

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Sundstrand Corporation) ASBCA No. 51572
)
Under Contract Nos. F41608-97-C-0859)
F41608-97-C-0895)
F41608-97-C-0896)

APPEARANCES FOR THE APPELLANT: W. Jay DeVecchio, Esq.
Ariel R. David, Esq.
Crowell & Moring, L.L.P.
Washington, DC

OF COUNSEL: Kevin Kney, Esq.
Sundstrand Corporation

APPEARANCES FOR THE GOVERNMENT: Jerome C. Brennan, Esq.
Chief Trial Attorney
Steven Gruenwald, Esq.
Trial Attorney
Defense Contract Management
Agency, Chicago

OPINION BY ADMINISTRATIVE JUDGE DICUS

This appeal is taken from a contracting officer's decision premised in part on the Government's assertion that certain FAR regulations and clauses are an invalid implementation of the law. In 1994, Congress passed the Federal Acquisition Streamlining Act of 1994 (FASA), Pub. L. 103-355, 108 Stat. 3243 (1994), encouraging the acquisition of commercial items. FASA authorized advance payments for commercial items in accordance with customary terms and conditions in the commercial marketplace provided there was "adequate security" for them and other safeguards were met. 10 U.S.C.A. § 2307(f) (West 1998). In 1995, the Federal Acquisition Regulation (FAR) was amended to implement FASA. The FAR provided that an offeror's "financial condition" could be adequate security for commercial financing and introduced several new clauses, including FAR 52.232-30 INSTALLMENT PAYMENTS FOR COMMERCIAL ITEMS (OCT 1995) (the Installment Payments clause). At all relevant times, appellant's financial condition was sound. Prior to award of the captioned contracts, it negotiated to have the Installment Payments clause included in the contracts. When it submitted

invoices for installment payments, however, the administrative contracting officer (ACO) refused to approve them unless appellant provided traditional security such as a lien. Appellant submitted claims for the installment payments, which the ACO denied, and this appeal followed. Jurisdiction arises under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, as amended. The appeal is submitted on the record pursuant to Board Rule 11. Only entitlement is to be decided.

There are two principal issues: first, was the ACO entitled to refuse to make the payments because the clause and related FAR provisions are invalid? Second, if not, was appellant entitled to installment payments under the Installment Payments clause? We sustain the appeal.

STATUTORY AND REGULATORY PROVISIONS
AND OTHER OFFICIAL GUIDANCE

FASA, sections 2001 and 2051, amended 10 U.S.C.A. § 2307 (the statute relevant to this appeal) and 41 U.S.C.A. § 255 by adding a new paragraph (f) providing for commercial financing:

(f) Conditions for payments for commercial items.

(1) Payments under subsection (a) [“Payment authority”] for commercial items may be made under such terms and conditions as the head of the agency determines are appropriate or customary in the commercial marketplace and are in the best interests of the United States. The head of the agency shall obtain adequate security for such payments. If the security is in the form of a lien in favor of the United States, such lien is paramount to all other liens and is effective immediately upon the first payment, without filing, notice, or other action by the United States.

(2) Advance payments made under subsection (a) for commercial items may include payments, in a total amount of not more than 15 percent of the contract price, in advance of any performance of work under the contract.

(3) The conditions of subsections (d) and (e) [“Security for advance payments” and “Conditions for progress payments”] need not be applied if they would be inconsistent, as determined by the head of the executive

agency, with commercial terms and conditions pursuant to paragraphs (1) and (2).

Effective 1 October 1995, the Federal Acquisition Regulatory Council issued Federal Acquisition Circular (FAC) 90-33, 60 F.R. 49706 (Sept. 26, 1995), implementing the commercial financing provisions of FASA. FAC 90-33 added FAR subpart 32.2, “Commercial Item Purchase Financing,” and related clauses, including FAR 52.232-29 TERMS FOR FINANCING OF PURCHASES OF COMMERCIAL ITEMS (OCT 1995) (the Terms for Financing clause), and FAR 52.232-30, the Installment Payments clause. According to FAC 90-33:

This final rule implements sections 2001 and 2051 of the [FASA]. Sections 2001 and 2051 substantially changed the statutory authorities for Government financing of contracts. The Government is now authorized to provide contract financing that is appropriate or customary in the commercial marketplace for purchases of commercial items. . . .

. . . .

Subpart 32.2 . . . provides several alternative procedures for establishing contract financing terms for commercial items. The new subpart also provides standard terms for use by contracting officers in establishing financing for contracts.

The installment payment clause at 52.232-30 permits contracting officers to incorporate financing into contracts for commercial items without any administrative effort beyond incorporation of the clause.

(FAC 90-33, Item Summary at 1-2) Related FAC 90-32, 60 F.R. 48206 (Sept. 18, 1995), issued Standard Form 1449, “Solicitation/Contract/Order for Commercial Items,” (SF1449), and FAR 52.212-4 CONTRACT TERMS AND CONDITIONS—COMMERCIAL ITEMS, the current version of which is dated March 1999.

FAR 32.202-1(b), “Authorization,” lists eight requirements for commercial financing payments. One requirement is that “[a]dequate security is obtained (see 32.202-4).” FAR 32.202-1(b)(5).

FAR 32.202-4 SECURITY FOR GOVERNMENT FINANCING, places responsibility for specifying the security required for commercial financing on the procurement contracting officer (PCO). It provides:

(a) *Policy.* (1) 10 U.S.C. 2307(f) and 41 U.S.C. 255(f) require the Government to obtain adequate security for Government financing. The contracting officer shall specify in the solicitation the type of security the Government will accept. If the Government is willing to accept more than one form of security, the offeror shall be required to specify the form of security it will provide. If acceptable to the contracting officer, the resulting contract shall specify the security (see 32.206(b)(1)(iv)).

(2) Subject to agency regulations, the contracting officer may determine the offeror's financial condition to be adequate security, provided the offeror agrees to provide additional security should that financial condition become inadequate as security (see paragraph (c) of the clause at 52.232-29, Terms for Financing of Purchases of Commercial Items). Assessment of the contractor's financial condition shall consider both net worth and liquidity. If the contracting officer finds the offeror's financial condition is not adequate security, the contracting officer shall require other adequate security. Paragraphs (b), (c), and (d) of this subsection list other (but not all) forms of security that the contracting officer may find acceptable.

FAR 32.206 SOLICITATION PROVISIONS AND CONTRACT CLAUSES, tells the PCO what clauses to use to carry out his responsibilities.

FAR 32.207(c) places responsibility for determining that the security specified in the contract continues to be adequate on the ACO:

(c) Management of security. After contract award, the contracting officer responsible for approving requests for financing payments shall be responsible for determining that the security continues to be adequate. If the contractor's financial condition is the Government's security, this contracting officer is also responsible for monitoring the contractor's financial condition.

