232–16 Progress Payments.**

\* \* \* \* \*

Progress Payments (JUL 2009)

\* \* \* \* \*

(a) \* \* \*

(9) The costs applicable to items delivered, invoiced, and accepted shall not include

costs in excess of the contract price of the items.

\* \* \* \* \*

(c) \* \* \*

(5) The fair value of the undelivered work is less than the amount of unliquidated progress payments for that work.

\* \* \* \* \*

(g) *Reports, forms, and access to records.*

(1) The Contractor shall promptly furnish reports, certificates, financial statements, and other pertinent information (including estimates to complete) reasonably requested by the Contracting Officer for the administration of this clause. Also, the Contractor shall give the Government reasonable opportunity to examine and verify the Contractor’s books, records, and accounts.

(2) The Contractor shall furnish estimates to complete that have been developed or updated within six months of the date of the progress payment request. The estimates to complete shall represent the Contractor’s best estimate of total costs to complete all remaining contract work required under the contract. The estimates shall include sufficient detail to permit Government verification.

(3) Each Contractor request for progress payment shall:

(i) Be submitted on Standard Form 1443, Contractor’s Request for Progress Payment, or the electronic equivalent as required by agency regulations, in accordance with the form instructions and the contract terms; and

(ii) Include any additional supporting documentation requested by the Contracting Officer.

\* \* \* \* \*

**PART 53—FORMS**

**53.232 [Amended]**

■ 8. Amend section 53.232 by removing “(10/82)” and adding “(JUL 2009)” in its place; and by removing “, as specified in 32.503.1”.

■ 9. Amend section 53.301–1443 by revising the form to read as follows:

**53.301–1443 Contractor’s Request for Progress Payment.**

BILLING CODE 6820–EP–S

CONTRACTOR'S REQUEST FOR PROGRESS PAYMENT

Form Approved OMB Number 9000-0010

IMPORTANT: This form is to be completed in accordance with instructions on the reverse.

SECTION I - IDENTIFICATION INFORMATION

1 TO NAME AND ADDRESS OF CONTRACTING OFFICE ADMINISTERING THE CONTRACT (Include ZIP Code)
2 FROM NAME AND ADDRESS OF CONTRACTOR (Include ZIP Code)
3 SMALL BUSINESS
4 CONTRACT NUMBER
5 CONTRACT PRICE
6. RATES
7. DATE OF INITIAL AWARD
8A PROGRESS PAYMENT REQUEST NUMBER
8B DATE OF THIS REQUEST

SECTION II - STATEMENT OF COSTS UNDER THIS CONTRACT THROUGH

9. RESERVED
10. RESERVED
11. COSTS ELIGIBLE FOR PROGRESS PAYMENTS UNDER THE PROGRESS PAYMENTS CLAUSE
12a. TOTAL CONTRACT COST(S) INCURRED TO DATE
13. ITEM 11 MULTIPLIED BY ITEM 6a
14a. FINANCING PAYMENTS PAID TO SUBCONTRACTORS
15. TOTAL DOLLAR AMOUNT (Item 13 plus 14e)
16. ITEM 5 MULTIPLIED BY ITEM 6b
17. LESSER OF ITEM 15 OR ITEM 16
18. TOTAL AMOUNT OF PREVIOUS PROGRESS PAYMENTS REQUESTED
19. MAXIMUM BALANCE ELIGIBLE FOR PROGRESS PAYMENTS (Item 17 less 18)

SECTION III - COMPUTATION OF LIMITS FOR OUTSTANDING PROGRESS PAYMENTS

20. COMPUTATION OF PROGRESS PAYMENT CLAUSE LIMITATION
21. COMPUTATION OF PROGRESS PAYMENT CLAUSE LIMITATION
22. MAXIMUM UNLIQUIDATED PROGRESS PAYMENTS (Lesser of Item 20e or 21e)
23. TOTAL AMOUNT LIQUIDATED AND TO BE LIQUIDATED
24. UNLIQUIDATED PROGRESS PAYMENTS (Item 18 less 23)
25. MAXIMUM PERMISSIBLE PROGRESS PAYMENTS (Item 22 less 24)
26. AMOUNT OF CURRENT INVOICE FOR PROGRESS PAYMENT (Lesser of item 25 or 19)
27. AMOUNT APPROVED BY CONTRACTING OFFICER

