

# BRIEFING PAPERS®



## SECOND SERIES

PRACTICAL TIGHT-KNIT BRIEFINGS INCLUDING ACTION GUIDELINES ON GOVERNMENT CONTRACT TOPICS

### FINANCING GOVERNMENT CONTRACTS / EDITION II—PART II

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**T**his BRIEFING PAPER is Part II of a comprehensive guide to understanding the availability of and requirements of the procedures relating to the financing of Government contracts as outlined in Federal Acquisition Regulation Part 32. Part I, published last month, focused on financing for noncommercial item purchases—especially cost-based progress payments and performance-based payments.<sup>1</sup> It described the principal methods that are available to you as a

Government contractor to expedite cash flow from the Government during performance, the circumstances in which they may be employed, and the procedural and substantive limitations imposed on their use.

This Part II continues the discussion of the above-described issues in relation to financing for *commercial item purchases*. In addition, Part II addresses some of the *liabilities* inherent in receiving money from the Government—namely, potential False Claims Act violations—and the requirements for the Government to pay interest under the Prompt Payment Act. It also discusses *statutory constraints* on assignments that could affect your ability to use private sources of funding in support of performance and the Government's ability to *interrupt payments* through the debt collection process, if and when performance difficulties afflict one or more of your contracts, and the measures you can and should take to forestall that prospect.

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#### IN BRIEF

- |   |  |
|---|--|
| Financing For Commercial Item Purchases           | ■ Invoice Requirements                 |
| ■ Availability                                    | ■ Accelerated Payments                 |
| ■ Definition Of "Commercial Item"                 | ■ Automatic Payment Of Interest        |
| ■ Types Of Commercial Payment Methods             | ■ Calculation Of Interest Penalties    |
| ■ Market Research                                 | ■ Overpayments                         |
| ■ Evaluation Of Proposals                         | ■ Relationship To Other Laws           |
| ■ Procedures For Determining Financing Terms      | Electronic Payments                    |
| ■ Procedures For Submitting Payment Requests      | ■ Applicability                        |
| ■ Liquidation                                     | ■ EFT Mechanisms                       |
| ■ Commercial Financing Payments To Subcontractors | ■ Payment Through EFT                  |
| ■ Security  | Assignments                            |
| False Claims Act                                  | ■ Statutory Prohibitions               |
| ■ Liability Under The Act                         | ■ "Financing Institutions" Exemption   |
| ■ Source Of Potential Liability                   | ■ Procedural Requirements              |
| ■ Penalties                                       | ■ Waiver                               |
| Prompt Payment Act                                | ■ Limits On Government's Setoff Rights |
| ■ Basic Provisions                                | Debt Collection                        |
| ■ Prompt Payment Act Regulations                  | ■ Contract Debts                       |
| ■ Policy  | ■ Debt Collection Act Procedures       |
| ■ Determining Due Dates                           |  |

As noted in Part I, there have been many significant changes in the area of financing Government contracts in the 18 years since the subject first received treatment in June 1986 in BRIEFING PAPERS No. 86-7.<sup>2</sup> This two-part Edition II BRIEFING PAPER supersedes both that 1986 version of this PAPER and its subsequent 1988 Revision Note. Relevant and current portions of the previous versions of this BRIEFING PAPER have been incorporated and updated herein, while unique issues arising in the intervening period—e.g., the distinctions between commercial and noncommercial payments, differences between performance-based and cost-based payments, and changes relating to prompt payment requirements and electronic payments—are addressed for the first time.

### Financing For Commercial Item Purchases

As the discussion in Part I made clear, the predominant financing methods for noncommercial transactions are highly complex. They impose significant administrative burdens on both the Contracting Officer and the contractor in an attempt to ensure that the Government's use of financing payments does not undermine its rights or interest in the contract. Recognizing these heavy burdens and hoping to streamline, simplify, and facilitate the use of Government financing methods for commercial goods or services, Congress included in the Federal Acquisition Streamlining Act of 1994 (FASA)<sup>3</sup> provisions to distinguish between financing payments for noncommercial items and financing payments for commercial items.<sup>4</sup>

Historically, commercial contracts were deemed inappropriate subjects of Government financing. In FASA, however, Congress authorized agencies to make financing payments for commercial items "under such terms and conditions as the head of the executive agency determines are appropriate or customary in the commercial marketplace and are in the best interests of the United States."<sup>5</sup> In implementing this authority to use financing provisions in commercial contracts, however, the FAR cautions that a CO must have a full understanding of the effects of the differing contract environments (i.e., Government markets vs. commercial markets), and the CO must take any and all steps necessary to protect the Government's interests.<sup>6</sup>

#### ■ Availability

The FAR recognizes that financing provisions are a common commercial practice in many markets.<sup>7</sup> A CO may include financing terms in a contract for commercial purchases provided *all of the following criteria* are met:<sup>8</sup>

- (1) The contract item financed is a commercial item or service under FAR Part 12.
- (2) The contract price exceeds the simplified acquisition threshold of \$100,000.<sup>9</sup>
- (3) The CO determines that it is appropriate or customary in the commercial marketplace to make financing payments for the particular item or service.
- (4) Authorizing this form of contract financing is in the best interest of the United States.<sup>10</sup>



### BRIEFING PAPERS

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- (5) Adequate financial security is obtained.
- (6) Aggregate commercial advance payments do not exceed 15% of the contract price.<sup>11</sup>
- (7) The contract is awarded on the basis of competitive procedures or, if only one offer is solicited, adequate consideration is obtained (based on the time value of the additional financing to be provided).
- (8) The payment office concurs with the CO concerning liquidation provisions.<sup>12</sup>

#### ■ Definition Of “Commercial Item”

FAR Part 12 describes, generally, the policies and procedures applicable to Government purchases of commercial products and services. Under the FAR, “commercial item” means any of the following types of items:<sup>13</sup>

- (1) Any item, other than real property, that is of a type *customarily used by the general public* or by nongovernmental entities for purposes other than governmental purposes and (a) has been *sold, leased, or licensed to the general public* or (b) has been *offered for sale, lease, or license to the general public*.
  - (2) Any item that evolved from an item described above through advances in technology or performance and that is not yet available in the commercial marketplace, but *will be available in the commercial marketplace* in time to satisfy the delivery requirements under a Government solicitation.
  - (3) Any item that would satisfy either of the foregoing criteria, but for (a) modifications of a type customarily available in the commercial marketplace or (b) minor modifications of a type not customarily available in the commercial marketplace made to meet Federal Government requirements.
  - (4) Any combination of the foregoing items that are of a type *customarily combined and sold in combination to the general public*.
- (5) A *nondevelopmental item*, if the procuring agency determines the item was developed exclusively at private expense and sold in substantial quantities, on a competitive basis, to multiple state and local governments.

In addition, the term “commercial item” also includes the following types of commercial services:<sup>14</sup>

- (a) Installation services, maintenance services, repair services, training services, and other services if (1) *such services are procured for support of a commercial item*, regardless of whether such services are provided by the same source or at the same time as the item, and (2) the source of such services *provides similar services contemporaneously to the general public* under terms and conditions similar to those offered to the Federal Government.
- (b) Services of a type *offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices* for specific tasks performed or specific outcomes to be achieved and under standard commercial terms and conditions.

Finally, the definition of “commercial item” also includes any item, combination of items, or services referred to above, notwithstanding the fact that the item, combination of items, or service is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor.<sup>15</sup>

#### ■ Types Of Commercial Payment Methods

The FAR identifies four types of financing payment methods available for commercial contracts: (1) commercial advance payments,<sup>16</sup> (2) commercial interim payments,<sup>17</sup> (3) delivery payments,<sup>18</sup> and (4) installment payments.<sup>19</sup> These are similar in concept to the financing methods available under noncommercial contracts but are designed to be more streamlined for commercial contracts.

Beyond these basic methods, however, the FAR also recognizes that alternative financing

terms may be appropriate if the commercial market uses them.<sup>20</sup> In some situations, contractors are free to propose to the CO their own financing terms, deviating from the prescribed FAR methods.<sup>21</sup> Still, as with noncommercial contracts, any deviation from the prescribed commercial methods or financing methods unsupported in commercial markets is considered “unusual” contract financing requiring agency head approval.<sup>22</sup>

*Commercial advance payments* are payments “made before any performance of work under the contract.”<sup>23</sup> The total amount of commercial advance payments must not exceed 15% of the contract price,<sup>24</sup> except in cases where the National Aeronautics and Space Administration provides commercial advance payments for expendable launch vehicle service contracts.<sup>25</sup> Notably, while similar in name to noncommercial advance payments, the FAR specifically exempts this payment method from the noncommercial advance payment regulations in FAR Subpart 32.4.<sup>26</sup> However, commercial advance payments are still considered contract financing, and thus the Prompt Payment Act<sup>27</sup> does not apply.<sup>28</sup>

*Commercial interim payments* are payments “given to the contractor after some work has been done, whereas a commercial advance payment is given to the contractor when no work has been done.”<sup>29</sup> Broadly speaking, commercial interim payments are any payment that is not a commercial advance payment or a delivery payment.<sup>30</sup> Commercial interim payments may be used based on achievement or occurrence of specified events, the passage of time, or specified times before the delivery dates.<sup>31</sup> As with other forms of commercial financing methods, the Prompt Payment Act does not apply.<sup>32</sup>

*Delivery payments* are payments for “accepted supplies or services, including payments for accepted partial deliveries.”<sup>33</sup> Delivery payments are available only for completed supplies and services accepted by the Government in accordance with the terms of the contract.<sup>34</sup> Commercial financing payments (including advance, interim, or installment commercial payments) are liquidated by deduction from the deliv-

ery payments.<sup>35</sup> Delivery payments are *invoice payments* for purposes of the Prompt Payment Act, and you may recover interest from the Government if it does not issue a delivery payment in a timely manner.<sup>36</sup>

*Installment payments* are a fixed number of equal interim financing payments made to the contractor before delivery and acceptance of a contract line item.<sup>37</sup> The purpose of this type of payment method is to reduce the administrative burden in computing financing amounts. However, it is possible that the number of deliveries under the contract may increase to a level at which use of installment payments would actually *increase* administrative burdens and thereby make other financing methods preferable.<sup>38</sup> Nonetheless, where installments payments are used, the “amount of each installment payment for each separately priced unit of each contract line item is equal to 70 percent of the unit price divided by the number of installment payments authorized for that unit.”<sup>39</sup> Commercial installment payments are not available for Department of Defense contracts unless market research shows that this type of financing payment is both appropriate and customary in the commercial marketplace.<sup>40</sup> The FAR Councils have considered, but rejected, allowing noncommercial installment payment provisions.<sup>41</sup>

#### ■ Market Research

Whenever an agency conducts a procurement, the FAR requires it to conduct market research to help the agency “arrive at the most suitable approach to acquiring, distributing, and supporting supplies and services.”<sup>42</sup> One of the market areas that an agency may investigate is contract financing.<sup>43</sup> However, if a CO contemplates contract financing for commercial contracts, the FAR requires the CO to have a “full understanding of effects of the differing contract environments,”<sup>44</sup> which can be accomplished only through market research to determine whether contract financing is “appropriate or customary” in the commercial marketplace.<sup>45</sup>

In conducting market research about commercial financing terms, the CO should con-



sider (1) the extent to which other buyers provide contract financing for purchases in that market, (2) the overall level of financing normally provided, (3) the amount or percentages of any payments equivalent to commercial advance payments, (4) the basis for any payments equivalent to commercial interim payments, as well as the frequency, and amounts or percentages of such payments, and (5) methods of liquidation of contract financing payments and any special or unusual payment terms applicable to delivery payments.<sup>46</sup>

### ■ Evaluation Of Proposals

Market research will lead the CO to one of two conclusions with regard to commercial financing payments: either commercial financing terms are appropriate in the given market, or they are not. If the CO concludes that financing is appropriate, the CO may determine either that the standard market terms are definite, such that the CO can propose the contract financing terms in the solicitation, or that there are no standard market terms and the parties must independently negotiate them.