The Installment Payments clause, authorized by FAR 32.206(g), provides:

INSTALLMENT PAYMENTS FOR COMMERCIAL ITEMS (OCT 1995)

(a) Contractor entitlement to financing payments. The Contractor may request, and the Government shall pay, a contract financing installment payment as specified in this contract when: the payment requested is properly due in accordance with this contract; the supplies deliverable or services due under the contract will be delivered or performed in accordance with the contract; and there has been no impairment or diminution of the Government's security under this contract.

....

(f) Security for installment payment financing. In the event the Contractor fails to provide adequate security as required in this contract, no financing payment shall be made under this contract. Upon receipt of adequate security, financing payments shall be made, including all previous payments to which the Contractor is entitled, in accordance with the terms of the contract. If at any time the Contracting Officer determines that the security provided by the Contractor is insufficient, the Contractor shall promptly provide such additional security as the Contracting Officer determines necessary. In the event the Contractor fails to provide such additional security, the Contracting Officer may collect or liquidate such security that has been provided, and suspend further payments to the Contractor; the Contractor shall repay to the Government the amount of unliquidated financing payments as the Contracting Officer at his sole discretion deems repayable.

On 9 May 1997, Defense Contract Management Command (DCMC), which administers Department of Defense contracts such as the captioned contracts, issued "DCMC Memorandum No. 97-49, Acceptance and Payment of Commercial Item Contracts (POLICY)." This memorandum requires the ACO to establish a security review plan. The memorandum states that "[w]here the contractor's financial condition is cited as security for the contract financing, the plan should state the manner and frequency in which the financial condition of the contractor will be monitored." (App. supp. R4, ex. C, tab 2 at 7, 8)

The appendix to this opinion includes the complete text of 10 U.S.C.A. § 2307(a)-(f), (h) (West 1998); 31 U.S.C.A. § 3324(a)-(b) (West 1983); and FAR 32.202-1, 32.202-4, 32.206, 52.232-29 and 52.232-30.

FINDINGS OF FACT

1. During 1997-1998, Sundstrand Corporation (appellant) manufactured electrical and mechanical products with a variety of military and civilian aerospace applications. It had performed numerous Air Force contracts, including ones larger than those in question in this appeal, with and without the assistance of Government financing. As of 1998, appellant's total capitalization was over \$1.7 billion. The Government does not allege that appellant's "net worth or liquidity" was insufficient to finance performance of the captioned contracts. (App. supp. R4, ex. C, Valenza affid.; Munoz decl., ¶ 9; Answer ¶ 16)

2. In April 1997, San Antonio Air Logistics Center (SA-ALC), Kelly Air Force Base, Texas, issued two requests for quotation (the RFQs) to appellant requesting "your best price, delivery, discount terms and quantity price break" for a quantity of six-each Bus Power Control Units (BPCUs). The RFQs consisted of a one page memorandum with a packaging attachment and did not refer to contract financing. (R4, tabs 22, 23, *see also* tab 24)

3. On 25 June 1997, appellant quoted a price of \$60,691.69 per BPCU. Appellant stated that the BPCUs were commercial items. (R4, tab 25)

4. On or about 22 August 1997, SA-ALC and appellant engaged in "fact-finding." Appellant agreed to reduce the price per BPCU from \$60,691.69 to \$56,156.94 "contingent upon F.A.R. clause 52-232-30 [the Installment Payments clause] being included on any resultant contract." Appellant also provided copies of invoices for other sales of the BPCUs. Those invoices showed prices of \$58,518.00 per BPCU with progress payments. (R4, tab 27)

5. The PCO "made a determination" that the BPCUs qualified as commercial items. Since the PCO had made that determination, he included the Installment Payments clause in the contract instead of FAR 52.232-16 PROGRESS PAYMENTS (JUL 1991) (the Progress Payments clause), which he normally included. (Munoz decl., ¶ 4)

6. On 26 September 1997, the PCO awarded appellant Contract No. F41608-97-C-0895 (Contract 0895) on SF1449 for a quantity of eight BCPUs, at a unit price of \$56,156.94, to be delivered in November 1998. The contract incorporated the Installment Payments clause. It also included FAR 52.233-1 DISPUTES (OCT 1995). On

24 February 1998, the PCO awarded appellant Contract No. F41608-97-C-0896 (Contract 0896) for an additional quantity of six BCPUs to be delivered in February 1999 on the same terms and conditions (R4, tabs 3, 4).

7. On 21 July 1997, SA-ALC issued an “Urgent Request for Proposal” (RFP) to appellant for a quantity of 50 Integrated Drive Generators (IDGs). On 25 August 1997, appellant offered a price of \$89,536.00 per IDG contingent upon the Installment Payments clause being included in the contract. As in the case of the BCPUs, appellant stated that the IDGs were commercial items, and the PCO “made a determination” that appellant was correct, and that the Installment Payments clause should be used instead of the Progress Payments clause. (R4, tabs 26, 28; Munoz decl., ¶ 4; *see also* app. supp. R4, ex. C, tab 4)

8. On 26 September 1997, the PCO awarded appellant Contract No. F41608-97-C-0859 (Contract 0859) for the IDGs at the proposed price, with delivery in November and December 1998, on the same terms and conditions as the other contracts (R4, tab 1).

9. The contracts did not explicitly specify the security for installment payments, and appellant’s representative understood prior to award that this meant its financial condition constituted adequate security for installment payments. The PCO “believed Sundstrand [was] financially sound and healthy enough to handle contracts of this size without financial assistance.” He states, “[a]s these contracts were awarded on an ‘urgent’ basis, I did not consider security nor did I specify any required security in the contract.” He also states that he did not make any “decision about the requirement for adequate security.” It is clear that the PCO was not concerned about obtaining security for the installment payments from Sundstrand, a long-time Air Force supplier. (App. supp. R4, ex. C, Valenza affid.; Munoz decl., ¶¶ 4-6) According to the PCO, he deferred to the ACO on the issue (Munoz dep. at 40).