CERTIFICATION

DATE
I Certify that

- (a) The above statement (with attachments) has been prepared from the books and records of the above-named contractor in accordance with the contract and the instructions hereon, and to the best of my knowledge and belief, that it is correct.
(b) All the costs of contract performance (except as herewith reported in writing) have been paid to the extent shown herein, or where not shown as paid have been paid or will be paid currently, by the contractor, when due, in the ordinary course of business.
(c) The work reflected above has been performed.
(d) The quantities and amounts involved are consistent with the requirements of the contract.
(e) There are no encumbrances (except as reported in writing herewith, or on previous progress payment request number ) against the property acquired or produced for, and allocated or properly chargeable to the contract which would affect or impair the Government's title.
(f) There has been no materially adverse change in the financial condition of the contractor since the contractor's (insert 'as of' date of financial information) submission of its last financial information dated (insert date of prior submission/certification) to the Government in connection with the contract.
(g) To the extent of any contract provision limiting progress payments pending first article approval, such provision has been complied with, and
(h) After the making of the requested progress payment the unliquidated progress payments will not exceed the maximum unliquidated progress payments permitted by the contract

NAME AND TITLE OF CONTRACTOR REPRESENTATIVE SIGNING THIS FORM SIGNATURE
NAME AND TITLE OF CONTRACTING OFFICER SIGNATURE

## INSTRUCTIONS

**GENERAL** - All dollar amounts must be shown in whole dollars, rounded using a consistent methodology (e.g., always round up, always round down, always round to the nearest dollar). All line item numbers not included in the instructions below are self-explanatory.

**SECTION I - IDENTIFICATION INFORMATION.** Complete items 1 through 8b in accordance with the following instructions.

Item 1. TO - Enter the name and address of the cognizant Contract Administration Office (the office administering the contract).

PAYING OFFICE - Enter the designation of the paying office, as indicated on the contract.

Item 2. FROM - CONTRACTOR'S NAME AND ADDRESS/ZIP CODE - Enter the name and mailing address of the contractor. If applicable, the division of the company performing the contract should be entered immediately following the contractor's name.

Item 3. Enter an "X" in the appropriate block to indicate whether or not the contractor is a small business concern.

Item 4. Enter the contract number, including the task or delivery order number if applicable. Progress payment requests under individual orders shall be submitted as if the order constituted a separate contract, unless otherwise specified in this contract (FAR 52.232-16(m)).

Item 5. Enter the total contract price in accordance with the following (See FAR 32.501-3):

(1) Under firm-fixed-price contracts, the contract price is the current amount fixed by the contract plus the not-to-exceed amount for any unpriced modifications.

(2) If the contract is redeterminable or subject to economic price adjustment, the contract price is the initial price until modified.

(3) Under a fixed-price incentive contract, the contract price is the target price plus the not-to-exceed amount for any unpriced modifications.

However, if the contractor's properly incurred costs exceed the target price, the contracting officer may provisionally increase the price up to the ceiling or maximum price.

(4) Under a letter contract, the contract price is the maximum amount obligated by the contract as modified.

(5) Under an unpriced order issued against a basic ordering agreement, the contract price is the maximum amount obligated by the order, as modified.

(6) Any portion of the contract specifically providing for reimbursement of costs only shall be excluded from the contract price.

Item 6A. PROGRESS PAYMENT RATES - Enter the 2-digit progress payment percentage rate shown in paragraph (a) (1) of the progress payment clause.

Item 6B. LIQUIDATED RATE - Enter the current progress payment liquidation rate prescribed in the contract (FAR 52.232-16(b)) using three digits - Example. show 80% as 800 - show 72.3% as 723. Decimals between tenths must be rounded up to the next highest tenth (not necessarily the nearest tenth), since rounding down would produce a rate below the minimum rate calculated (FAR 32.503-10(b) (4)).

Item 7. DATE OF INITIAL AWARD - Enter the four digit calendar year. Use two digits to indicate the month. Example: Show January 2005 as 2005/01.

Item 8A. PROGRESS PAYMENT REQUEST NUMBER - Enter the number assigned to this request. All requests under a single contract must be numbered consecutively, beginning with 1. Each subsequent request under the same contract must continue in sequence, using the same series of numbers without omission.

Item 8B. Enter the date of the request.

**SECTION II - STATEMENT OF COSTS UNDER THIS CONTRACT.**

Date. In the space provided in the heading enter the date through which costs have been accumulated from inception for inclusion in this request. This date is applicable to item entries in Sections II and III.

Cost Basis. In accordance with FAR 52.232-16 (a) (1), the basis for progress payments is the contractor's total costs incurred under this contract, whether or not actually paid, plus financing payments to subcontractors (computed in accordance with FAR 52.232-16(j)), less the sum of all previous progress payments made by the Government under this contract.

Item 11. Costs eligible for progress payments under the progress payments clause. Compute the eligible costs in accordance with the requirements at FAR 52.232-16(a)(1) through (4). First articles: Before first article approval, the acquisition of materials or components for, or the commencement of production of, the balance of the contract quantity is at the sole risk of the contractor. Before the first article approval, the costs thereof shall not be allowable for purposes of progress payments (See FAR 52.209-3(g) and FAR 52.209-4(h)).

