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48 CFR Ch. 9 (10-1-01 Edition)

(2) For costs associated with employee whistleblower actions where a retaliatory act is alleged against a covered contractor or subcontractor, the contracting officer:

(i) May authorize reimbursement of costs on a provisional basis, in appropriate cases;

(ii) Must consult with the Office of General Counsel whistleblower costs point of contact, who will consult with other Headquarters points of contact as appropriate, before making a final allowability determination; and

(iii) Must determine allowability of defense, settlement and award costs on a case-by-case basis after considering the terms of the contract, relevant cost regulations, and the relevant facts and circumstances, including federal law and policy prohibiting reprisal against whistleblowers, available at the conclusion of the employee whistleblower action.

(3) Covered contractors and subcontractors must segregate legal costs, including costs of in-house counsel, incurred in the defense of an employee whistleblower action so that the costs are separately identifiable.

(4) If a contracting officer provisionally disallows costs associated with an employee whistleblower action for a covered contractor or subcontractor, funds advanced by the Department may not be used to finance costs connected with the defense, settlement and award of an employee whistleblower action.

(5) Contractor defense, settlement and award costs incurred in connection with the defense of suits brought by employees under section 2 of the Major Fraud Act of 1988 are excluded from coverage of this section.

[65 FR 62301, Oct. 18, 2000]

PART 932—CONTRACT FINANCING

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AUTHORITY: 42 U.S.C. 7254; 40 U.S.C. 486(c).

SOURCE: 49 FR 12011, Mar. 28, 1984, unless otherwise noted.

932.006-4 Procedures.

(a) The remedy coordination official shall follow the procedures identified in FAR 32.006-4.

(b) [Reserved]

[63 FR 5273, Feb. 2, 1998]

Subpart 932.1—General

932.102 Description of contract financing methods. (DOE coverage—paragraph (e))

(e)(2) Progress payments based on a percentage or stage of completion may be authorized by the Head of the Contracting Activity when a determination is made that progress payments based on costs cannot be practically employed and that there are adequate

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safeguards provided for the administration of progress payments based on a percentage or stage of completion.

[61 FR 41708, Aug. 9, 1996]

Subpart 932.3—Loan Guarantees for Defense Production

932.304–2 Certificate of eligibility.

(h) Guaranteed loan applications shall be authorized and transmitted to the Federal Reserve Bank only by the Secretary or designee specified for that purpose.

Subpart 932.4—Advance Payments for Non-Commercial Items

932.402 General.

(e)(1) The Head of the Contracting Activity or designee shall have the responsibility and authority for making findings and determinations, and for approval of contract terms concerning advance payments.

(2) Before authorizing any advance payment arrangements, the approving official shall obtain the advice, and other inputs of the servicing finance office.

932.407 Interest.

(d)(4) Advance payments may be made without interest under cost-reimbursement contracts for construction or engineering services.

Subpart 932.5—Progress Payments Based on Costs

932.501–2 Unusual progress payments.

(a)(3) The Head of the Contracting Activity shall forward all requests which are considered favorable, with supporting information, to the Chief Financial Officer, Headquarters, will approve or deny the request.

(d) Requests for unusual progress payments will not be considered as a handicap or adverse factor in the award of a contract; provided the bid or proposal is not conditioned on approval of such request.

[49 FR 12011, Mar. 28, 1984, as amended at 59 FR 9106, Feb. 25, 1994]

Subpart 932.6—Contract Debts

932.605 Responsibilities and cooperation among Government officials.

(b) The DOE contracting officer has primary responsibility for determining the amount of contract debt and notifying the cognizant finance office of such debt due the Government. The servicing DOE finance office making payments under the contract has primary responsibility for debt collection.

Subpart 932.8—Assignment of Claims

932.803 Policies.

(d) In the case of prime contracts, when it has been determined that the financing of contracts will be facilitated in the interest of DOE programs, it is the policy of DOE that such contracts provide, or be amended without consideration (see Assignment of Claims Act of 1940) to provide, in conformance with FAR 32.804, that payments to be made to an assignee shall not be subject to reduction or setoff. In the case of subcontracts, when loans are made for the purpose of financing performance of subcontracts under DOE prime contracts, financing institutions or the Government as guarantor in those instances in which such loans are guaranteed should not be required to incur risks of loss by reason of possible diversion of assigned subcontracts proceeds for payment of other claims of the prime contractor against the borrower, otherwise unrelated to the assigned subcontracts. The Head of the Contracting Activity shall require the adoption of these policies and practices by DOE prime contractors with respect to DOE subcontract work. The Head of the Contracting Activity should inform the Chief Financial Officer, Headquarters of each DOE contractor who is unwilling to adopt policies consistent with this paragraph and the reasons given in support of the contractor's position.