10. On 10 December 1997, the ACO, who works for DCMC, Chicago, approved “Postaward Orientation Determination” forms for contracts 0859 and 0895. The forms stated that the contractor’s financial condition was “adequate” and that installment payments were authorized. The forms also stated that the ACO would “develop a security plan with concurrence from DCAA (Sundstrand’s financial condition will be part of the security plan)” and that the ACO would monitor the financial condition of the contractor through annual financial updates. (R4, tabs 5, 13) On 10 December 1997, appellant submitted its first installment billing for contract 0859 showing amounts due for the first three installments, October, November and December 1997. On 5 January 1998, the ACO’s office returned the billing with instructions to recalculate the amount due in accordance with the ACO’s interpretation of the mechanics of the clause. (R4, tabs 6, 7)

11. The ACO testified she did not reach the conclusion that appellant's financial condition could be adequate security, but that she "had that thought process" (O'Rourke dep. at 100). She conceded that she concluded that appellant's financial condition could be adequate security prior to discussions with counsel (*id.* at 70-71). Moreover, the ACO did not follow the internal procedure required when the contract inadequately states security assets (*id.* at 66-68). We find, based on the foregoing and finding 10, that the ACO was satisfied that appellant's financial condition constituted adequate security up to at least 5 January 1998.

12. Sometime thereafter the ACO consulted with the legal department about the Installment Payments clause (O'Rourke dep. at 70-71). There is no evidence of a dispute on installment payments prior to that time. On 10 March 1998, following the consultation with counsel, the ACO notified appellant for the first time that she would not approve installment payments unless it provided a guaranteed line of credit, a corporate guaranty, a lien or some other form of security which the Government could liquidate if it became necessary:

Sundstrand has received two commercial contracts [contracts 0859 and 0895] from San Antonio Air Logistics Center allowing installment payments in accordance with FAR 52.232-30, Installment Payments for Commercial Items. FAR 52.232-30(f) discusses the need for adequate security to be provided by the contractor in order for the contracting officer to allow payments. The clause specifies that adequate security is a prerequisite to payments, and that the security is subject to liquidation in certain circumstances.

FAR 32.202-4, Security for Government financing, further discusses the issue of security, and specifically that the value of the security must be at least equal to the maximum unliquidated amount of the payments made to the contractor. In the event contract performance is jeopardized, the security may be liquidated to ensure the Government's interests are protected. Under 10 U.S.C. 2307 and 31 U.S.C. 3324, I cannot legally release any payments until security of at least equal value to the payments is provided. This security may take the form of a guaranteed line of credit, a corporate guaranty, a lien on assets as described in FAR 32.202-4(b), or possibly other forms which the Government would be able to liquidate if it becomes necessary. If it takes the form of a lien, guaranty, or other security which is backed up by Sundstrand's own resources, the documentation of it will need

to be authorized by a Sundstrand official who has the authority to obligate the Corporation. Also, whatever security is offered needs to be a separate obligation for each contract.

Upon receipt of adequate security, I will forward the requests for installment payments to DFAS. If you have any questions, please contact the undersigned.

(R4, tab 8; *see also* app. supp. R4, ex. C, O'Rourke dep., tr. 35-36, 87-89) Based on respondent's willingness to make payments once additional security was provided and respondent's failure to allege that payment was not due or that performance, delivery, or both were not in accord with the contract, we find that payment was due and that performance and delivery were not issues.

13. Appellant immediately challenged the ACO's interpretation of the requirements for installment payments. On 12 March 1998, it submitted an invoice for \$232,447 for the installment payment for February 1998 on contract 0859. Appellant stated in its cover letter:

This invoice represents the installment payment due under the contract cited thereon for which you have unjustifiably refused to authorize payment. Pursuant to FAR 32.202-4(a), the cited contract does not specify any type of security. Accordingly, Sundstrand's financial condition was and is adequate security for this contract and no basis exists for requiring any other type of security.

(R4, tab 9) Appellant stated that it considered the invoice to be in dispute and that its letter constituted a "claim" pursuant to the CDA for the payment of \$232,447 and Prompt Payment Act or CDA interest as applicable. On 20 April 1998, appellant certified its claim in accordance with the CDA. As detailed in a chart attached to the ACO's final decision, appellant submitted additional claims raising the same basic issue with respect to all three contracts. (R4, tabs 9, 12, 21)

14. On 7 May 1998, the ACO denied appellant's claims. She reiterated her view that "[t]he contracting officer cannot liquidate Sundstrand's financial condition in the event of a default; it therefore does not constitute security for any extension of funds." This timely appeal followed. (R4, tab 21)

15. According to the ACO, as of 1 June 1999, appellant's "financial condition is, and continually has been, sound, so that in the event of default and/or a judgment for recovery of funds it would have the resources to make repayment of the amounts to be

paid under these particular contracts.” We find that there was no impairment or diminution in appellant’s financial condition as relevant to the contract between the dates of award and the date of the final decision. (O’Rourke affid. ¶ 10)

DECISION

Appellant seeks installment payments pursuant to the Installment Payments clause incorporated in its contracts. The clause states in (a) that

the Government shall pay, a contract financing installment payment as specified in this contract when: the payment requested is properly due in accordance with this contract; the supplies deliverable or services due under the contract will be delivered or performed in accordance with the contract; and there has been no impairment or diminution of the Government’s security under this contract.

Appellant argues that the Government’s security is appellant’s “financial condition” and that there has been no impairment or diminution of the security. The Government argues that, notwithstanding the clause and the applicable FAR regulations, appellant must provide security which the ACO can liquidate in order to obtain the payments, and, if not, that the clause and related FAR provisions are invalid. There is no issue as to whether appellant has met the requirements of the clause apart from security.

We first look to the Government’s argument that the FAR provisions are invalid. The Government avers that, notwithstanding any interpretation of the clauses and FAR provisions at issue favorable to appellant, “underlying law . . . prohibits the Government from making [installment] payments” based on the contractor’s financial condition. (Gov’t br. at 2) Appellant argues that the Government here “is in the ironic position of attacking the validity of Executive interpretations of 10 U.S.C. § 2307(f).” According to appellant, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), properly construed, leads to the conclusion that the FAR provisions, which provide that “adequate security” for installment payments includes a contractor’s “financial condition,” must be accorded deference by this Board. (App. reply br at 11, n. 7) Appellant does not further address *Chevron* and the Government’s briefs cite no cases. We are persuaded that *Chevron* is governing here as to whether the regulation is an enforceable implementation of 10 U.S.C. § 2307.

The Court in *Chevron* described the process of reviewing an agency’s interpretation as follows:

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842-43 (footnotes omitted).