Item 12a. Enter the total contract costs incurred to date, if the actual amount is not known, enter the best possible estimate. If an estimate is used, enter (E) after the amount.

Item 12b. Enter the estimated cost to complete the contract. The contractor shall furnish estimates to complete that have been developed or updated within six months of the date of the progress payment request. The estimates to complete shall represent the contractor's best estimate of total costs to complete all remaining contract work required under the contract. The estimates shall include sufficient detail to permit Government verification.

Items 14a through 14e. Include only financing payments (progress payments, performance-based payments, and commercial item financing) on subcontracts which are in accordance with the requirements of FAR 52.232-16(j). Do not include interim payments under a cost reimbursement contract.

Item 14a. Enter only financing payments actually paid.

Item 14b. Enter total financing payments recouped from subcontractors.

Item 14d. Include the amount of unpaid subcontract progress payment billings which have been approved by the contractor for the current payment in the ordinary course of business.

**SECTION III - ADVANCE PAYMENTS/ACCEPTED ITEMS.** This Section must be completed only if the contractor has received advance payments against this contract, or if the items have been delivered, invoiced and accepted as of the date indicated in the heading of Section II above.

EXCEPTION: Item 27 must be completed for all progress payment requests where the line 12c amount exceeds the amount on Line 5.

Item 20a. Of the costs reported in Item 11, compute and enter only costs which are properly allocable to items delivered, invoiced and accepted to the applicable date. In order of preference, these costs are to be computed on the basis of one of the following: (a) The actual unit cost of items delivered, giving proper consideration to the deferment of the starting load costs or (b) projected unit costs (based on experienced costs plus the estimated cost to complete the contract), where the contractor maintains cost data which will clearly establish the reliability of such estimates.

Item 23. Enter total progress payments liquidated (monies recouped from the contractor on prior billings) and those to be liquidated from billings submitted but not yet paid (monies to be recouped from the contractor on submitted but unpaid billings).

**CERTIFICATION**

Paragraph (f). If no financial information has been provided previously in connection with this contract, insert "N/A" in the submission date block and the financial information date block. Otherwise, insert respectively, the "as of" date of the financial information submitted last and the date of the last submission.

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 BILLING CODE 6820-EP-C

**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES  
 ADMINISTRATION**

**NATIONAL AERONAUTICS AND  
 SPACE ADMINISTRATION**

**48 CFR Chapter 1**

[Docket FAR 2009-0002, Sequence 4]

**Federal Acquisition Regulation;  
 Federal Acquisition Circular 2005-33;  
 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) 2005-33 which amend the FAR. Interested parties may obtain further information regarding these rules by referring to FAC 2005-33,

which precedes this document. These documents are also available via the Internet at <http://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** Ms. Hada Flowers, Regulatory Secretariat, (202) 208-7282. For clarification of content, contact the analyst whose name appears in the table below.

**LIST OF RULES IN FAC 2005-33**

Item	Subject	FAR case	Analyst
I .....	Trade Agreements—Costa Rica, Oman, and Peru (Interim) .....	2008-036	Murphy.
II .....	Contractor's Request for Progress Payments .....	2005-032	Murphy.

**SUPPLEMENTARY INFORMATION:**

Summaries for each FAR rule follow. For the actual revisions and/or amendments to these FAR cases, refer to the specific item number and subject set forth in the documents following these item summaries.

FAC 2005-33 amends the FAR as specified below:

**Item I—Trade Agreements—Costa Rica, Oman, and Peru (FAR Case 2008-036) (Interim)**

This interim rule allows contracting officers to purchase the goods and services of Costa Rica, Oman, and Peru without application of the Buy American Act if the acquisition is subject to the applicable trade

agreements. The free trade agreements with Costa Rica, Oman, and Peru join the North American Free Trade Agreement (NAFTA), the Australia, Bahrain, Chile, Morocco, and Singapore Free Trade Agreements, and the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR) with respect to the Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua, which are already in the FAR.

The threshold for supplies and services is \$67,826 for the CAFTA-DR and \$194,000 for the Oman and Peru FTAs. The threshold for construction is \$7,443,000 for the CAFTA-DR and the Peru FTA and \$8,817,449 for the Oman FTA.

**Item II—Contractor's Request for Progress Payments (FAR Case 2005-032)**

This final rule converts the proposed rule published at 73 FR 19035 on April 8, 2008, to a final rule with one editorial change. This final rule incorporates improvements related to requests for progress payments and the Standard Form (SF) 1443, Contractor's Request for Progress Payments, used to request those progress payments.

Dated: June 9, 2009.

**Al Matera,**

*Director, Office of Acquisition Policy.*

[FR Doc. E9-13976 Filed 6-12-09; 8:45 am]

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