If the CO is unable in the first place to determine what financing terms are the most advantageous to the Government, the CO should include in the contract solicitation a clause inviting contractors to propose financing terms.<sup>47</sup> The CO must include the delivery payment dates and the interest rate to be used in evaluating the financing proposals.<sup>48</sup> This information enables each contractor to craft appropriate commercial financing terms. In evaluating the competing proposals and the differing financing terms, the CO must adjust each proposed price to reflect the cost of providing the financing proposed by the contractor.<sup>49</sup> This requires the CO to determine the “imputed cost” of the financing payments and add it to the total proposed contract price.<sup>50</sup> The FAR instructs a CO to calculate the time value of proposal-specified contract financing arrangements using the interest rate proposed in the Office of Management and Budget Circular A-94, “Guidelines and Discount Rates for Benefit-Cost Analysis of Federal Programs.”<sup>51</sup>

On the other hand, if the CO determines that the market financing terms are sufficiently definite to determine the financing method in the Government’s best interest, the CO may “construct” the financing terms in the solicitation.<sup>52</sup> When the CO proposes contract financing terms, evaluation of the contract financing provisions is not a factor in the evaluation of the responsive proposals, because the effect of contract financing is already reflected in each contractor’s proposed prices.<sup>53</sup> If a contractor proposes alternative financing terms, then both the terms and the proposal should be rejected as nonresponsive.<sup>54</sup> “However, an offer stating that the CO-specified contract financing terms will not be used by the offeror “does not alter the evaluation of the offer, nor does it render the offer nonresponsive or otherwise unacceptable.”<sup>55</sup> If a contractor that declined the financing terms is eventually awarded the contract, then the financing terms are deleted from the final contract.<sup>56</sup>

Regardless of who proposes the financing terms, the FAR requires each contract financing clause to include the following information: (1) a computation of the financing payment amounts, (2) specific conditions of contractor entitlement to those financing payments, (3) a description of the liquidation of those financing payments by delivery payments, (4) a description of the security the contractor will provide for financing payments, and (5) frequency, form, and any additional content of the contractor’s request for financing payments.<sup>57</sup>

### ■ Procedures For Determining Financing Terms

The standard clauses for commercial financing payments leave the bulk of the terms and conditions of the financing payments to be negotiated between the parties.<sup>58</sup> The FAR states: “Contracts may provide for commercial advance and commercial interim payments based upon a wide variety of bases, including (but not limited to) achievement or occurrence of specified events, the passage of time, or specified times before the delivery date(s). The basis for payment must be objectively determinable.”<sup>59</sup>

### ■ Procedures For Submitting Payment Requests

If your commercial item contract provides for contract financing, you may request payment no more than once a month.<sup>60</sup> The Government must pay a commercial financing payment when (1) the payment requested is properly due in accordance with the terms of the contract, (2) the supplies or services to be delivered under the contract will be delivered or performed in accordance with the contract, and (3) there has been no impairment or diminution of the Government's security under the contract.<sup>61</sup>

Requests for commercial financing payments must include (a) the name and address of the contractor, (b) the date of the request, (c) the contract number or order number, and (d) an itemized and totaled statement of the financing payments requested or, in the case of a request for installment payments, an itemized and totaled statement of the items, installment payment amount, and month for which payment is being requested for each separately priced unit of each contract line item.<sup>62</sup> As noted above, with the exception of commercial delivery payments (which are not technically financing payments),<sup>63</sup> commercial financing methods do not qualify as payments under the Prompt Payment Act.<sup>64</sup>

### ■ Liquidation

As with the noncommercial financing provisions, the commercial financing provisions require liquidation of the financing payments through contract performance. The FAR identifies three basic requirements for the liquidation provisions for commercial contracts: (1) liquidation of contract financing payments must be on the same basis as the computation of contract financing payments (e.g., financing payments computed on a whole contract basis must be liquidated on a whole contract basis, and a payment computed on a line item basis must be liquidated against that line item); (2) if liquidation is on a whole contract basis, the CO must use a uniform liquidation percentage, unless the CO obtains the concurrence of the cognizant payment office that the proposed liquidation provisions can be ex-

ecuted by that office; and (3) agency regulations can provide alternative liquidation methods.<sup>65</sup> "In the case of installment payments, the FAR provides that liquidation is accomplished "by deducting from the delivery payment of each item the total unliquidated amount of installment payments made for that separately priced unit of that contract line item."<sup>66</sup> The liquidation amounts for each unit of each line item must be delineated in each request for delivery payment you submit to the CO.<sup>67</sup>

Additionally, if the contract is terminated, the CO may demand immediate repayment of all unliquidated commercial advance, interim, or installment payments.<sup>68</sup> This is the same as with noncommercial financing, as discussed in Part I.<sup>69</sup> However, note that this does *not* include delivery payments, which are final payments from the Government accepting an item or service from the contractor.<sup>70</sup>

Despite these similarities with noncommercial financing, one of the best features of commercial interim payments is that the Government *does not have any additional right to reduce or withhold payment.*<sup>71</sup> This feature alone makes this particular financing method a much more preferable option when compared to the administratively burdensome noncommercial methods.

### ■ Commercial Financing Payments To Subcontractors

As with noncommercial financing methods, if a commercial contract contains financing terms, then these financing terms must be flowed down to your subcontractors.<sup>72</sup> However, commercial contracts *do not* have the same mandatory payment provisions for suppliers or subcontractors, and a contractor is not liable for reductions or breach of contract with the Government for receiving commercial financing payments but not paying its suppliers or subcontractors.<sup>73</sup> Presumably, the pressures of the commercial marketplace and risk of litigation from the supplier or subcontractor for breach of contract will keep the contractor "honest."

### ■ Security

Similar to the requirements for noncommercial financing payments, FASA requires the Government to obtain adequate security from contractors for financing commercial contracts.<sup>74</sup> The CO will specify in the solicitation the type of security the Government will accept under the commercial contract.<sup>75</sup> If the Government is willing to accept more than one form of security, you must specify in your offer the form of security you will provide. If the security proposed in your offer is acceptable to the CO, the resulting contract will specify the security.<sup>76</sup>

The CO may determine your general financial condition to be adequate security, provided you agree to provide additional security should the CO deem it necessary.<sup>77</sup> Note, however, that just because your financial condition is sufficient for you to be determined “responsible,” that does not necessarily mean that your financial condition is sufficient for security purposes.<sup>78</sup> Assessment of your financial condition will consider both net worth and liquidity.<sup>79</sup> If the CO determines that your financial condition provides insufficient security, the CO may require additional security, including (1) liens, (2) U.S. bonds or notes, (3) currency, checks, or bank drafts, (4) an irrevocable letter of credit from a federally insured financial institution, (5) a bond from a surety, (6) a guarantee of repayment from a sufficiently liquid affiliated company, or (7) title to identified contractor assets.<sup>80</sup>

With regard to liens, FASA specifically provides that any lien obtained in favor of the United States in connection with commercial financing is “paramount to all other liens and is effective immediately upon the first payment, without filing, notice, or other action by the United States.”<sup>81</sup> The contract will specify what asset the lien is upon (e.g., the work in process, the contractor’s plant, or the contractor’s inventory), and the CO has significant flexibility in determining what assets will offer sufficient security.<sup>82</sup> If liens are contemplated, the contractor must certify that the assets subject to the Government’s lien are free from any prior encumbrances.<sup>83</sup> This is the only certification that might be required under the commercial financing terms.

In determining whether security should be required under a commercial contract, the CO “must be aware of certain risks.”<sup>84</sup> The FAR explains that “very high amounts of financing early in the contract (front-end loading) may unduly increase the risk to the Government.”<sup>85</sup> Thus, the “security and the amounts and timing of financing payments must be analyzed as a whole to determine whether the arrangement will be in the best interest of the Government.”<sup>86</sup>

If you fail to provide adequate security, then the Government will not make any financing payment under the contract.<sup>87</sup> Additionally, if the CO determines at any time that your security is insufficient, the CO may demand additional security as necessary.<sup>88</sup> If you fail to provide additional security, the CO may collect or liquidate any security that has already been provided, suspend any further financing payments, and demand immediate repayment of all unliquidated payment amounts.<sup>89</sup>

### False Claims Act

Inherent in the detailed mechanics of commercial and noncommercial financing methods outlined in FAR Part 32 and discussed in these BRIEFING PAPERS are liabilities associated with erroneous billings to the Government. It is a well known and perilous fact of life for all Government contractors that incorrect statements made in, or in support of, a request for payment from the Government may expose you to significant liability under the civil False Claims Act (FCA).<sup>90</sup> In submitting requests for financing payments from the Government, whether under commercial or noncommercial contracts, you run the risk of a “false claim” allegation if any of the information contained in your payment requests (whether in a Standard Form (SF) 1443<sup>91</sup> or some other payment request format) is incorrect. The consequences can be dire.