As discussed *supra* FASA amended 10 U.S.C. § 2307 to provide for advance payments when commercial items are acquired. FASA requires adequate security for advance payments, but it does not expressly address the question of whether a contractor's financial condition could be adequate security for advance payments. Moreover, the parties have not identified and we cannot find guidance on this point in the legislative history. The basic requirement for adequate security is in 10 U.S.C. § 2307(d), Security for advance payments. That section requires that advance payments "may be made only if the contractor gives adequate security and after a determination by the head of the agency that to do so would be in the public interest." However, 10 U.S.C. § 2307(f)(3) provides that subsection (d) need not be applied if it "would be inconsistent, as determined by the head of the agency, with commercial terms and conditions pursuant to [(f)(1)]." Thus, 10 U.S.C. § 2307(f)(3) allows the agency head to disregard subsection (d) if its application would be inconsistent with commercial practice. Similarly, 10 U.S.C. § 2307(f), Conditions for payments for commercial items, provides at (1) that advance payments for commercial items may be made under terms and conditions determined by the agency head to be customary in the commercial marketplace, while also requiring that the agency head obtain adequate security. Although not free from ambiguity, the Congressional intent appears to favor agency use of commercial standards in determining what constitutes adequate security. The statute does not, however, specifically address whether a contractor's financial condition can be "adequate security" for advance payments. We conclude, therefore, that, although we believe FASA intended to liberalize financing for commercial items, the first of the two questions we must ask under *Chevron* is answered in the negative - Congress has not spoken directly to the question at issue. Accordingly, we must determine whether the FAR provision in dispute "is based on a permissible construction of the statute." *Id.* at 843.

When the FAR was amended to implement FASA, FAR 32.202-4 SECURITY FOR GOVERNMENT FINANCING, emerged. That regulation specifically provides that “the contracting officer may determine the offeror’s financial condition to be adequate security.” The Government brief, which does not address *Chevron*, contains a section titled “General principles of ‘commercial’ Government contract financing.” From that we have extrapolated arguments and applied them to the principles in *Chevron*. The essence of the Government’s argument that, in effect, FAR 32.202-4 is not a permissible construction of 10 U.S.C. § 2307, is centered on the definition of “security.” According to the Government, in the commercial marketplace “security” means “collateral.” The argument continues that, without a requirement for collateral, FAR 32.202-4 runs headlong into the 10 U.S.C. § 3324 prohibition against advance payments:

Consistently, the Government is required to ensure that the outstanding payments do not exceed the value of property in which it holds either title or a security interest. To this extent, the authorization of 10 U.S.C. §2307 is at most a marginal extension of 31 U.S.C. §3324, in that it authorizes the Government to use something other than the contract end-item itself — provided that something which is substituted is of at least equal value — as the collateral against which payments are made.

(Gov’t br. at 11)

Subsection (b)(1) of 31 U.S.C. § 3324 permits advance payments of more than the worth of the service or article provided by the contractor where authorized by “a specific appropriation or other law.” FASA is just such an “other law,” and FAR 32.202-4 is only at odds with 31 U.S.C. § 3324 if that regulation does not represent a “permissible construction” of FASA, because a regulation not in harmony with the statute it implements is a nullity. *Manhattan General Equipment Co. v. Commissioner*, 297 U.S. 129, 134 (1936). However, under *Chevron*, if the administrative interpretation represented by FAR 32.202-4 is a reasonable interpretation, it is in harmony with FASA and must be given deference in interpreting FASA. Thus, if FASA, properly interpreted, permits the contractor’s financial condition to be adequate security for advance payments, it authorizes advance payments, and 31 U.S.C. § 3324 is removed from issue. Further, under *Chevron*, if we disagreed with the administrative interpretation of FASA, it would not be our place to adopt our interpretation if the administrative interpretation articulated in the FAR is “a permissible construction.”

In resolving this issue, we are not persuaded that the only definition of “security” that is appropriate here is the definition advanced by respondent. Definitions of “security” include the following:

1. Freedom from doubt, harm or risk of loss: SAFE . . . 3.
Something that gives or assures safety

WEBSTER’S NEW RIVERSIDE UNIVERSITY DICTIONARY 2d ed. (1984) *s.v.* “security.”

. . . something that secures . . . 4. . . protection against economic vicissitudes.

WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (1986) *s.v.* “security.” We believe an interpretation of adequate security which includes a contractor’s good financial condition is consistent with these definitions.

Another matter that bears upon what constitutes a “permissible construction” is the FASA provision at § 10002 requiring public comments on proposed revisions to the FAR:

SEC. 10002. IMPLEMENTING REGULATIONS.

(a) PROPOSED REVISIONS.—Proposed revisions to the Federal Acquisition Regulation and such other proposed regulations (or revisions to existing regulations) as may be necessary to implement this Act shall be published in the Federal Register not later than 210 days after the date of the enactment of this Act.

(b) PUBLIC COMMENT.—The proposed regulations described in subsection (a) shall be made available for public comment for a period of not less than 60 days.

FASA delegated ample authority to permit the regulations that resulted from the process through which the FAR is revised to emulate the commercial marketplace. Section 2001, codified at 10 U.S.C § 2307(f), *supra*, permitted the agency head to determine what terms and conditions existed in the commercial sphere and to implement FASA in accordance with those terms and conditions. The interagency team responsible for implementing FASA acted on the statutory mandate and sought public comment. After receiving and considering public comments on financing, it was decided to change the originally proposed version of FAR 32.202-4. The regulation that evolved from this process permits the contracting officer to treat the contractor’s financial condition as adequate security. (App. exs. A-G)

We believe a construction based on the public comments received and other accepted definitions of security, or both, is permissible. The administrative interpretation here is supported by both. We conclude that the administrative interpretation of FASA which permits a determination that the contractor's financial condition constitutes adequate security is a permissible construction and consistent with FASA. *Chevron, supra.*

We conclude further that appellant's interpretation of the clause is correct. FAR part 32.2 clearly permits the determination that the contractor's financial condition is adequate security for contract financing payments and the clause requires installment payments so long as certain conditions are met. As discussed below, the conditions were met.

We turn now to the question of whether the contract, reasonably interpreted, entitled appellant to installment payments. The Installment Payments clause mandates payment when due if performance and delivery are on target and there has been no diminution or impairment of security. All conditions were met (findings 12, 15). Thus, the matter turns on whether the contract provided that appellant's financial condition was adequate security. According to appellant, the controlling principle is that the interpretation of an agreement before a controversy has developed is entitled to great weight and prior to legal review (when the controversy arose) the parties treated appellant's financial condition as adequate security. Respondent argues that what was going on in the minds of the parties' representatives at times relevant to this dispute is mere speculation. We agree with appellant.

As this is a Rule 11 case with depositions and declarations in place of live testimony, the Board has not had the opportunity to evaluate credibility as we would at a hearing. We are not, however, without either the means or the common sense to separate the wheat from the chaff in addressing the question of the parties' intentions at relevant times. First, as to appellant, its pricing was conditioned on inclusion of the Installment Payments clause (findings 4, 7). Appellant's representative has declared that he contemporaneously believed that when the PCO elected not to specify the security for installment payments, it was a determination that appellant's financial condition was adequate security for installment payments (finding 9). Thus, we conclude that appellant intended to enter into the contracts based on receiving installment payments with its financial condition as the only security.