[49 FR 12011, Mar. 28, 1984, as amended at 59 FR 9106, Feb. 25, 1994]

Subpart 932.9—Prompt Payment**Subpart 932.70—DOE Loan Guarantee Authority****932.970 Implementing DOE policies and procedures.**

(a) *Invoice payments*—(1) *Contract Settlement Date*. For purposes of determining any interest penalties under cost-type contracts, the effective date of contract settlement shall be the effective date of the final contract modification issued to acknowledge contract settlement and to close out the contract.

(2) *Constructive acceptance periods*. Where the contracting officer determines, in writing, on a case-by-case basis, that it is not reasonable or feasible for DOE to perform the acceptance or approval function within the standard period, the contracting officer should specify a longer constructive acceptance or approval period, as appropriate. Considerations include, but are not limited to, the nature of supplies or services involved, geographical site location, inspection and testing requirements, shipping and acceptance terms, and available DOE resources.

(b) *Contract financing payments*. Contracting officers may specify payment due dates that are less than the standard 30 days when a determination is made, in writing, on a case-by-case basis, that a shorter contract financing payment cycle will be required to finance contract work. In such cases, the contracting officer should coordinate with the finance and program officials that will be involved in the payment process to ensure that the contract payment terms to be specified in solicitations and resulting contract awards can be reasonably met. Consideration should be given to geographical separation, workload, contractor ability to submit a proper request, and other factors that could affect timing of payment. However, payment due dates that are less than 7 days for progress payments or less than 14 days for interim payments on cost-type contracts are not authorized.

[61 FR 41708, Aug. 9, 1996]

932.7002 Authority.

Guaranteed loan applications shall be authorized and transmitted to the Federal Reserve Board only by the Secretary, or designee specified for that purpose, and only when made pursuant to enabling legislation or other authority; e.g., by executive order or regulation.

932.7003 Policies.

The following policies governing the exercise of its loan guarantee authority have been established by DOE:

(a) The use of the loan guarantee authority is not restricted to contracts or subcontracts of any particular type or class. Each case is to be evaluated on its own merits and under the particular circumstances applicable thereto.

(b) The fact that a contract has been awarded as a result of competitive bidding should not, of itself, render the loan ineligible for guarantee by DOE if the contractor is financially responsible and its need for working capital is the result of the impact of a defense program or any other DOE program for which guaranteed loans are authorized.

(c) The guarantee authority should, in general, not be used in connection with loans to contractors required to furnish performance bonds, except in those cases in which the time likely to be required for the surety or DOE to take over in the event of default will result in delays which cannot be tolerated by the particular program concerned. When performance bonds have been furnished, the surety shall be required to subordinate its rights in favor of the guaranteed loan.

(d) The criterion that the materials or services to be provided cannot readily be acquired from alternative sources does not require the finding that the materials or services are absolutely unobtainable elsewhere. The criterion should be so applied as to permit guarantees of loans when, although the materials or services can be obtained elsewhere, such factors as the urgency of supply schedules, technical capacity

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of the contractor, comparative prices, and time and expense involved in re-issuing the contract, including termination payment, establish that it is to the Government's advantage not to resort to alternative sources merely because the contractor or subcontractor may require a guaranteed loan.

(e) If it is known at the time the contract is to be awarded that the low offeror who is technically qualified and competent to furnish the required materials and services will require a guaranteed loan, the contracting officer should obtain appropriate advice and in reaching a decision should consider at least the following:

(1) The savings to be realized by awarding the contract to the low offeror;

(2) The risk to the Government in guaranteeing a loan; and

(3) The likelihood, if award is made to the second low offeror, of that offeror's applying for a guaranteed loan at a later date.

Extreme care should be exercised in rejecting a low bid or proposal simply because the low offeror requires a guaranteed loan.

(f) The amount of the loan should bear reasonable relationship to such factors as the value and terms of the contract, the probable investment required to be made by the contractor in payrolls and inventories, the frequency with which contract payments are to be made, and the borrower's current working capital position.

(g) Borrowings for working capital purposes under guaranteed loans shall be limited to the amount necessary to perform the contract for which the loan is sought. In order that the contractor will also use its own funds in the performance of the contracts, amounts outstanding under the loan or line-of-credit shall be limited to an amount not to exceed 90 percent of the borrower's investment in its contracts, regardless of the total amount of the loan or line of credit authorized. The borrower's investment includes all items for which the borrower would be entitled to payment on performance or termination of contracts, but does not include any items for which no work has been done nor expenditures made.

(h) Unless there are exceptional circumstances, the loan should mature not later than 30 days after the estimated date of final payment under the contract.

[49 FR 12011, Mar. 28, 1984, as amended at 59 FR 9106, Feb. 25, 1994]

932.7004 Procedures.

932.7004-1 Guaranteed loans for civilian programs.