### ■ Liability Under The Act

A complete discussion of the False Claims Act is beyond the scope of these BRIEFING PAPERS.<sup>92</sup> Suffice it to say that the FCA prohibits a person from *knowingly*<sup>93</sup> submitting a *false claim* to the Government for payment.<sup>94</sup>

The FCA enumerates several different types of “claims” that result in liability under the Act, including (1) presenting, or causing to be presented, a false or fraudulent claim for payment or approval (e.g., a false SF 1443 certification),<sup>95</sup> and (2) using a false claim or statement to avoid or decrease an obligation to pay the Government (e.g., retaining money improperly paid or reducing an obligation to the Government).<sup>96</sup> Both of these types of “claims” are implicated by the submission of financing payment requests, whether money is ultimately received from the Government or not.<sup>97</sup>

The FCA does not define “false,” but the courts have held that liability under the Act requires an *actual* falsity,<sup>98</sup> as opposed to a claim that is arguably false. “Knowingly” is defined in the Act as (a) having actual knowledge of the information, (b) acting in deliberate ignorance of the truth or falsity of the information, or (c) acting in reckless disregard of the truth or falsity of the information.<sup>99</sup> No proof of specific intent to defraud is required.<sup>100</sup>

### ■ Source Of Potential Liability

A request for progress payments on SF 1443 containing incorrect information is one example of potential FCA liabilities arising from requests for contract financing payments. The “Progress Payments” clause (discussed in detail in Part I)<sup>101</sup> does not on its face impose a duty on contractors to disclose a loss.<sup>102</sup> Instead, the clause merely imposes a duty to provide such relevant reports, financial statements, and other information as may be reasonably requested by the CO.<sup>103</sup> Thus, evidence of a loss is usually uncovered pursuant to requests by COs for information, often triggered by (1) disproportionate incurrence of costs,<sup>104</sup> (2) failure to meet delivery dates,<sup>105</sup> or (3) information from outside sources.<sup>106</sup>

While the “Progress Payments” clause does not impose a disclosure duty on contractors, the progress payment voucher *does*. One of the primary causes of FCA allegations in the area of contract financing is the contractor’s failure to update its estimated additional cost (EAC) to complete the contract, which is required

under Item 12b of SF 1443.<sup>107</sup> Reported increases in EACs can trigger reductions in progress payments or other actions on the part of the CO. An understated EAC could prompt the CO to continue to make progress payments available at an unreasonably high rate or at an unreasonably early point in time. The requirement to update your EAC is not absolute, however, since the instructions on SF 1443 for Item 12b allow a contractor merely to deduct incurred costs from a previous estimate of contract completion costs and only require revised estimates every six months.<sup>108</sup> Still, Defense Contract Audit Agency auditors are instructed to “verify contract compliance with this requirement and determine that the [EAC] is supported with current, accurate, and complete information.”<sup>109</sup>

EACs figure prominently in the DOD Inspector General’s list of “fraud indicators” for Government contracts and financing payments. Among those “fraud indicators” are:<sup>110</sup>

- (1) Improper billing of costs.
- (2) Supporting documents missing or unavailable for review.
- (3) Only copies, no originals, available for review.
- (4) A contractor is slow in paying its suppliers or has not paid suppliers, employees, or the Government.
- (5) Billing costs that were not incurred on the contract.
- (6) No supporting documentation for calculation of key figures, such as EACs or cost of undelivered work;
- (7) The EACs for billing or contract performance reports differ from other internal financial EAC projections without reasonable explanations.
- (8) Little or no physical progress on the contract, even though significant costs have been billed and the contract delivery schedule indicates that significant physical progress should have occurred.



- (9) Significant extensions to the contract delivery schedule with no increase in the EAC and the contractor has no acceptable explanation for why costs will not increase.
- (10) Continued work performance identified by either the Government or the contractor, but no adjustments made to the EAC.
- (11) The EAC is calculated based on an out-of-date delivery schedule.
- (12) Billing for deliverables never received by the Government.

This list is not exhaustive, and COs are encouraged to look at all of the facts. If the CO concludes based on substantial evidence that a contractor's requests for financing payments are based on fraud, then the agency may reduce or suspend the financing payments or refer the matter for a fraud investigation.<sup>111</sup>

#### ■ Penalties

The penalties under the FCA are severe. Any person who knowingly submits a false claim to the Government is liable for (1) a civil penalty between \$5,500 and \$11,000 for *each* false claim submitted,<sup>112</sup> (2) three times the amount of damages the Government sustained because of the submission of the false claim, *and* (3) costs incurred prosecuting the claim.<sup>113</sup> Considering that *each* financing payment request submitted *each* month may constitute a separate claim, and considering the treble damages provision, the FCA should serve as a significant motivating factor for ensuring the accuracy of financing payment requests.

### Prompt Payment Act

It is essential that payments be issued promptly to maximize your cash flow. Congress enacted the Prompt Payment Act of 1982<sup>114</sup> in response to criticisms by the General Accounting Office (now the Government Accountability Office) and contractors that federal agencies consistently were failing to pay for goods and services in a timely fashion. As a result, contrac-

tors were in effect being asked to carry their Government customers' accounts by providing interest-free loans during periods of nonpayment. Late payments disrupt contractors' normal cash flow, necessitate additional borrowing to finance performance, and generally threaten the financial stability of federal suppliers, especially small businesses. Inefficient agency payment procedures thus force contractors to make an unfortunate choice—they can either contingency price their products or services to cover anticipated payment delays, or they can refuse to do business with the Government. In enacting the Prompt Payment Act, Congress deemed both of these alternatives unacceptable from the standpoint of maintaining effective competition for Government contracts and securing the lowest possible price.

#### ■ Basic Provisions

The Act addresses Congress' concerns by requiring federal agencies to pay interest if they fail to pay contractors by the date payment is due under the contract for the item of property or service provided, or if they attempt to take advantage of a prompt payment discount after the expiration of the discount period.<sup>115</sup> If the contract does not specify a due date for payment, then the due date automatically is set at 30 days after the Government receives a "proper invoice" for the goods or services.<sup>116</sup> The statute establishes shorter due dates and grace periods for meat, dairy, and perishable agricultural commodities.<sup>117</sup> With respect to improperly taken discounts, the required payment date for the unpaid amount is the last day specified in the contract that a properly discounted amount may be paid.<sup>118</sup>

The statute itself does not define the term "proper invoice." Instead, whether an invoice is "proper" is determined under implementing regulations promulgated by the Office of Management and Budget.<sup>119</sup> Both the Act<sup>120</sup> and the implementing regulations<sup>121</sup> require the head of the agency to notify the contractor—within seven days of the date the invoice is received—of any defects or improprieties in the invoice that would prevent the running of interest as specified in the statute. If

the CO does not return the defective invoice, it automatically converts into a “proper invoice” for purposes of the Prompt Payment Act.<sup>122</sup>

In contrast to the simple interest payable on contractor claims under the Contract Disputes Act,<sup>123</sup> accrued interest is compounded under the Prompt Payment Act in accordance with the rate determined every six months by the Secretary of the Treasury for interest payments under the Contract Disputes Act.<sup>124</sup> For the first half of 2005, the prompt payment interest rate is 4.25%.<sup>125</sup> As a further incentive for improved agency payment practices, the Act precludes appropriation of additional funds to cover interest penalty assessments. Instead, agencies must pay all required penalties from the administrative or operating budgets of the program for which the penalty was incurred.<sup>126</sup>

#### ■ Prompt Payment Act Regulations

The Prompt Payment Act directed the OMB to prescribe regulations implementing the statutory interest penalties.<sup>127</sup> Part 1315 to Title 5 of the *Code of Federal Regulations* responds to that mandate. Before 1999, the Prompt Payment Act regulations were included in OMB Circular A-125, “Prompt Payment.”<sup>128</sup> In 1999, however, the regulations were formally added to the *Code of Federal Regulations*.<sup>129</sup> Still, not all federal regulations have been universally amended to reflect that codification, and the current regulations state that “regulatory references to OMB Circular A-125 shall be construed as referring to [Part 1315].”<sup>130</sup> FAR Subpart 32.9 outlines equivalent regulations.

#### ■ Policy

Part 1315 reflects the fundamental Government policy that agencies must ensure “timely payments and payment of interest penalties where required.”<sup>131</sup> For purposes of interest entitlement, the normal rule for commercial transactions and contractor payments is that payment is deemed made on the day the check is dated,<sup>132</sup> not on the date it is actually received by the payee.<sup>133</sup> For purposes of electronic fund transfers (EFTs), payment is made on the settlement date of the EFT.<sup>134</sup> Payments

falling due on a weekend or federal holiday may be made on the following business day without any penalty.<sup>135</sup>

The FAR specifically provides that agency heads:<sup>136</sup>

(1) Must establish the policies and procedures necessary to implement [Subpart 32.9];

(2) May prescribe additional standards for establishing invoice payment due dates... necessary to support agency programs and foster prompt payment to contractors;

(3) May adopt different payment procedures to accommodate unique circumstances, provided that such procedures are consistent with the policies in [FAR Subpart 32.9];

(4) Must inform contractors of points of contact within their cognizant payment offices to enable contractors to obtain status of invoices; and

(5) May authorize the use of accelerated payment methods....

The Prompt Payment Act requirements apply to invoice payments on all contracts, except those contracts specifically regulated by other laws.<sup>137</sup> “Invoice payments” include (1) payments for partial deliveries that have been accepted by the Government, (2) final cost or fee payments where amounts owed have been settled between the Government and the contractor, (3) payments under fixed-price construction and architect-engineer contracts, and (4) interim payments under a cost-reimbursement services contract.<sup>138</sup>

As already discussed, the Prompt Payment Act requirements do not apply to “financing payments.”<sup>139</sup> However, the FAR has implemented certain “prompt payment”-type procedures for issuing financing payments, while not risking penalties under the Act.<sup>140</sup> The FAR provides that financing payments should be made within 30 days of receiving a proper contract financing request, unless agency procedures provide otherwise.<sup>141</sup> At the DOD, COs are instructed to make all performance-based payments on either the contract entitlement date or within 14 days after receipt of a proper payment request.<sup>142</sup> At the Department of Energy, COs may specify financing 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.”<sup>143</sup> However, payment due dates that are less than seven days for progress payments or less than 14 days for interim payments on cost-type contracts are not authorized.<sup>144</sup> If an agency misses a due date identified in the contract for payment of a financing payment, the agency does not violate the Prompt Payment Act, leaving the contractor only with whatever contract remedies it might be willing to pursue through the disputes process, which is ill-suited for this particular kind of Government inaction.

#### ■ Determining Due Dates

With a few exceptions, 5 C.F.R. Part 1315 provides that a payment is due either (a) on the date specified in the contract, (b) in accordance with discount terms when discounts are offered and taken, (c) in accordance with the accelerated payment methods, or (d) 30 days after the start of the payment period, if not otherwise specified.<sup>145</sup> There are two exceptions to this general rule: (1) the payment due date for interim payments under cost-reimbursement service contracts is 30 days after the receipt of the proper invoice,<sup>146</sup> and (2) the payment due date for commodity payments for meat products, dairy, and perishable agricultural commodities (as well as mixed invoices for commodities) is between 7 and 10 days after the receipt of the proper invoice.<sup>147</sup>

The FAR offers more specific guidance on establishing due dates for Government contracts. The prescribed due date for making an invoice payment is (a) the later of either the 30th day after the designated billing office receives a proper invoice or the 30th day after Government acceptance of supplies delivered or services performed,<sup>148</sup> (b) the date specified in the contract, if the contract does not require submis-

sion of an invoice for payment,<sup>149</sup> or (c) the 30th day after the date of the contractor’s invoice, if the designated billing office fails to annotate the invoice with the receipt date.<sup>150</sup> Exceptions to this rule apply to architect-engineer contracts and construction contracts.<sup>151</sup>

The DOD offers an even more aggressive timeline for commercial payments. Commercial interim payments must be paid by the date specified in the contract or 14 days after receipt of the proper request for payment.<sup>152</sup> Commercial advance payments must be paid by the date specified in the contract or 30 days after receipt of the proper request for payment.<sup>153</sup> These financing payments, however, are not eligible for Prompt Payment Act interest.<sup>154</sup>