As to the PCO, even respondent concedes that it was the PCO's responsibility to include in the contract what would be accepted as adequate security.¹ He took no action

¹ While respondent does not explain its position, we note that FAR 32.204-4 requires the contracting officer to make determinations about the *offeror's*

regarding security. All he did was include the Installment Payments clause in the contract without any description of the security required for installment payments. We have concluded that he was not concerned about obtaining security from appellant. (Findings 7, 9) Based on his action in not describing security in the contract and the fact that he was not concerned about security, we conclude that he did not intend to require particular assets for security.

If we take the PCO's testimony at face value, he deferred the matter to the ACO (finding 9). The ACO's deposition testimony carefully avoids any direct admission that she intended to accept appellant's financial condition as adequate security. However, she testified she "had that thought process" when asked if appellant's financial condition could be adequate security. (Finding 11) Documentation prepared prior to the point when the ACO obtained an opinion from her legal department strongly implies that appellant's financial condition was to be the security for installment payments (finding 10). Other action (and inaction) imply that, prior to obtaining legal advice, she did not intend to seek specific, palpable, security from appellant. (Finding 11) There was no controversy until she obtained legal advice. Thereafter, she demanded additional security. (Finding 12) On balance, we place greater weight on the above recounted facts than on the lack of a direct statement by the ACO that she regarded appellant's financial condition as adequate security. We find that the ACO intended to make installment payments to appellant based on its financial condition up to the point when she obtained legal advice. Accordingly, we hold that, prior to the dispute, both parties intended appellant's financial condition to be the security for installment payments under the contracts. This establishes that, prior to the emergence of the dispute addressed herein, both the ACO and appellant's representative interpreted the contract to require installment payments with only appellant's financial condition as security. The interpretation of an agreement before it becomes the subject of a dispute is entitled to great weight. *Blinderman Construction Co. v. United States*, 695 F.2d 552 (Fed. Cir. 1982); *Ver-Val Enterprises*, ASBCA No. 43766, 95-1 BCA ¶ 27,334. We note, further, that the dispute resulted from legal advice which, judging from the timing of events, caused the ACO to question her authority to approve installment payments without security in the form of specific assets which could be liquidated (finding 12). This is contrary to our view of the regulation and clauses at issue, under which we hold that the ACO had authority to make the payments. In the circumstances, appellant was entitled to installment payments.

The Government has argued that what was in the parties' minds is mere speculation. While we disagree with that assessment, the facts alleged here by the

financial condition. Here, only the PCO dealt with appellant as an *offeror*. He turned the matter over to the ACO after award. (Munoz dep. at 41-42; O'Rourke dep. at 24-25.)

Government also may be viewed as falling within the principle set out at RESTATEMENT (SECOND) OF CONTRACTS § 204 (1981):

§ 204. Supplying an Omitted Term

When the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court.

Despite the fact that it was the PCO's duty to specifically identify the security the Government is relying on, the contract does not expressly describe what constitutes adequate security for the installment payments. The parties' rights and duties in this dispute are centered on adequate security. We have held, *supra*, that FAR 32.2 properly implements FASA, and it is to that regulation we would first look to find guidance in supplying the missing definition of "adequate security." The PCO, by including the Installment Payments clause, agreed to make installment payments. FAR 32.202-4(a)(2) permits the PCO to determine that the offeror's financial condition is adequate security, thereby electing not to seek disposable assets as security. However, although both the Installment Payments clause and FAR 32.206 anticipate a description of security in the contract, the PCO did not expressly describe security for the installment payments. Respondent's argument, in effect, disputes whether its representatives at any time relevant to this appeal made a conscious determination as to what constitutes adequate security. If not, we are left with an omission and we must fill in the missing provision to resolve the issue of the parties' rights and duties. In the circumstances we conclude that no fungible security was, or should be provided, and that appellant's financial condition was and is adequate security for installment payments. This is what is "reasonable in the circumstances" under these facts where the Government, in error, disavowed its own regulation; RESTATEMENT, § 204, *supra*. Indeed, appellant is a large corporation which had total capitalization of \$1.7 billion in 1998 (finding 1). Its financial condition is and was sound. It has and had the unimpaired resources to make repayment of the amounts due under the contracts. (Finding 15)

We have found there was no impairment or diminution of appellant's financial condition as relevant to the contracts (finding 15). In these circumstances, the clause provides that the Government "shall" make the payments. The ACO should, therefore, have made the bargained-for payments.

SUMMARY

We hold that FAR 32.2 properly implements 10 U.S.C.A. § 2307, and that appellant's interpretation of the provisions thereunder which are relevant to this appeal is correct. We conclude that appellant's financial condition was adequate security for installment payments. Accordingly, appellant is entitled to be paid the installment payments requested under the contracts at issue, along with CDA interest from the dates of receipt of the certified claims. The appeal is sustained.

Dated: 15 November 2000

CARROLL C. DICUS, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEMLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

APPENDIX

10 U.S.C.A. § 2307(a) - (f), (h)

§ 2307. Contract financing

(a) Payment authority.--The head of any agency may--

(1) make advance, partial, progress, or other payments under contracts for property or services made by the agency; and

(2) insert in solicitations for procurement of property or services a provision limiting to small business concerns advance or progress payments.

(b) Performance-based payments.--Whenever practicable, payments under subsection (a) shall be made on any of the following bases:

(1) Performance measured by objective, quantifiable methods such as delivery of acceptable items, work measurement, or statistical process controls.

(2) Accomplishment of events defined in the program management plan.

(3) Other quantifiable measures of results.

(c) Payment amount.--Payments made under subsection (a) may not exceed the unpaid contract price.

(d) Security for advance payments.--Advance payments made under subsection (a) may be made only if the contractor gives adequate security and after a determination by the head of the agency that to do so would be in the public interest. Such security may be in the form of a lien in favor of the United States on the property contracted for, on the balance in an account in which such payments are deposited, and on such of the property acquired for performance of the contract as the parties may agree. This lien is paramount to any other liens and is effective immediately upon the first advancement of funds without filing, notice, or any other action by the United States.

(e) Conditions for progress payments.--(1) The Secretary of Defense shall ensure that any payment for work in progress (including materials, labor, and other items) under a defense contract that provides for such payments is commensurate with the work accomplished that meets standards established under the contract. The contractor shall

provide such information and evidence as the Secretary of Defense determines necessary to permit the Secretary to carry out the preceding sentence.

(2) The Secretary shall ensure that progress payments referred to in paragraph (1) are not made for more than 80 percent of the work accomplished under a defense contract so long as the Secretary has not made the contractual terms, specifications, and price definite.

(3) This subsection applies to any contract in an amount greater than \$25,000.