The procedures for authorizing a guaranteed loan under legislation other than section 301 of the Defense Production Act of 1950 (50 U.S.C. App. 2091) shall be essentially the same as those set forth in FAR 32.304, Procedures, FAR 32.305, Loan Guarantees for Terminated Contracts, and FAR 32.306 Loan Guarantee for Subcontracts; except that any contrary provisions required by enabling legislation authorizing the loan shall govern.

932.7004-2 Criteria.

(a) The materials or services to be furnished by the contractor are necessary to the Government interest.

(b) The materials or services cannot as a practical matter be obtained from alternate sources without delay or impeding the Government's interest, except that no small business concern shall be held ineligible for the issuance of such guarantee by reason of alternative sources of supply.

(c) The contractor has demonstrated its inability to obtain the necessary financing in conventional credit channels without the guarantee.

(d) There is reasonable assurance that the loan can be repaid.

(e) The contractor is competent to perform the contract.

[49 FR 12011, Mar. 28, 1984, as amended at 59 FR 9106, Feb. 25, 1994]

932.7004-3 Eligibility.

The applicant's eligibility for a guaranteed loan will be based on:

(a) Contracting officer determinations and findings regarding items (a), (b) and (e) in 932.7004-2 as incorporated in a Certificate of Eligibility (FAR 32.304-2); and

(b) The Chief Financial Officer's determination for items (c) and (d) in

932.7004-2 based on information contained in the application, the Federal Reserve Bank's report, and information furnished by the contracting activity concerned.

[49 FR 12011, Mar. 28, 1984, as amended at 59 FR 9106, Feb. 25, 1994]

PART 933—PROTESTS, DISPUTES, AND APPEALS

Subpart 933.1—Protests

- 933.102 General.
- 933.103 Protests to the agency.
- 933.104 Protests to GAO.
- 933.106 Solicitation provisions.

AUTHORITY: 42 U.S.C. 7254; 40 U.S.C. 486(c).

SOURCE: 51 FR 31336, Sept. 3, 1986, unless otherwise noted.

Subpart 933.1—Protests

SOURCE: 61 FR 41708, Aug. 9, 1996, unless otherwise noted.

933.102 General. (DOE coverage— paragraph (b))

(b) The Heads of Contracting Activities, for contracts estimated to be within the limits of their delegated authority, may, without power of redelegation, provide corrective relief in response to a protest in accordance with 48 CFR 33.102(b).

[63 FR 53758, Oct. 16, 1997]

933.103 Protests to the agency. (DOE coverage—paragraphs (f), (i), (j), and (k))

(f) If FAR 33.103(f) requires that award be withheld or performance be suspended or the awarded contract be terminated pending resolution of an agency protest, authority to award and/or continue performance of the protested contract may be requested by the Head of the Contracting Activity (HCA), concurred in by counsel, and approved by the Procurement Executive.

(i)(1) Protests filed with the contracting officer before or after award shall be decided by the Head of the Contracting Activity except for the following cases, which shall be decided by the Procurement Executive:

(i) The protester requests that the protest be decided by the Procurement Executive.

(ii) The HCA is the contracting officer of record at the time the protest is filed, having signed either the solicitation where the award has not been made, or the contract, where the award or nomination of the apparent successful offeror has been made.

(iii) The HCA concludes that one or more of the issues raised in the protest have the potential for significant impact on DOE acquisition policy.

(2) Upon receipt of a protest requesting a decision by the Procurement Executive, the contracting activity shall immediately provide a copy of the protest to the Office of Clearance and Support.

(j) The Department of Energy encourages direct negotiations between an offeror and the contracting officer in an attempt to resolve protests. In those situations where the parties are not able to achieve resolution, the Department favors the use of alternative dispute resolution (ADR) techniques to resolve protests. A protest requesting a decision at the Headquarters level shall state whether the protester is willing to utilize ADR techniques such as mediation or nonbinding evaluation of the protest by a neutral. Upon receipt of a protest requesting a decision at the Headquarters level, the Office of Clearance and Support will explore with the protester whether the use of ADR techniques would be appropriate to resolve the protest. Both parties must agree that the use of such techniques is appropriate. If the parties do not mutually agree to utilize ADR to resolve the protest, the protest will be processed in accordance with the procedures set forth in paragraph (k).

(k) Upon receipt of a protest lodged with the Department, the contracting officer shall prepare a report similar to that discussed in FAR 33.104(a)(3)(iii). In the case of a protest filed at the Headquarters level, the report shall be forwarded to the Office of Clearance and Support within 21 calendar days of being notified of such a protest with a proposed response to the protest. The Procurement Executive (for protests at the Headquarters level or those specific HCA protests cited in paragraph (i)(1))