#### ■ Invoice Requirements

As already noted, interest penalties will run only on delayed payment of a “proper invoice.” The regulations specify the elements of a “proper invoice” as follows: (1) name and address of the contractor, (2) invoice date and invoice number, (3) contract number or other authorization for delivery of property or services, (4) description, price, and quantity of property and services actually delivered or rendered, (5) shipping and payment terms, (6) name, address, title, and phone number of the responsible official to whom payment is to be sent, (7) name, address, title, and phone number of the responsible person to be notified in the event of a defective invoice, (8) a Taxpayer Identification Number, (9) EFT banking information, and (10) any other substantiating documentation or information as required by the contract.<sup>155</sup> Absent the foregoing specified documentation, an agency is under no obligation to make payment and, thus, interest on late payments would not be triggered. Notably, at least one agency board of contract appeals has held that an additional requirement for a “proper invoice” is that it must be the *original* invoice—a facsimile is insufficient.<sup>156</sup>

#### ■ Accelerated Payments

In addition to requiring payment by a specific date upon the receipt of a “proper in-

voice,” the regulations prohibit payment at *too early* a date. The regulations require agencies to “make payments no more than seven days before the payment due date, but as close to the due date as possible, unless the agency head or designee has determined, on a case-by-case basis for specific payments, that earlier payment is necessary.”<sup>157</sup> In such situations, agencies may make “accelerated payments.”<sup>158</sup>

There are four circumstances in which accelerated payment may be made without higher-level approval. *First*, a single invoice under \$2,500 may be paid as soon as the necessary underlying documents are assembled.<sup>159</sup> *Second*, agencies may pay small businesses “as quickly as possible,” provided the underlying documentation is provided.<sup>160</sup> *Third*, certain emergency payments (*e.g.*, payments relating to emergencies and disasters and payments relating to the release of hazardous substances) may be paid as soon as the underlying documentation is assembled.<sup>161</sup> *Finally*, interim payments under cost-reimbursement service contracts may be made earlier than seven days before the due date, as allowed by agency regulations.<sup>162</sup>

Typically, before an agency will make a payment, it must have documentation or evidence that the services or products subject to the invoice have been actually received by the Government. However, the regulations allow for an exception through “fast payment” procedures, which allow payment based on certification from the contractor that the goods or services have been delivered.<sup>163</sup> “Fast payments” are appropriate when the following conditions are present:<sup>164</sup>

(1) Individual orders do not exceed \$25,000 (except where agency heads permit [ ] a higher amount on a case-by-case basis);

(2) Deliveries of supplies are to occur where there is both a geographical separation and a lack of adequate communications facilities between Government receiving and disbursing activities that make it impracticable to make timely payments based on evidence of Federal acceptance;

(3) Title to supplies will vest in the Government upon delivery to a post office or common carrier for mailing or shipment to destination or upon receipt by the Government if the shipment is by

means other than the Postal Service or a common carrier; *and*

(4) The contractor agrees to replace, repair, or correct supplies not received at destination, damaged in transit, or not conforming to purchase requirements.

#### ■ Automatic Payment Of Interest

The CO cannot require you to file a claim for Prompt Payment Act interest accrued on late payments. The Government is automatically required to pay interest at the prevailing statutory rate “without regard to whether the vendor has requested payment of such penalty,”<sup>165</sup> provided (1) the designated billing office received a proper invoice, (2) the Government has accepted the goods or services and there is no disagreement over quantity, quality, or other contract provisions, (3) payment is made to you after the due date.<sup>166</sup> Interest penalties also will be paid automatically if an agency takes a discount improperly.<sup>167</sup> Of course, if you intend to appeal a CO’s denial of interest, then you must submit a claim to the CO to satisfy the disputes process and the Contract Disputes Act.<sup>168</sup>

Contractors are entitled to an additional penalty payment, in addition to the interest, when the contractor is owed interest and the Government declines to pay the interest amount automatically.<sup>169</sup> The additional penalty is equal to 100% of the original late payment interest, not exceeding \$5,000<sup>170</sup> and is based on failure to pay individual invoices.<sup>171</sup> Therefore, penalty determinations are on an invoice-by-invoice basis.

#### ■ Calculation Of Interest Penalties

Interest on late payments is computed from the day after the due date through the payment date and is to be separately stated on the Government’s remittance check.<sup>172</sup> The Government should compute its interest penalties using a daily simple interest formula or a monthly compounding interest formula.<sup>173</sup> When an interest penalty is not paid, interest will continue to accrue on the unpaid amount until paid. Interest penalties remaining unpaid for any 30-day period will be added to the principal, and interest penalties thereafter will accrue monthly



on the total of principal and previously accrued interest.<sup>174</sup> Accrual of interest under the Prompt Payment Act is limited to one year or until a claim for such interest is filed under the Contract Disputes Act,<sup>175</sup> whichever occurs earlier.<sup>176</sup> Note, however, that the Armed Services Board of Contract Appeals has held that interest does not accrue on delayed payments when, following the receipt of proper invoices, the contractor and the CO dispute an unrelated payment amount.<sup>177</sup>

### ■ Overpayments

The FAR requires a contractor to “immediately notify” the CO when the contractor becomes aware of a duplicate charge or overpayment.<sup>178</sup> The regulations do not define “overpayment.”

This requirement was implemented in 2001 following a congressional demand for agencies, pursuant to OMB guidance, to investigate and ensure that overpaid contractors were required to return the money to the United States.<sup>179</sup> Charged primarily with ensuring that overpayments were properly monitored and returned to the Government, the OMB issued guidance on the implementation of recovery audits to review the issue.<sup>180</sup> In 2004, the OMB concluded that, while progress was being made on recovering overpayments, “significant challenges do remain.”<sup>181</sup> Clearly, the affirmative duty to repay “overpayments” will remain in force for a long while, and one may anticipate that these new obligations will be readily linked to the “reverse false claims” provisions of the FCA in an effort to further the reach of that statute in the financing realm.<sup>182</sup>

### ■ Relationship To Other Laws

The Prompt Payment Act distinguishes between improper Government delays in paying undisputed invoices and the Government’s proper withholding of funds as to which the contractor’s entitlement is in dispute. The Act authorizes you to file a Contract Disputes Act claim for unpaid interest penalties.<sup>183</sup> However, no interest penalties apply to payments that are delayed “because of a dispute between a Federal agency and a vendor over the amount of pay-

ment or other issues concerning compliance with the terms of a contract.”<sup>184</sup> Such disputed claims and interest thereon are to be resolved under the Contract Disputes Act.<sup>185</sup> This limitation is intended to preclude Government liability for duplicate interest payments.

Additionally, under the Small Business Act,<sup>186</sup> agencies with an Office of Small and Disadvantaged Business Utilization must assist small businesses in obtaining prompt payment and any interest or penalties due from the Government.<sup>187</sup>

## Electronic Payments

Historically, the necessity of the Prompt Payment Act was made all the more important by the physical reality of paper checks and the U.S. mail. The Government satisfies its requirements under the Prompt Payment Act when it issues and dates a check.<sup>188</sup> However, it may still take the check several more days to reach the outgoing mail and still more time to reach the contractor’s accounts receivable department. This delay was, unfortunately, a necessary part of doing business.

With the advent of electronic commerce and electronic banking, invoice payments and financing payments can now be made more promptly by electronic fund transfers (EFTs). Through the Government Management Reform Act of 1994<sup>189</sup> and the Debt Collection Improvement Act of 1996,<sup>190</sup> Congress announced a Government-wide mandate that all payments to recipients of Government funds should be by electronic transfer.

### ■ Applicability

While regulations issued by the Department of the Treasury govern EFTs generally,<sup>191</sup> provisions in FAR Part 32 provide policy and procedures for electronic payment to Government contractors.<sup>192</sup> The FAR requires *all contract payments* to be made through EFT,<sup>193</sup> with the following limited exceptions:<sup>194</sup>

- (1) The agency making the EFT loses the ability to release a payment electronically.

- (2) The payment will be received outside of the United States.
- (3) A contract is to be paid in a denomination other than U.S. dollars.
- (4) Payment by EFT under a classified contract could compromise the program.
- (5) The payment is for combat contingency operations, and EFT is either not possible or would not support the operation.
- (6) The agency does not expect to make more than one payment to the recipient within a one-year period.
- (7) Unusual or compelling circumstances require payment by a method other than EFT.

#### ■ EFT Mechanisms

The FAR identifies specific mechanisms to make electronic transfers. For transfers within the United States using U.S. currency, the Government must use the U.S. Automated Clearing House network or the Fedwire Transfer System.<sup>195</sup> An agency head may authorize other payment mechanisms with the concurrence of the office or agency responsible for making payments.<sup>196</sup> For transfers made to contractors outside the United States or for transfers made in other than U.S. currency, the Government is instructed to use “other than EFT” methods for payment.<sup>197</sup> However, EFT may be authorized if the political, financial, and communications infrastructure in the foreign country supports EFT or if payments in the foreign currency may not be made safely.<sup>198</sup>

Immediate payment may also be made through use of a Government-wide commercial purchase card.<sup>199</sup> For the DOD, the commercial purchase card is the only approved EFT method for purchases valued at or below the micropurchase threshold of \$2,500.<sup>200</sup>

#### ■ Payment Through EFT

Your EFT information is contained in your electronic registry with the Government on the Central Contractor Registration (CCR) da-

tabase.<sup>201</sup> In collecting information relating to electronic transfers, the FAR is clear that the Government must protect the contractor’s financial information from improper disclosure.<sup>202</sup> The FAR provides for payment, in limited circumstances, through an alternate vehicle other than the CCR database.<sup>203</sup>

An EFT payment is deemed to have been made, for purposes of the Prompt Payment Act, on the date specified for settlement of the payment in the EFT payment transaction instruction release to the Federal Reserve System.<sup>204</sup> However, if the contractor’s EFT information in the CCR database is incorrect, then the invoice submission is considered an “improper invoice,” and the Government is under no obligation to make an EFT until the information is corrected.<sup>205</sup> If you assign the proceeds of a contract to a third-party, the third-party must also register in the CCR database, and that third-party will be paid by EFT in accordance with the terms of the original contract.<sup>206</sup> Any assignment of contract proceeds must be done in accordance with the statutory and FAR requirements.<sup>207</sup>

### Assignments

You may finance your Government contract in the same manner as you would a private contract—by obtaining commercial financing through a bank or other type of financing institution. Commercial financing is strongly encouraged by the Government; indeed, it is the preferred method of securing sufficient funds to enable timely contract performance.<sup>208</sup>

Typically, banks and other financing entities will require you to assign to them the proceeds of the contract or contracts to be financed as security for any monies advanced. If your contract proceeds are to be assigned in exchange for a loan, you must comply with the provisions of the so-called Anti-Assignment Act<sup>209</sup> and Assignment of Claims Act,<sup>210</sup> as well as the implementing regulations.<sup>211</sup>

#### ■ Statutory Prohibitions

The Anti-Assignment Act and the Assignment of Claims Act are often linked together

in legal analyses, but they operate to bar different kinds of actions. The Anti-Assignment Act bars the transfer of executory contracts; the Assignment of Claims Act pertains to claims for work already done.<sup>212</sup>

The Anti-Assignment Act proscribes assignment of Federal Government contracts as follows:<sup>213</sup>

No contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States is concerned. All rights of action, however, for any breach of such contract by the contracting parties, are reserved to the United States.