(f) Conditions for payments for commercial items.--(1) Payments under subsection (a) for commercial items may be made under such terms and conditions as the head of the agency determines are appropriate or customary in the commercial marketplace and are in the best interests of the United States. The head of the agency shall obtain adequate security for such payments. If the security is in the form of a lien in favor of the United States, such lien is paramount to all other liens and is effective immediately upon the first payment, without filing, notice, or other action by the United States.

(2) Advance payments made under subsection (a) for commercial items may include payments, in a total amount of not more than 15 percent of the contract price, in advance of any performance of work under the contract.

(3) The conditions of subsections (d) and (e) need not be applied if they would be inconsistent, as determined by the head of the agency, with commercial terms and conditions pursuant to paragraphs (1) and (2).

....

(h) Vesting of title in the United States.-- If a contract paid by a method authorized under subsection (a)(1) provides for title to property to vest in the United States, the title to the property shall vest in accordance with the terms of the contract, regardless of any security interest in the property that is asserted before or after the contract is entered into.

31 U.S.C.A. § 3324(a) - (b)

§ 3324. Advances

(a) Except as provided in this section, a payment under a contract to provide a service or deliver an article for the United States Government may not be more than the value of the service already provided or the article already delivered.

(b) An advance of public money may be made only if it is authorized by--

(1) a specific appropriation or other law; or

(2) the President to be made to—

(A) a disbursing official if the President decides the advance is necessary to carry out—

(i) the duties of the official promptly and faithfully; and

(ii) an obligation of the Government; or

(B) an individual serving in the armed forces at a distant station if the President decides the advance is necessary to disburse regularly pay and allowances.

FAR 32.202-1 POLICY (OCT 1995)

(a) *Use of financing in contracts.* It is the responsibility of the contractor to provide all resources needed for performance of the contract. Thus, for purchases of commercial items, financing of the contract is normally the contractor's responsibility. However, in some markets the provision of financing by the buyer is a commercial practice. In these circumstances, the contracting officer may include appropriate financing terms in contracts for commercial purchases when doing so will be in the best interest of the Government.

(b) *Authorization.* Commercial interim payments and commercial advance payments may be made under the following circumstances--

(1) The contract item financed is a commercial supply or service;

(2) The contract price exceeds the simplified acquisition threshold in part 13;

(3) The contracting officer determines that it is appropriate or customary in the commercial marketplace to make financing payments for the item;

(4) Authorizing this form of contract financing is in the best interest of the Government (see paragraph (e) of this subsection);

(5) Adequate security is obtained (see 32.202-4);

(6) Prior to any performance of work under the contract, the aggregate of commercial advance payments shall not exceed 15 percent of the contract price;

(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) if the financing is expected to be substantially more advantageous to the offeror than the offeror's normal method of customer financing; and

(8) The contracting officer obtains concurrence from the payment office concerning liquidation provisions when required by 32.206(e).

(c) *Difference from non-commercial financing.* Government financing of commercial purchases under this subpart is expected to be different from that used for non-commercial purchases under subpart 32.1 and its related subparts. While the contracting officer may adapt techniques and procedures from the non-commercial subparts for use in implementing commercial contract financing arrangements, the contracting officer must have a full understanding of effects of the differing contract environments and of what is needed to protect the interests of the Government in commercial contract financing.

(d) *Unusual contract financing.* Any contract financing arrangement not in accord with the requirements of agency regulations or this part is unusual contract financing and requires advance approval in accordance with agency procedures. If not otherwise specified, such unusual contract financing shall be approved by the head of the contracting activity.

(e) *Best interest of the Government.* The statutes cited in 32.201 do not allow contract financing by the Government unless it is in the best interest of the United States. Agencies may establish standards to determine whether contract financing is in the best interest of the Government. These standards may be for certain types of procurements, certain types of items, or certain dollar levels of procurements. [Added, FAC 90-33, 60 FR 49706, 9/26/95, effective 10/1/95]

FAR 32.202-4 SECURITY FOR GOVERNMENT FINANCING. (OCT 1995)

(a) *Policy.* (1) 10 U.S.C. 2307(f) and 41 U.S.C. 255(f) require the Government to obtain adequate security for Government financing. The contracting officer shall specify in the solicitation the type of security the Government will accept. If the Government is willing to accept more than one form of security, the offeror shall be required to specify the form of security it will provide. If acceptable to the contracting officer, the resulting contract shall specify the security (see 32.206(b)(1)(iv)).

(2) Subject to agency regulations, the contracting officer may determine the offeror's financial condition to be adequate security, provided the offeror agrees to provide additional security should that financial condition become inadequate as security (see paragraph (c) of the clause at 52.232-29, Terms for Financing of Purchases of Commercial Items). Assessment of the contractor's financial condition shall consider both net worth and liquidity. If the contracting officer finds the offeror's financial condition is not adequate security, the contracting officer shall require other adequate security. Paragraphs (b), (c), and (d) of this subsection list other (but not all) forms of security that the contracting officer may find acceptable.

(3) The value of the security must be at least equal to the maximum unliquidated amount of contract financing payments to be made to the contractor. The value of security may be adjusted periodically during contract performance, as long as it is always equal to or greater than the amount of unliquidated financing.

(b) *Paramount lien.* (1) The statutes cited in 32.201 provide that if the Government's security is in the form of a lien, such lien is paramount to all other liens and is effective immediately upon the first payment, without filing, notice, or other action by the United States.

(2) When the Government's security is in the form of a lien, the contract shall specify what the lien is upon, e.g., the work in process, the contractor's plant, or the contractor's inventory. Contracting officers may be flexible in the choice of assets. The contract must also give the Government a right to verify the existence and value of the assets.

(3) Provision of Government financing shall be conditioned upon a contractor certification that the assets subject to the lien are free from any prior encumbrances. Prior liens may result from such things as capital equipment loans, installment purchases, working capital loans, various lines of credit, and revolving credit arrangements.

(c) *Other assets as security.* Contracting officers may consider the guidance at 28.203-2, 28.203-3, and 28.204 in determining which types of assets may be acceptable as

security. For the purpose of applying the guidance in part 28 to this subsection, the term “surety” and/or “individual surety” should be interpreted to mean “offeror” and/or “contractor.”

(d) *Other forms of security.* Other acceptable forms of security include--

(1) An irrevocable letter of credit from a federally insured financial institution;

(2) A bond from a surety, acceptable in accordance with part 28 (note that the bond must guarantee repayment of the unliquidated contract financing);

(3) A guarantee of repayment from a person or corporation of demonstrated liquid net worth, connected by significant ownership to the contractor; or

(4) Title to identified contractor assets of adequate worth.

(e) *Management of risk and security.* In establishing contract financing terms, the contracting officer must be aware of certain risks. For example, very high amounts of financing early in the contract (front-end loading) may unduly increase the risk to the Government. 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. [Added, FAC 90-33, 60 FR 49706, 9/26/95, effective 10/1/95]

FAR 32.206 SOLICITATION PROVISIONS AND CONTRACT CLAUSES (OCT 1995)

(a) The contract shall contain the paragraph entitled “Payment” of the clause at 52.212-4, Contract Terms and Conditions--Commercial Items. If the contract will provide for contract financing, the contracting officer shall construct a solicitation provision and contract clause. This solicitation provision shall be constructed in accordance with 32.204 or 32.205. If the procedure at 32.205 is used, the solicitation provision at 52.232—31, Invitation to Propose Financing Terms, shall be included. The contract clause shall be constructed in accordance with the requirements of this subpart and any agency regulations.

(b) Each contract financing clause shall include:

(1) A description of the--

(i) Computation of the financing payment amounts (see paragraph (c) of this section);

(ii) Specific conditions of contractor entitlement to those financing payments (see paragraph (c) of this section);

(iii) Liquidation of those financing payments by delivery payments (see paragraph (e) of this section);

(iv) Security the contractor will provide for financing payments and any terms or conditions specifically applicable thereto (see 32.202-4); and

(v) Frequency, form, and any additional content of the contractor's request for financing payment (in addition to the requirements of the clause at 52.232-29, Terms for Financing of Purchases of Commercial Items; and

(2) Unless agency regulations authorize alterations, the unaltered text of the clause at 52.232-29, Terms for Financing of Purchases of Commercial Items.

(c) *Computation of amounts, and contractor entitlement provisions.* (1) Contracts shall provide that delivery payments shall be made only for completed supplies and services accepted by the Government in accordance with the terms of the contract. 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 prior to the delivery date(s). The basis for payment must be objectively determinable. The clause written by the contracting officer shall specify, to the extent access is necessary, the information and/or facilities to which the Government shall have access for the purpose of verifying the contractor's entitlement to payment of contract financing.

(2) If the contract is awarded using the offeror-proposed procedure at 32.205, the clause constructed by the contracting officer under paragraph (b)(1) of this section shall contain the following:

(i) A statement that the offeror's proposed listing of earliest times and greatest amounts of projected financing payments submitted in accordance with paragraph (d)(2) of the provision at 52.232-31, Invitation to Propose Financing Terms, is incorporated into the contract, and

(ii) A statement that financing payments shall be made in the lesser amount and on the later of the date due in accordance with the financing terms of the contract, or in the amount and on the date projected in the listing of earliest times and greatest amounts incorporated in the contract.

(3) If the security accepted by the contracting officer is the contractor's financial condition, the contracting officer shall incorporate in the clause constructed under paragraph (b)(1) of this section the following--

(i) A statement that the contractor's financial condition has been accepted as adequate security for commercial financing payments; and

(ii) A statement that the contracting officer may exercise the Government's rights to require other security under paragraph (c), Security for Government Financing, of the clause at 52.232-29, Terms for Financing of Purchases of Commercial Items, in the event the contractor's financial condition changes and is found not to be adequate security.

(d) *Instructions for multiple appropriations.* If contract financing is to be computed for the contract as a whole, and if there is more than one appropriation account (or subaccount) funding payments under the contract, the contracting officer shall include, in the contract, instructions for distribution of financing payments to the respective funds accounts. Distribution instructions and contract liquidation instructions must be mutually consistent.

(e) *Liquidation.* Liquidation of contract financing payments shall be on the same basis as the computation of contract financing payments; that is, financing payments computed on a whole contract basis shall be liquidated on a whole contract basis; and a payment computed on a line item basis shall be liquidated against that line item. If liquidation is on a whole contract basis, the contracting officer shall use a uniform liquidation percentage as the liquidation method, unless the contracting officer obtains the concurrence of the cognizant payment office that the proposed liquidation provisions can be executed by that office, or unless agency regulations provide alternative liquidation methods.

(f) *Prompt payment for commercial purchase payments.* The provisions of subpart 32.9, Prompt Payment, apply to contract financing and invoice payments for commercial purchases in the same manner they apply to non-commercial purchases. The contracting officer is responsible for including in the contract all the information necessary to implement prompt payment. In particular, contracting officers must be careful to clearly differentiate in the contract between contract financing and invoice payments and between items having different prompt payment times.

(g) *Installment payment financing for commercial items.* Contracting officers may insert the clause at 52.232-30, Installment Payments for Commercial Items, in solicitations and contracts in lieu of constructing a specific clause in accordance with paragraphs (b) through (e) of this section, if the contract action qualifies under the criteria

at 32.202-1(b) and installment payments for the item are either customary or are authorized in accordance with agency procedures.

(1) *Description.* Installment payment financing is payment by the Government to a contractor of a fixed number of equal interim financing payments prior to delivery and acceptance of a contract item. The installment payment arrangement is designed to reduce administrative costs. However, if a contract will have a large number of deliveries, the administrative costs may increase to the point where installment payments are not in the best interests of the Government.

(2) *Authorized types of installment payment financing and rates.* Installment payments may be made using the clause at 52.232-30, Installment Payments for Commercial Items, either at the 70 percent financing rate cited in the clause or at a lower rate in accordance with agency procedures.

(3) *Calculating the amount of installment financing payments.* The contracting officer shall identify in the contract schedule those items for which installment payment financing is authorized. Monthly installment payment amounts are to be calculated by the contractor pursuant to the instructions in the contract clause only for items authorized to receive installment payment financing.

(4) *Liquidating installment payments.* If installment payments have been made for an item, the amount paid to the contractor upon acceptance of the item by the Government shall be reduced by the amount of installment payments made for the item. The contractor's request for final payment for each item is required to show this calculation. [Added, FAC 90-33, 60 FR 49706, 9/26/95, effective 10/1/95]

**FAR 52.232-29 TERMS FOR FINANCING OF PURCHASES OF COMMERCIAL ITEMS.
(OCT 1995)**

As prescribed in 32.206(b)(2), insert the following clause:

TERMS FOR FINANCING OF PURCHASES OF COMMERCIAL ITEMS (OCT 1995)

(a) Contractor entitlement to financing payments. The Contractor may request, and the Government shall pay, a contract financing payment as specified elsewhere in this contract when: the payment requested is properly due in accordance with this contract; the supplies deliverable or services due under the contract will be delivered or performed in accordance with the contract; and there has been no impairment or diminution of the Government's security under this contract.

(b) Special terms regarding termination for cause. If this contract is terminated for cause, the Contractor shall, on demand, repay to the Government the amount of unliquidated contract financing payments. The Government shall be liable for no payment except as provided by the Termination for Cause paragraph of the clause at 52.212-4, Contract Terms and Conditions--Commercial Items.