Under the Assignment of Claims Act, an assignment of claims against the Federal Government “may be made only after a claim is allowed, the amount of the claim is decided, and a warrant for payment of the claim has been issued.”<sup>214</sup> As defined by the Act, “assignment” broadly encompasses derivative interests of all types:<sup>215</sup>

(a) In this section, “assignment” means—

(1) a transfer or assignment of any part of a claim against the United States Government or of an interest in the claim; or

(2) the *authorization to receive payment for any part of the claim.*

Assignments of contracts by a subcontractor are governed by the provisions of the contract between the prime contractor and the subcontractor. Except in the unusual circumstance where the Government is a party to the subcontract, the statutory prohibition against assignments would not apply.

The provisions of the Anti-Assignment Act and the Assignment of Claims Act quoted above serve two basic purposes. *First*, they are intended “to prevent persons of influence from buying up claims against the United States, which might then be improperly urged upon the officers of the Government.”<sup>216</sup> *Second*, they are intended to enable the Government “to deal exclusively with the original claimant instead of with several parties.”<sup>217</sup>

Although the Anti-Assignment Act states that an attempt to transfer any contract with the Government “shall cause the annulment of the contract or order transferred, so far as the United States is concerned,”<sup>218</sup> a contractor’s attempt to assign a claim does not necessarily forfeit the claim—“it leaves the claim where it was before the purported assignment.”<sup>219</sup> And, the General Services Administration Board of Contract Appeals has held that an attempted transfer of a contract in contravention of the Anti-Assignment Act, standing alone, does not provide an independent basis for termination of the contract, especially when the Government otherwise still gains the benefit from the contract. In that case, the board concluded that despite the invalid transfer of a lease, the purposes of the Anti-Assignment Act were not contravened and the contract and the associated claim were not voided where the Government obtained what it had bargained for from the contractor since lease performance continued until it was terminated during the option period. Moreover, there was no proof of a deliberate intent to deceive, but rather, a movement of assets within a family business that in no manner prejudiced the Government.<sup>220</sup>

Note that while an assignment of a contract is prohibited under the Anti-Assignment Act, a transfer “by operation of law” (e.g., through a merger) allows the transfer of a contract to a new third party without running afoul of the Act.<sup>221</sup> An asset transfer generally is *not* regarded as a transfer by operation of law, however, and such a transaction requires a *novation agreement* between the Government and the newly assigned party for the contract to be enforceable.<sup>222</sup> Under the novation process, the Government may, when in its interest, recognize a third party as the successor in interest to a contract when the third party’s interest in the contract arises out of the transfer of (1) all the contractor’s assets, or (2) the entire portion of the assets involved in performing the contract.<sup>223</sup> There are specific procedures that should be followed to facilitate the novation by the Government.<sup>224</sup> The content of the novation agreement is generally governed by regulation.<sup>225</sup> If the Government chooses not to assent to the transfer

of a contract, the original contractor remains liable under the contract, and the Government may terminate the contract for default.<sup>226</sup>

#### ■ “Financing Institutions” Exemption

To encourage private financing of Government contracts, Congress expressly exempted from the statutory prohibitions the assignment of contract proceeds<sup>227</sup>—“moneys due or to become due from the United States under a contract”—aggregating in excess of \$1,000 when “assigned to a bank, trust company or other financing institution” for the purpose of facilitating performance of one or more Government contracts (without regard to the type of contract).<sup>228</sup> Unless otherwise expressly permitted by the contract, an assignment to a “financing institution” must cover all amounts payable under the contract or contracts, may not be made to more than one party, and may not be re-assigned.<sup>229</sup> More than one party may, however, participate in the financing through an agency or trust arrangement.<sup>230</sup> To assign the contract proceeds to a financing institution, the assignee must send a written notice of assignment together with a true copy of the assignment instrument to the CO or the agency head, the surety on any bond applicable to the contract, and the disbursing officer designated in the contract to make payment.<sup>231</sup>

The statute does not define the term “financing institution.” Fortunately, however, in light of the diversification of investment and financial service firms, entities other than traditional banks or trust companies may qualify as proper assignees under the statute. The Comptroller General has provided the following guidance:<sup>232</sup>

*A financing institution, within the purview of the Assignment of Claims Act, is one which deals in money as distinguished from other commodities as the primary function of its business activity.... A firm—be it a corporation, a partnership or a sole proprietorship—which as a primary function is regularly engaged in the financing business may be regarded as a financing institution.... However, a firm whose credit extension and lending operations, although carried on regularly, are merely incidental or subsidiary to another end, in the light of the firm’s overall operations, more important purpose, is not a financing institution.... Finally, a firm having as a main purpose the financing of small and*

*undercapitalized businesses, either through loans or direct purchase and resale, has been regarded as a financing institution....*

Under these guidelines, assignees such as banks acting as trustees for factoring organizations,<sup>233</sup> pension trusts,<sup>234</sup> partnerships engaged in the financing of accounts receivable,<sup>235</sup> small business investment companies,<sup>236</sup> and the Small Business Administration<sup>237</sup> have all been held entitled to the prophylactic status of a statutory “assignee.”

Two additional points relating to assignments to financing institutions bear mentioning for the benefit of lenders. *First*, a contract may include a “Discounts for Prompt Payment” clause,<sup>238</sup> which authorizes the Government to discount payments to a contractor based on early payment. The specific terms of this clause will be included in the contract, but the discount could serve to confuse an assignee when the amounts it expects to receive are not the same as the payment amounts presented by the Government. *Second*, Government contracts are subject to the funds available at the time of appropriations.<sup>239</sup> If the contract costs exceed this limit, then the contractor cannot recover.<sup>240</sup> To minimize risk in this regard, lenders should ensure (to whatever extent possible) that the contract is fully funded.<sup>241</sup>

#### ■ Procedural Requirements

To effect a valid assignment to a financing institution, you must strictly comply with the applicable regulatory procedures.<sup>242</sup> As a threshold matter, you must determine whether the solicitation on which you are bidding or the contract you are performing expressly prohibits such assignments.<sup>243</sup>

The CO will insert the “Prohibition of Assignment of Claims” clause in solicitations and resulting contracts when the CO has determined that prohibiting the assignments is in the Government’s interest.<sup>244</sup> For DOD contracts, a contract clause prohibiting the assignment of claims is included in contracts for personal services.<sup>245</sup> When your contract includes a prohibition clause, you may assign contract claims only with the express consent of the Government, waiving the contract provision, and even



then only in accordance with the specified statutory and regulatory formalities.<sup>246</sup> An invalid assignment does not, however, necessarily vitiate either the claim assigned or the underlying contract.<sup>247</sup> As discussed below, the prohibition on assignments is solely for the Government's benefit and, as such, may be waived either by express consent<sup>248</sup> or by the Government's course of conduct.<sup>249</sup> In addition, assignments may be barred under classified contracts<sup>250</sup> and will, under no circumstances, be authorized if you are receiving advance payments from the Government.<sup>251</sup>

Assuming that assignments to a financing institution are not prohibited, the following procedures must be followed to effect a valid assignment.<sup>252</sup> Assignments by a corporation must be executed by a duly authorized official and attested by the secretary or assistant secretary of the corporation.<sup>253</sup> Notice of the assignment in the prescribed form,<sup>254</sup> together with a true copy of the assignment instrument, must be filed in quadruplicate with the CO, any applicable sureties, and the disbursing office designated to make payment.<sup>255</sup> Following written acknowledgment by each of the recipients, the Government will be bound to make payment in accordance with the terms of the assignment instrument.<sup>256</sup>

Once an assignment has been recognized by the Government, you will be requested to execute a release of the original assignment if (1) a further assignment or reassignment occurs, or (2) you wish to reestablish your rights to payment after your obligations to the assignee have been satisfied.<sup>257</sup>

#### ■ Waiver

If you have complied with the procedural filing requirements outlined above and the Government has acknowledged your notice of assignment in writing, the Government is, thereafter, obligated to make contract payments in accordance with the terms of the assignment instrument. What happens, however, if you have neglected to fully comply with the procedural prerequisites or if the entity that has advanced funds to you does not qualify as a "financial institution" under the statute?

In several instances, the Government's course of conduct with respect to an assignment of contracts has been found to constitute constructive or implied recognition of the assignment where the Government is "aware of, assented to, and recognized" the assignment such that the statutory requirements for the completion of the assignment were waived.<sup>258</sup> For example, in one case,<sup>259</sup> the Government awarded two contracts for mobile homes to a contractor, which then assigned all the work under the first contract and one half of the work under the second to an assignee. The contractor and assignee informed the CO of the assignments and requested that all payments under the first contract be made to the assignee and all payments under the second contract be made to a law firm that was to allocate them between the contractor and assignee. The CO acknowledged the assignment and the requests for payment distribution.

During performance of the first contract, the Government paid approximately \$400,000 to the assignee and approximately \$200,000 to the contractor. On the second contract, the vast majority of payments were made to the contractor, and only a small number of payments were made to the law firm. When the assignee could not collect on a judgment it obtained against one of the contractor's employees, it sued the Government.

The Government moved to dismiss the action, claiming that the assignments of the contracts were invalid because they violated the Anti-Assignment Act. The U.S. Court of Claims found that the CO was fully aware of the assignments, recognized them, and communicated such recognition to the parties. The court held that having chosen to recognize the assignments, the Government was bound to act in accordance with their terms. Additionally, the court carefully noted that no one particular act is determinative of Government recognition of the particular assignment. Instead, the totality of the circumstances surrounding the assignment must be examined.<sup>260</sup>

You should not count on the Government's implied recognition or ratification to preserve

an assignment. Indeed, it would almost appear that unless the CO had actual knowledge of and acquiesced in the assignment, it would be difficult to obtain such a finding.

### ■ Limits On Government's Setoff Rights

Certain protections inure to the assignee's benefit based on the Government's express or implied recognition of an assignment. Specifically, a valid assignment circumscribes to some extent the Government's common-law right of setoff—the reduction of contract payments by the amount of the contractor's indebtedness to the Government.

The general rule is that the assignee stands in the shoes of the assignor and the Government may assert against the assignee whatever claims could have been asserted against the assignor. In one case, for example, a bank advanced \$11,000 to a contractor in support of a Government contract. The Government accepted delivery of the purchased items, valued at \$17,000, and refused to pay the assignee-bank, claiming a setoff of more than \$17,000 for past due taxes. The court approved the setoff.<sup>261</sup>

We consider that the manner in which the bank's interest...was created is of no significance. Under applicable federal law, the bank had no greater rights to the purchase money than [the contractor] would have had. If the result, as it affects the bank, appears harsh, it should be remembered that it knew it was dealing with the holder of a government contract. It was bound to ascertain the applicable federal law.

Exercising its right of setoff, when a contract does not include a "no-setoff commitment," the Government may apply against payments to the assignee any liability of the contractor to the Government arising independently of the assigned contract if the liability existed at the time notice of the assignment was received even though that liability had not yet matured so as to be due and payable.<sup>262</sup> The Government's right of setoff is not unlimited, however. The Government is prohibited from recovering payments *already made* to the assignee under the contract, even if the assignor-contractor was liable to the Government based on the assigned contract or some other independent liability.<sup>263</sup>

The Government's right of setoff is further limited where the contract contains a "*no setoff commitment*" providing that payments by the Government to the assignee under an assignment of claims will not be reduced to liquidate the indebtedness of the contractor to the Government.<sup>264</sup> Such provisions are authorized by the Anti-Assignment Act, which provides:<sup>265</sup>

Any contract of the Department of Defense, the General Services Administration, the Department of Energy, or any other department or agency of the United States designated by the President, except any such contract under which full payment has been made, may, upon a determination of need by the President, provide or be amended without consideration *to provide that payments to be made to the assignee of any moneys due or to become due under such contract shall not be subject to reduction or setoff.* Each such determination of need shall be published in the Federal Register.

The Assignment of Claims Act contains a similar provision.<sup>266</sup>

Pursuant to an October 1995 delegation of authority by the President, agency heads may make determinations of need under this provision to include no-setoff commitments in contracts, subject to such additional guidance as provided Office of Federal Procurement Policy.<sup>267</sup> This guidance provides that the use of a no-setoff commitment may be appropriate (1) to facilitate the national defense, (2) to facilitate the private financing of contract performance, or (3) in the event of a national emergency or natural disaster.<sup>268</sup> When an offeror is significantly indebted to the U.S., however, the guidance states that the CO should consider whether the inclusion of the no-setoff commitment in a particular contract is in the best interests of the United States.<sup>269</sup>

With limited exceptions, where the assigned contract includes a no-setoff commitment, an assignee is entitled to receive contract payments free of reduction or setoff for liabilities of the contractor to the Government, including taxes, social security contributions, penalties (other than penalties related to performance), or fines under the contract, as well as any other contractor liability arising independent of the contract.<sup>270</sup> Thus, where applicable, a no-setoff commitment defeats operation of federal tax liens and levies and re-

duces the Government's common-law right of setoff to the extent of the contractor-assignor's indebtedness to the assignee.<sup>271</sup> Assuming all other statutory prerequisites are met—e.g., the assignment to a “financing institution” served as collateral for a loan to finance contract performance—neither the Internal Revenue Service nor any other Government agency can set off amounts due the assignee from contract proceeds even if the Government claim matures before the effective date of the assignment.<sup>272</sup>

Despite a contractual no-setoff commitment, setoffs may be appropriate in “some circumstances.” Such circumstances include, for example, when the assignee has neither made a loan to the contractor, nor made a commitment to do so, or when the amount due on the contract exceeds the loan amount.<sup>273</sup>

## Debt Collection

Cash flow under a Government contract can often be reduced or interrupted when the Government seeks to use funds due and owing under the contract to offset debts of the contractor allegedly arising either under the affected contract or independently. In so doing, the Government exercises a common-law right “which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due to him.”<sup>274</sup>

The FAR identifies the basic procedural rights that the Government and a contractor have relating to setoffs for contract debts.<sup>275</sup> On the other hand, when the Government attempts to collect an extra-contractual debt, you have procedural statutory rights that can delay the Government's ability to collect the debt.<sup>276</sup>

### ■ Contract Debts

FAR Subpart 32.6 outlines policies and procedures for the Government's actions “in ascertaining and collecting contract debts, charging interest on the debts, deferring collections, and compromising and terminating certain debts.”<sup>277</sup> The FAR provides several examples of “contract debts,” including (1) damages or excess costs related to defaults in performance, (2) breach

of contract obligations concerning progress payments, advance payments, or Government-furnished property or material, (3) Government expense of correcting defects, (4) overpayments related to errors in quantity or billing or deficiencies in quality, (5) retroactive price reductions resulting from contract terms for price redetermination or for determination of prices under incentive-type contracts, (6) overpayments disclosed by quarterly statements required under price redetermination or incentive contracts, (7) delinquency in contractor payments due under agreements or arrangements for deferral or postponement of collections, and (8) reimbursement of costs following a successful postaward bid protest.<sup>278</sup>

The FAR requires a contracting official to determine “promptly” whether an actual debt is due when “any indication of a contract debt arises.”<sup>279</sup> In so doing, the contracting official must collect the following information: (a) the name and address of the contractor, (b) the contract number, (c) a description of the debt, (d) the amount of the debt and the appropriate amount to be credited, (e) the date the debt was determined, (f) the dates of demands for repayment, (g) the amounts and dates of collections, as they occur, (h) the date of any appeal filed under the “Disputes” clause, and (i) the status of any collection efforts, including funds requested to be withheld or deferment requests.<sup>280</sup>

In determining the amount of a contract debt, the contracting official “shall fairly consider both the Government's claim and any contract claims by the contractor against the Government.”<sup>281</sup> The contracting official may negotiate debt determinations with the contractor, provided the negotiations are “completed expeditiously.”<sup>282</sup> However, the official may also make a unilateral determination if the contract allows such an action and the contractor delays determination of the contract debt amount.<sup>283</sup> A unilateral determination must be an amount that is consistent with the contract terms, within the range that the contractor would consider “acceptable” in negotiating the amount, and properly founded.<sup>284</sup>

Once the contract debt amount has been determined, the CO should issue a demand for repayment.<sup>285</sup> This demand must include the following information: (1) a description of the debt, including the debt amount, (2) notification that any amounts not paid within 30 days of the date of the demand will bear interest from the date of the demand (or an earlier date, if specified in the contract), (3) notification that the contractor may submit a proposal for deferment of collection if immediate payment is not practicable or if the amount is disputed, and (4) identification of the contracting official designated for determining the amount of the debt and its collection.<sup>286</sup> If the demand is delayed for some reason, the date of the debt and accrual of interest are extended to “a time that is fair and reasonable under the particular circumstances.”<sup>287</sup>

If a disbursing officer is also the CO responsible for determination and collection of the debt, the disbursing officer may make an appropriate routine setoff.<sup>288</sup> Otherwise, the contracting official responsible for collecting the debt should carefully consider with the CO whether circumstances require immediate action, respecting the fact that the demand for payment provided the contractor with 30-days to respond.<sup>289</sup> Unless the contractor has entered into a deferment agreement or bankruptcy proceedings have been initiated, the contractor must liquidate the debt within the 30-day period by (a) cash payment in a lump sum, on demand, or (b) credit against existing unpaid bills due the contractor.<sup>290</sup> To aid in the collection of the debt, Government officials are encouraged to use “all proper means available to them for collecting debts as rapidly as possible.”<sup>291</sup> If the debt is not paid within 30 days, or the parties do not otherwise reach a deferment agreement, interest on the debt will immediately begin to accrue.<sup>292</sup>

The FAR recognizes two alternatives to complete payment of the contract debt—(1) compromise<sup>293</sup> and (2) a deferment agreement.<sup>294</sup>

For debts under \$100,000 (exclusive of interest), the agency may *compromise* the debt, or

terminate or suspend further collection, if further collection is not practicable or if it would cost more for the agency to attempt recovery than would be recovered by pursuing the debt.<sup>295</sup> At the DOD, only the department or agency contract financing offices are authorized to compromise debts.<sup>296</sup> If the debt is \$100,000 or more, it may still be settled by compromise, but only with consent from the Department of Justice.<sup>297</sup> A compromise is final and conclusive, unless obtained by fraud or misrepresentation.<sup>298</sup>

The FAR outlines specific procedures for *deferring* collection of contract debts.<sup>299</sup> Generally, debt deferral is easier to obtain if the contractor has appealed the debt under the “Disputes” clause of the contract.<sup>300</sup> Under those circumstances, the contractor need only provide information regarding its financial condition, and the agency may grant deferral where “advisable” to avoid overpayment, or where the contractor is a small or financially weak business, pending the resolution of the appeal.<sup>301</sup> The FAR states that deferment will not be granted, however, unless the contractor provides collateral in the amount of the claim within 30 days of filing the claim.<sup>302</sup>

If no appeal has been filed, the contractor must provide greater detail in a request for deferral, including information on contract backlog, projected cash receipts, the feasibility of immediate payment, and the probable effect on operations of immediate payment.<sup>303</sup> In addition, deferments or installment payments are expressly authorized only if the contractor has demonstrated an inability to pay “at once in full” or the contractor’s operations under national defense contracts would be “seriously impaired.”<sup>304</sup>

The FAR requires that deferment agreements include a description of the debt, the date payment was first demanded, an interest provision, an “access to records” provision, and a provision allowing the Government to accelerate repayment in the event of contractor insolvency.<sup>305</sup> The Government may also include other “protective terms” deemed “prudent and feasible.”<sup>306</sup>



### ■ Debt Collection Act Procedures

Under the Debt Collection Act of 1982<sup>307</sup> and the Debt Collection Improvement Act of 1996,<sup>308</sup> the Government may not collect any debt by “administrative offset” to a Government contract unless it first follows certain procedures.<sup>309</sup> Administrative offset is defined by the statute as “withholding funds payable by the United States (including funds payable by the United States on behalf of a State government) to, or held by the United States for, a person to satisfy a claim.”<sup>310</sup>

After the passage of the Debt Collection Act, controversy ensued as to whether the Act applied to Government contract debts. The Government argued that its common-law rights permitted contract setoffs without complying with the Act and that imposing the Act’s procedural restrictions on contract debts would extinguish its common-law right. However, the U.S. Court of Appeals for the Federal Circuit put this issue to rest, holding that the Act does not eliminate the Government’s rights, but merely imposes procedural safeguards on the exercise of the rights.<sup>311</sup>

The boards of contract appeals have drawn an important distinction between debts subject to the Debt Collection Act and the mutual offset of debts and credits arising under the same contract.<sup>312</sup> Debts or credits arising under the same contract are *not* subject to the procedural restrictions of the Debt Collection Act, but are subject to the procedural

requirements identified in the individual contracts and in the FAR.<sup>313</sup>

The procedures the Government must follow under the Debt Collection Act before invoking its administrative offset rights against you as a contractor include: (1) an initial attempt to collect the claim without invoking offset procedures, (2) written notice of the type and amount of the claim, the intention of the head of the agency to collect the claim by administrative offset, and an explanation of the rights of the debtor, (3) an opportunity to inspect and copy the records of the agency related to the claim, (4) an opportunity for a review within the agency of the decision of the agency related to the claim, and (5) an opportunity to make a written agreement with the head of the agency to repay the amount of the claim.<sup>314</sup> The statute also conditions administrative offset on the promulgation by each agency of regulations governing such collections.<sup>315</sup>

The remedy generally available to contractors if the Government violates the Act is to seek repayment, with interest, under the Contract Disputes Act.<sup>316</sup> It may be argued, however, that requiring the return to a contractor of funds improperly withheld because of a procedural error under the Debt Collection Act would defeat the Government’s common-law setoff rights, since setoff on those funds would be lost forever. The cases do not discuss this point, however.

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## GUIDELINES

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These *Guidelines* are intended to assist contractors and financing institutions in understanding the various financing techniques available to support the performance of Government contracts, the preconditions to their use, and the correlative rights of the Government, the contractor and the financing institution—and the associated risks—when financing is made available. They are not, however, a substitute for professional representation in any specific situation.

1. Recognize that the policies and procedures outlined in FAR Part 32 provide myriad

opportunities for you to improve your cash flow and finance your contract with the Government. Although the mechanics associated with the financing methods are incredibly complex, the Government has attempted to balance these procedures to provide flexibility for the contractor, while simultaneously protecting the Government’s interest. These procedures are available for you to use, and ignoring them could leave you with reduced liquidity, despite the fact that financing options could have been available to you all along. Blissful ignorance of these procedures is not recommended, for one always requests and accepts money from the Government with a

certain degree of peril, and rarely without a cost. Thus, you should ensure that your policies and procedures for billing the Government comply with all statutory and regulatory requirements.

**2.** If you are a commercial item supplier, seriously consider commercial advance payments and commercial interim payments as alternatives to cost- or performance-based progress payments. Simply stated, they call for far less judgment to be exercised incorrectly on both sides of the transaction, far less opportunity for dispute, and far less potential for the types of liabilities that can attend cost-based payment requests. If your contract calls for multiple deliverables, more traditional partial payments may be preferable than the installment payments authorized for commercial items.

**3.** Have policies and procedures in place to ensure that you properly account for your costs and that your invoices properly bill the Government for monies due. The False Claims Act is a broad-reaching statute and is very unforgiving.

**4.** Make sure that your estimated additional costs are updated on your progress payment vouchers. Misrepresenting or concealing your estimated costs could give rise to liabilities under the FCA.

**5.** Understand the difference between payments that *do* entitle you to interest when not made in timely fashion (e.g., invoice payments for deliveries made and/or services performed) and those that *do not* (e.g., financing payments).

Have a process for keeping track of payments against your invoices and for verifying the Government's payment of Prompt Payment Act interest as and when required.

**6.** To avail yourself of the expeditious nature of payments made via EFT, ensure that you periodically review the EFT information on file in the Central Contractor Registration (CCR) database.

**7.** If you plan to assign your contract proceeds, make sure that (a) the proceeds are, in fact, assignable, (b) the assignee qualifies as a "financing institution," (c) proper notices have been given of the assignment, and (d) if the assignment has terminated, you obtain a release from the assignee and you notify all necessary Government officials. If you have any doubt with respect to the qualifications of the assignee, resolve the issue with your CO before perfecting the assignment.

**8.** If you are a financing institution, you should evaluate the nature of Government claims that could affect the flow of the payments that have been assigned to you. You will be particularly interested in whether the underlying contracts include a "no-setoff commitment." You will also want to make sure that your EFT information is correctly entered and current in the CCR database.

**9.** Be prepared to use the disputes process, where appropriate, and the deferral agreement process to forestall unilateral Governmental setoffs against your contracts.

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| <b>2/</b> Chierichella et al., "Financing Government Contracts," Briefing Papers No. 86-7 (June 1986).                         | <b>7/</b> FAR 32.202-1(a).   | <b>14/</b> FAR 2.101.                    |
| <b>3/</b> Pub. L. No. 103-355, 108 Stat. 3243 (1994).  | <b>8/</b> FAR 32.202-1(b).   | <b>15/</b> FAR 2.101.                    |
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| <b>5/</b> 10 U.S.C. § 2307(f)(1); 41 U.S.C. § 255(f)(1); FAR 32.201, 12.210.   | <b>10/</b> See FAR 32.202-1(e) (authorizing agencies to identify their own standards in determining whether contract financing for commercial items is in "the best interest of the United States"). | <b>17/</b> FAR 32.202-2; see FAR 32.001. |
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- 24/ 10 U.S.C. § 2307(f)(2); 41 U.S.C. § 255(f)(2); FAR 32.202-1(b)(6), 32.202-2.
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- 28/ FAR 32.202-2; see FAR 32.901(b).
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- 33/ FAR 32.001.
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- 50/ FAR 32.205(c)(2), (3).
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- 61/ FAR 52.232-29(a), 52.232-30, para. (a).
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- 105/ See, e.g., *McDonald Welding & Mach. Co.*, ASBCA 36284, 94-3 BCA ¶ 27,181; *Midwest Metal Stamping Co.*, ASBCA 11543, 67-2 BCA ¶ 6605.
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- 112/ 28 C.F.R. § 85.3(9). While the statutory text of the FCA lists penalties between \$5,000 and \$10,000 for each false claim, Congress has instructed federal agency heads under the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890 (1990), as amended by the Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, § 31001(s), 110 Stat. 1321 (1996), codified at 28 U.S.C. § 2461 note, to make inflationary adjustments to civil monetary penalties at least once every four years. The statutory penalties were last adjusted to their current level in 1999. See 64 Fed. Reg. 47,099 (Aug. 30, 1999).
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- 146/ 5 C.F.R. § 1315.4(g)(2); see 5 C.F.R. § 1315.20 (implementing statutory requirement that agencies pay interest penalty on interim payments under cost-reimbursement service contracts made after more than 30 days after receipt of a proper invoice); see also FAR 32.904(e).
- 147/ 5 C.F.R. § 1315.4(g)(3), (4); see also FAR 32.904(f), 52.232-25, para. (a)(2).
- 148/ FAR 32.904(b)(1), 52.232-25, para. (a)(1)(i).
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- 154/ See FAR 32.001, 32.202-2; see also FAR 32.901(b).
- 155/ 5 C.F.R. § 1315.9(b)(1); FAR 32.905(b)(1), 52.232-25, para. (a)(3).
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- 168/ 41 U.S.C. §§ 601–613; see 31 U.S.C. § 3907(a); 5 C.F.R. § 1315.16(a).
- 169/ 5 C.F.R. § 1315.11(a); FAR 32.907(c), 52.232-25, para. (a)(7).
- 170/ 5 C.F.R. § 1315.11(b).
- 171/ 5 C.F.R. § 1315.11(d).
- 172/ 5 C.F.R. § 1315.10(a)(1), (b)(2).
- 173/ 5 C.F.R. § 1315.17(b), (c).
- 174/ 5 C.F.R. 1315.10(a).
- 175/ 41 U.S.C. §§ 601–613.
- 176/ 31 U.S.C. § 3907(b); 5 C.F.R. § 1315.10(a)(5).
- 177/ Ross & McDonald Contracting, GmbH, ASBCA 38154, 94-1 BCA ¶ 26,316, 35 GC ¶ 682.
- 178/ FAR 52.232-25, para. (d).
- 179/ National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, § 831, 115 Stat 1012 (2001) (codified at 31 U.S.C. §§ 3561–3567); 66 Fed. Reg. 65,353 (Dec. 18, 2001).
- 180/ OMB, Programs To Identify and Recover Erroneous Payments to Contractors (OMB/M-03-07, Jan. 16, 2003) (available at <http://www.whitehouse.gov/omb/memoranda/m03-07.html>); see 45 GC ¶ 37.

- 181/ OMB, Federal Financial Management Report 2004, at 11 (Sept. 2004) ([http://www.whitehouse.gov/omb/financial/2004\\_report.pdf](http://www.whitehouse.gov/omb/financial/2004_report.pdf)).
- 182/ See 31 U.S.C. § 3729(a)(7).
- 183/ 5 U.S.C. § 3907(a); 5 C.F.R. § 1315.16(a).
- 184/ 5 C.F.R. § 1315.10(c)(1); see 5 C.F.R. § 3907(c); FAR 32.907(d), 52.232-25, para. (a)(5)(ii).
- 185/ 31 U.S.C. § 3907(c); 5 C.F.R. §§ 1315.10(c)(1), 1315.16(a); FAR 32.907(d), 52.232-25, para. (a)(5)(ii).
- 186/ 15 U.S.C. § 644(k)(6).
- 187/ 5 C.F.R. § 1315.16(b).
- 188/ 31 U.S.C. § 3901(a)(5); 5 C.F.R. § 1315.4(h).
- 189/ Pub. L. No. 103-356, tit. IV, § 402(a), 108 Stat. 3412 (1994) (amending 31 U.S.C. § 3332).
- 190/ Pub. L. No. 104-134, tit. III, § 31001(x), 110 Stat. 1321 (1996) (amending 31 U.S.C. § 3332).
- 191/ 31 C.F.R. pt. 208.
- 192/ FAR subpt. 32.11.
- 193/ FAR 32.1103, 52.232-33, para. (a)(1), 52.232-34, para. (a)(1).
- 194/ FAR 32.1103.
- 195/ FAR 32.1106(a), 52.232-33, para. (c), 52.232-34, para. (c).
- 196/ FAR 32.1106(a).
- 197/ FAR 32.1106(b).
- 198/ FAR 32.1106(b)(1), (2).
- 199/ FAR 32.1108(a), 52.232-36.
- 200/ DFARS 232.1108; see also FAR 2.101.
- 201/ FAR 52.232-33, para. (b). See also 39 GC ¶ 171 (discussing mandatory registration on the CCR).
- 202/ FAR 32.1104.
- 203/ FAR 52.232-35.
- 204/ FAR 52.232-33, para. (f), 52.232-34, para. (f); see 5 C.F.R. § 1315.4(h).
- 205/ FAR 52.232-33, para. (d), 52.232-34, para. (d)(1).
- 206/ FAR 52.232-33, para. (g), 52.232-34, para. (g).
- 207/ FAR 52.232-33, para. (g), 52.232-34, para. (g).
- 208/ FAR 32.106(a).
- 209/ 41 U.S.C. § 15.
- 210/ 31 U.S.C. § 3727.
- 211/ FAR subpt. 32.8.
- 212/ See Hood Lumber Co., AGBCA 98-156-1, 99-2 BCA ¶ 30,560.
- 213/ 41 U.S.C. § 15 (emphasis added).
- 214/ 31 U.S.C. § 3727.
- 215/ 31 U.S.C. § 3727 (emphasis added). See also Hornbeck Offshore Operators, Inc. v. Ocean Line of Bermuda, Inc., 849 F. Supp. 434, 442 (E.D. Va. 1994) (“The statute...embraces alike legal and equitable assignments, and strikes at every derivative interest, in whatever form required, and incapacitates every claimant to create an interest in the claim in any other than himself.”).
- 216/ Tuftco Corp. v. United States, 614 F.2d 740, 744 (Ct. Cl. 1980); see also Spofford v. Kirk, 97 U.S. 484, 490 (1878).
- 217/ Patterson v. United States, 173 Ct. Cl. 819, 823, 354 F.2d 327, 329 (1965); see also Hood Lumber Co., AGBCA 98-156-1, 99-2 BCA ¶ 30,560.
- 218/ 41 U.S.C. § 15(a).
- 219/ Colonial Navigation Co. v. United States, 149 Ct. Cl. 242, 245, 181 F. Supp. 237, 240 (Ct. Cl. 1960); see also Sun Cal, Inc. v. United States, 21 Ct. Cl. 31, 37 (1990); Tuftco Corp. v. United States, 222 Ct. Cl. 277, 284, n.4 (1980); Hood Lumber Co., AGBCA 98-156-1, 99-2 BCA ¶ 30,560. cf. Great Lakes Dredge & Dock Co., ASBCA 53929, 04-1 BCA ¶ 32,518, 46 GC ¶ 90 (holding that a contractor did not void its contract under the Anti-Assignment Act by entering into a “secret” joint venture agreement after contract award, because the parties never acted upon the “joint venture” provisions of the agreement and conducted themselves at all times in a prime contractor/subcontractor-type relationship).
- 220/ Adelaide Blomfield Mgmt. Co. v. General Servs. Admin., GSBGA 13125, 95-2 BCA ¶ 27,865.
- 221/ FAR 42.1204(b).
- 222/ Siracusa Moving & Storage, ASBCA 51433, 99-2 BCA ¶ 30,447; see FAR subpt. 42.12. But see Giuliani Assocs., Inc., ASBCA 51672, 00-1 BCA ¶ 30,780 (holding that a contract assignment through a sale of assets did not run afoul of the Anti-Assignment Act because of a provision in the contract specifically allowing for sale of the assets). See generally Dover, “Mergers & Acquisitions—Special Considerations When Purchasing Government Contractor Entities,” Briefing Papers No. 04-8 (July 2004).

- 223/** FAR 42.1204(a).
- 224/** FAR 42.1204(e), (f).
- 225/** FAR 42.1204(h), (i).
- 226/** FAR 42.1204(c).
- 227/** See *First Federal Sav. & Loan Ass'n of Rochester v. United States*, 58 Fed. Cl. 139 (2003) (drawing distinction between assignment of "proceeds" and assignment of "claims"); *Franklin Fed. Sav. Bank v. United States*, 53 Fed. Cl. 690 (2002); see also *A.C. Davenport & Son Co. v. United States*, 703 F.2d 266 (7th Cir. 1983) (holding that a contractor's agreement with its subcontractor to have payment made directly to the subcontractor was not assignment under the Assignment of Claims Act, thereby precluding the Government from asserting an affirmative defense to the subcontractor's action to recover payments deducted from unrelated contracts for duplicate payment made to the subcontractor). See generally *Vickery & Paalborg*, "Assignment of Claims Act," Briefing Papers No. 87-3 (Feb. 1987).
- 228/** 41 U.S.C. § 15(b); see 31 U.S.C. § 3727(c); see also FAR 32.802.
- 229/** 41 U.S.C. § 15(b)(2); see 31 U.S.C. § 3727(c)(2); see also FAR 32.802(d).
- 230/** 41 U.S.C. § 15(b)(2); see 31 U.S.C. § 3727(c)(2); see also FAR 32.802(d).
- 231/** 41 U.S.C. § 15(b)(3); see 31 U.S.C. § 3727(c)(2); see also FAR 32.802(e), 32.805, 52.232-23.
- 232/** Comp. Gen. Dec. B-152012, 43 Comp. Gen. 138, 1963 CPD ¶ 54 (emphasis added).
- 233/** *Chelsea Factors, Inc. v. United States*, 149 Ct. Cl. 202 (1960).
- 234/** Comp. Gen. Dec. B-143922, 40 Comp. Gen. 174, 1960 CPD ¶ 67.
- 235/** Comp. Gen. Dec. B-14415, 20 Comp. Gen. 415 (1941).
- 236/** Comp. Gen. Dec. B-152012, 43 Comp. Gen. 138, 1963 CPD ¶ 54.
- 237/** *Keco Indus., Inc. v. United States*, 157 Ct. Cl. 691 (1962).
- 238/** FAR 52.232-8.
- 239/** 31 U.S.C. § 1341; FAR 32.702, 52.232-18.
- 240/** FAR 32.704, 52.232-20, -22.
- 241/** FAR 32.703-1.
- 242/** FAR 32.805, 52.232-23.
- 243/** FAR 32.802(c).
- 244/** FAR 32.803(b), 32.806(b), FAR 52.232-24.
- 245/** DFARS 232.803(b).
- 246/** 31 U.S.C. § 3727.
- 247/** See, e.g., *Peterson Sharpe Eng'g Corp.*, ASBCA 18780, 75-2 BCA ¶ 11,408.
- 248/** See *Healy Tibbits Builders, Inc.*, ASBCA 45269, 94-1 BCA ¶ 26,409; *Radiatronics, Inc.*, ASBCA 15133, 75-2 BCA ¶ 11,349.
- 249/** See *Tuftco Corp. v. United States*, 614 F.2d 740 (Ct. Cl. 1980).
- 250/** See FAR 32.403(d); see also FAR 52.232-23, para. (c).
- 251/** FAR 52.232-12, para. (l).
- 252/** FAR 32.805.
- 253/** FAR 32.805(a).
- 254/** FAR 32.805(c).
- 255/** FAR 32.805(b), 32.802(e).
- 256/** FAR 32.805(b), 32.802(e).
- 257/** FAR 32.805(e).
- 258/** *Tuftco Corp. v. United States*, 222 Ct. Cl. 277, 283, 614 F.2d 740, 745-46 (1980); see also *Cadwalder v. United States*, 45 F.3d 297 (9th Cir. 1995); *Riviera Fin. of Texas, Inc. v. United States*, 58 Fed. Cl. 528 (2003), 45 GC ¶ 498; *Norwest Bank Ariz., N.A. v. United States*, 37 Fed. Cl. 605 (1997), 39 GC ¶ 298; *American Nat'l Bank & Trust Co. of Chicago v. United States*, 23 Cl. Ct. 542 (1991).
- 259/** *Tuftco Corp. v. United States*, 222 Ct. Cl. 277, 614 F.2d 740 (1980).
- 260/** *Tuftco Corp. v. United States*, 222 Ct. Cl. 277, 283, 614 F.2d 740, 745-46 (1980); see also *Cadwalder v. United States*, 45 F.3d 297 (9th Cir. 1995); *Riviera Fin. of Texas, Inc. v. United States*, 58 Fed. Cl. 528 (2003), 45 GC ¶ 498; *American Nat'l Bank & Trust Co. of Chicago v. United States*, 23 Cl. Ct. 542 (1991).
- 261/** *South Side Bank & Trust Co. v. United States*, 221 F.2d 813, 814 (7th Cir. 1953).
- 262/** FAR 32.803(e).
- 263/** 41 U.S.C. § 15(d); 31 U.S.C. § 3727(e); FAR 32.804.(a)

- 264/ FAR 32.801, 52.232-23 (Alternate I).
- 265/ 41 U.S.C. § 15(e) (emphasis added).
- 266/ 31 U.S.C. § 3727(d).
- 267/ See 38 GC ¶ 208; 37 GC ¶ 525.
- 268/ FAR 32.803(d); see also DFARS 232.803(d)
- 269/ FAR 32.803(d); see also DFARS 232.803(d)
- 270/ FAR 32.803(d). see 41 U.S.C. § 15(f); 31 U.S.C. § 3727(d).
- 271/ FAR 32.803(d). see 41 U.S.C. § 15(f); 31 U.S.C. § 3727(d).
- 272/ Priority to Contract Proceeds, Comp. Gen. Dec. B-221717, 65 Comp. Gen. 554 (1986).
- 273/ FAR 32.804(c).
- 274/ United States v. Munsey Trust Co., 332 U.S. 234, 239 (1947).
- 275/ FAR subpt. 32.6.
- 276/ 31 U.S.C. § 3701 et seq.
- 277/ FAR 32.600; see FAR 32.603.
- 278/ FAR 32.602.
- 279/ FAR 32.606(a).
- 280/ FAR 32.606(c).
- 281/ FAR 32.606(b).
- 282/ FAR 32.608(a).
- 283/ FAR 32.608(a).
- 284/ FAR 32.608(b).
- 285/ FAR 32.610(a).
- 286/ FAR 32.610(b).
- 287/ FAR 32.615.
- 288/ FAR 32.611.
- 289/ FAR 32.612.
- 290/ FAR 32.606(d).
- 291/ FAR 32.606(e).
- 292/ FAR 32.612; see also FAR 32.614-1, 32.614-2, 52.232-17 (discussing interest charges and interest credits).
- 293/ FAR 32.616; see 31 U.S.C. § 3711(a)(2); 31 C.F.R. § 902.1(a).
- 294/ FAR 32.613.
- 295/ FAR 32.616.
- 296/ DFARS 232.616.
- 297/ 31 C.F.R. § 902.1(b).
- 298/ 31 U.S.C. § 3711(c).
- 299/ FAR 32.613.
- 300/ FAR 32.613(b).
- 301/ FAR 32.613(b), (d), (e).
- 302/ FAR 32.613(l).
- 303/ FAR 32.613(a), (c).
- 304/ FAR 32.613(f).
- 305/ FAR 32.613(h).
- 306/ FAR 32.613(h)(7).
- 307/ Pub. L. No. 97-365, 96 Stat. 1749 (1982); see also Pub. L. No. 97-452, 96 Stat. 2467 (1983).
- 308/ Pub. L. No. 104-134, tit. III, § 31001, 110 Stat. 1321 (1996).
- 309/ See 31 U.S.C. § 3701 et seq.
- 310/ 31 U.S.C. § 3701(a)(1).
- 311/ Cecile Indus., Inc. v. Cheney, 995 F.2d 1052 (Fed. Cir. 1993), 35 GC ¶ 410.
- 312/ See, e.g., Cecile Indus., Inc., ASBCA 40813, 91-3 BCA ¶ 24,099; Allied Signal Aerospace Co., ASBCA 37248, 90-1 BCA ¶ 22,448; Rivera Constr. Co., ASBCA 29391, 88-2 BCA ¶ 20,750; B&A Elec. Co., ASBCA 33667, 88-2 BCA ¶ 20,533; A.J. Fowler Corp., ASBCA 28965, 86-2 BCA ¶ 18,970; Atlantic States Constr. Inc., ASBCA 27681, 85-3 BCA ¶ 18,501; Fairchild Republic Co., ASBCA 29385, 85-2 BCA ¶ 18,047.
- 313/ See Spectrum Leasing Corp. v. United States, 764 F.2d 891 (D.C. Cir. 1985).
- 314/ 31 U.S.C. §§ 3701(a), 3716(a).
- 315/ 31 U.S.C. § 3716(b); see also 31 C.F.R. pts. 900-904 (codifying the Federal Claims Collection Standards, jointly issued by the Department of the Treasury and the Department of Justice).
- 316/ See, e.g., Snowbird Indus., Inc., ASBCA 33171, 87-2 BCA ¶ 19,862; Pat's Janitorial Serv., Inc., ASBCA 29129, 84-3 BCA ¶ 17,549; IBM Corp., ASBCA 28821, 84-3 BCA ¶ 17,689.