(c) Security for Government financing. In the event the Contractor fails to provide adequate security, as required in this contract, no financing payment shall be made under this contract. Upon receipt of adequate security, financing payments shall be made, including all previous payments to which the Contractor is entitled, in accordance with the terms of the provisions for contract financing. If at any time the Contracting Officer determines that the security provided by the Contractor is insufficient, the Contractor shall promptly provide such additional security as the Contracting Officer determines necessary. In the event the Contractor fails to provide such additional security, the Contracting Officer may collect or liquidate such security that has been provided and suspend further payments to the Contractor; and the Contractor shall repay to the Government the amount of unliquidated financing payments as the Contracting Officer at his sole discretion deems repayable.

(d) Reservation of rights. (1) No payment or other action by the Government under this clause shall (i) excuse the Contractor from performance of obligations under this contract, or (ii) constitute a waiver of any of the rights or remedies of the parties under the contract.

(2) The Government's rights and remedies under this clause (i) shall not be exclusive, but rather shall be in addition to any other rights and remedies provided by law or this contract; and (ii) shall not be affected by delayed, partial, or omitted exercise of any right, remedy, power, or privilege, nor shall such exercise or any single exercise preclude or impair any further exercise under this clause or the exercise of any other right, power, or privilege of the Government.

(e) Content of Contractor's request for financing payment. The Contractor's request for financing payment shall contain the following:

(1) The name and address of the Contractor;

(2) The date of the request for financing payment;

(3) The contract number and/or other identifier of the contract or order under which the request is made; and

(4) An appropriately itemized and totaled statement of the financing payments requested and such other information as is necessary for computation of the payment, prepared in accordance with the direction of the Contracting Officer.

(f) Limitation on frequency of financing payments. Contractor financing payments shall be provided no more frequently than monthly.

(g) In the event of any conflict between the terms proposed by the offeror in response to an invitation to propose financing terms (52.232-31) and the terms in this clause, the terms of this clause shall govern.

(End of clause)

[Added, FAC 90-33, 60 FR 49706, 9/26/95, effective 10/1/95]

FAR 52.232-30 INSTALLMENT PAYMENTS FOR COMMERCIAL ITEMS (OCT 1995)

As prescribed in 32.206(g), insert the following clause:

INSTALLMENT PAYMENTS FOR COMMERCIAL ITEMS (OCT 1995)

(a) Contractor entitlement to financing payments. The Contractor may request, and the Government shall pay, a contract financing installment payment as specified in this contract when: the payment requested is properly due in accordance with this contract; the supplies deliverable or services due under the contract will be delivered or performed in accordance with the contract; and there has been no impairment or diminution of the Government's security under this contract.

(b) Computation of amounts. Installment payment financing shall be paid to the Contractor when requested for each separately priced unit of supply (but not for services) of each contract line item in amounts approved by the Contracting Officer pursuant to this clause.

(1) Number of installment payments for each contract line item. Each separately priced unit of each contract line item is authorized a fixed number of monthly installment payments. The number of installment payments authorized for each unit of a contract line item is equal to the number of months from the date of contract award to the date one month before the first delivery of the first separately priced unit of the contract line item. For example, if the first scheduled delivery of any separately priced unit of a contract line item is 9 months after award of the contract, all separately priced units of that contract line item are authorized 8 installment payments.

(2) Amount of each installment payment. 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.

(3) Date of each installment payment. Installment payments for any particular separately priced unit of a contract line item begin the number of months prior to the delivery of that unit that are equal to the number of installment payments authorized for that unit. For example, if 8 installment payments are authorized for each separately priced unit of a contract line item, the first installment payment for any particular unit of that contract line item would be 8 months before the scheduled delivery date for that unit. The last installment payment would be 1 month before scheduled delivery of a unit.

(4) Limitation on payment. Prior to the delivery payment for a separately priced unit of a contract line item, the sum of all installment payments for that unit shall not exceed 70 percent of the price of that unit.

(c) Contractor request for installment payment. The Contractor may submit requests for payment of installment payments not more frequently than monthly, in a form and manner acceptable to the Contracting Officer. Unless otherwise authorized by the Contracting Officer, all installment payments in any month for which payment is being requested shall be included in a single request, appropriately itemized and totaled.

(d) Dates for payment. An installment payment under this clause is a contract financing payment under the Prompt Payment clause of this contract, and except as provided in paragraph (e) of this clause, approved requests shall be paid within 30 days of submittal of a proper request for payment.

(e) Liquidation of installment payments. Installment payments shall be liquidated 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. The liquidation amounts for each unit of each line item shall be clearly delineated in each request for delivery payment submitted by the Contractor.

(f) Security for installment payment financing. In the event the Contractor fails to provide adequate security as required in this contract, no financing payment shall be made under this contract. Upon receipt of adequate security, financing payments shall be made, including all previous payments to which the Contractor is entitled, in accordance with the terms of the contract. If at any time the Contracting Officer determines that the security provided by the Contractor is insufficient, the Contractor shall promptly provide

such additional security as the Contracting Officer determines necessary. In the event the Contractor fails to provide such additional security, the Contracting Officer may collect or liquidate such security that has been provided, and suspend further payments to the Contractor; the Contractor shall repay to the Government the amount of unliquidated financing payments as the Contracting Officer at his sole discretion deems repayable.

(g) Special terms regarding termination for cause. If this contract is terminated for cause, the Contractor shall, on demand, repay to the Government the amount of unliquidated installment payments. The Government shall be liable for no payment except as provided by the Termination for Cause paragraph of the clause at 52.212-4, Contract Terms and Conditions--Commercial Items.

(h) Reservation of rights. (1) No payment, vesting of title under this clause, or other action taken by the Government under this clause shall (i) excuse the Contractor from performance of obligations under this contract, or (ii) constitute a waiver of any of the rights or remedies of the parties under the contract.

(2) The Government's rights and remedies under this clause (i) shall not be exclusive, but rather shall be in addition to any other rights and remedies provided by law or this contract, and (ii) shall not be affected by delayed, partial, or omitted exercise of any right, remedy, power, or privilege, nor shall such exercise or any single exercise preclude or impair any further exercise under this clause or the exercise of any other right, power, or privilege of the Government.

(i) Content of Contractor's request for installment payment. The Contractor's request for installment payment shall contain the following:

- (1) The name and address of the Contractor;
- (2) The date of the request for installment payment;
- (3) The contract number and/or other identifier of the contract or order under which the request is made; and
- (4) 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.

(End of clause)

[Added, FAC 90-33, 60 FR 49706, 9/26/95, effective 10/1/95]

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 51572, Appeal of Sundstrand Corporation, rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals