

PERFORMANCE-BASED PAYMENTS (CUMULATIVE)

Incomplete performance.

Boeing shall not approve a performance-based payment until the specified event or performance criterion has been successfully accomplished in accordance with the contract. If an event is cumulative, Boeing shall not approve the performance-based payment unless all identified preceding events or criteria are accomplished.

(a) *Amount of payments and limitations on payments.* Subject to such other limitations and conditions as are specified in this Contract and this clause, the amount of payments and limitations on payments shall be specified in the Contract's description of the basis for payment.

(b) *Seller request for performance-based payment.* The Seller may submit requests for payment of performance-based payments not more frequently than monthly, in a form and manner acceptable to the Buyer. Unless otherwise authorized by the Buyer, all performance-based payments in any period for which payment is being requested shall be included in a single request, appropriately itemized and totaled. The Seller's request shall contain the information and certification detailed in paragraphs (l) and (m) of this clause. (c) *Approval and payment of requests.*

(1) The Seller shall not be entitled to payment of a request for performance-based payment prior to successful accomplishment of the event or performance criterion for which payment is requested. The Buyer shall determine whether the event or performance criterion for which payment is requested has been successfully accomplished in accordance with the terms of the Contract. The Buyer may, at any time, require the Seller to substantiate the successful performance of any event or performance criterion which has been or is represented as being payable.

(2) A payment under this performance-based payment clause is a contract financing payment and not subject to interest penalty provisions. Buyer will pay approved requests in accordance with the payment terms of this Contract. Buyer is not required to provide payment if the Buyer requires substantiation as provided in paragraph (c)(1) of this clause, or inquires into the status of an event or performance criterion, or into any of the conditions listed in paragraph (e) of this clause, or into the Seller certification. The payment period will not begin until the Buyer approves the request.

(3) The approval by the Buyer of a request for performance-based payment does not constitute an acceptance by the Buyer and does not excuse the Seller from performance of obligations under this Contract.

(d) *Liquidation of performance-based payments.*

- (1) Performance-based finance amounts paid prior to payment for delivery of an item shall be liquidated by deducting a percentage or a designated dollar amount from the delivery payment. If the performance-based finance payments are on a delivery item basis, the liquidation amount for each such line item shall be the percent of that delivery item price that was previously paid under performance-based finance payments or the designated dollar amount. If the performance-based finance payments are on a whole contract basis, liquidation shall be by either pre-designated liquidation amounts or a liquidation percentage.
- (2) If at any time the amount of payments under this Contract exceeds any limitation in this Contract, the Seller shall repay to the Buyer the excess. Unless otherwise determined by the Buyer, such excess shall be credited as a reduction in the unliquidated performance-based payment balance(s), after adjustment of invoice payments and balances for any retroactive price adjustments.

(e) *Reduction or suspension of performance-based payments.* The Buyer may reduce or suspend performance-based payments, liquidate performance-based payments by deduction from any payment under the Contract, or take a combination of these actions after finding upon substantial evidence any of the following conditions:

- (1) The Seller failed to comply with any material requirement of this Contract (which includes paragraphs (h) and (i) of this clause).
- (2) Performance of this Contract is endangered by the Seller's --
 - (i) Failure to make progress; or
 - (ii) Unsatisfactory financial condition.
- (3) The Seller is delinquent in payment of any subcontractor or supplier under this Contract in the ordinary course of business.

(f) *Title.*

- (1) Title to the property described in this paragraph (f) shall vest in the Buyer. Vestiture shall be immediately upon the date of the first performance-based payment under this Contract, for property acquired or produced before that date. Otherwise, vestiture shall occur when the property is or should have been allocable or properly chargeable to this Contract

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- (2) "Property," as used in this clause, includes all of the following described items acquired or produced by the Seller that are or should be allocable or properly chargeable to this Contract under sound and generally accepted accounting principles and practices:
- (i) Parts, materials, inventories, and work in process;
 - (ii) Special tooling and special test equipment to which the Buyer is to acquire title;
 - (iii) Nondurable (*i.e.*, noncapital) tools, jigs, dies, fixtures, molds, patterns, taps, gauges, test equipment and other similar manufacturing aids, title to which would not be obtained as special tooling under subparagraph (f)(2)(ii) of this clause; and
 - (iv) Drawings and technical data, to the extent the Seller or subcontractors are required to deliver them to the Buyer by other clauses of this Contract.
- (3) Although title to property is in the Buyer under this clause, other applicable clauses of this contract (e.g., the termination clauses) shall determine the handling and disposition of the property.
- (4) Reserved.
- (5) In order to acquire for its own use or dispose of property to which title is vested in the Buyer under this clause, the Seller shall obtain the Buyer's advance approval of the action and the terms. If approved, the basis for payment (the events or performance criteria) to which the property is related shall be deemed to be not in compliance with the terms of the Contract and not payable (if the property is part of or needed for performance), and the Seller shall refund the related performance-based payments in accordance with paragraph (d) of this clause.
- (6) When the Seller completes all of the obligations under this Contract, including liquidation of all performance-based payments, title shall vest in the Seller for all property (or the proceeds thereof) not --
- (i) Delivered to, and accepted by, the Buyer under this Contract; or
 - (ii) Incorporated in supplies delivered to, and accepted by, the Buyer under this Contract and to which title is vested in the Buyer under this clause.
- (7) The terms of this Contract concerning liability for Buyer-furnished property shall not apply to property to which the Buyer acquired title solely under this clause.

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- (g) *Risk of loss.* Before delivery to and acceptance by the Buyer, the Seller shall bear the risk of loss for property, the title to which vests in the Buyer under this clause, except to the extent the Buyer expressly assumes the risk. If any property is lost, the basis of payment (the events or performance criteria) to which the property is related shall be deemed to be not in compliance with the terms of the Contract and not payable (if the property is part of or needed for performance), and the Seller shall refund the related performance-based payments in accordance with paragraph (d) of this clause.
- (h) *Records and controls.* The Seller shall maintain records and controls adequate for administration of this clause. The Seller shall have no entitlement to performance-based payments during any time the Seller's records or controls are determined by the Buyer to be inadequate for administration of this clause.
- (i) *Reports and Buyer access.* The Seller shall promptly furnish reports, certificates, financial statements, and other pertinent information requested by the Buyer for the administration of this clause and to determine that an event or other criterion prompting a financing payment has been successfully accomplished. The Seller shall give the Buyer reasonable opportunity to examine and verify the Seller's records and to examine and verify the Seller's performance of this Contract for administration of this clause.
- (j) *Special terms regarding default.* If this Contract is terminated under the Default clause,
- (1) the Seller shall, on demand, repay to the Buyer the amount of unliquidated performance-based payments, and
 - (2) title shall vest in the Seller, on full liquidation of all performance-based payments, for all property for which the Buyer elects not to require delivery under the Default clause of this contract. The Buyer shall be liable for no payment except as provided by the Default clause.
- (k) *Reservation of rights.*
- (1) No payment or vesting of title under this clause shall --
 - (i) Excuse the Seller 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 Buyer'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

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(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 Buyer.

(l) *Content of Seller's request for performance-based payment.* The Seller's request for performance-based payment shall contain the following:

- (1) The name and address of the Seller;
- (2) The date of the request for performance-based payment;
- (3) The contract number and/or other identifier of the contract or order under which the request is made;
- (4) Such information and documentation as is required by the contract's description of the basis for payment; and
- (5) A certification by a Seller official authorized to bind the Seller, as specified in paragraph (m) of this clause.

(m) *Content of Seller's certification.* As required in paragraph (l) (5) of this clause, the Seller shall make the following certification in each request for performance-based payment:

I certify to the best of my knowledge and belief that --

- (1) This request for performance-based payment is true and correct; this request (and attachments) has been prepared from the books and records of the Seller, in accordance with the contract and the instructions of the Buyer;
- (2) (Except as reported in writing on _____), all payments to subcontractors and suppliers under this Contract have been paid, or will be paid, currently, when due in the ordinary course of business;
- (3) There are no encumbrances (except as reported in writing on _____) against the property acquired or produced for, and allocated or properly chargeable to, the Contract which would affect or impair the Buyer's title;
- (4) There has been no materially adverse change in the financial condition of the Seller since the submission by the Seller to the Buyer of the most recent written information dated _____; and

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(5) After the making of this requested performance-based payment, the amount of all payments for each deliverable item for which performance-based payments have been requested will not exceed any limitation in the contract, and the amount of all payments under the contract will not exceed any limitation in the Contract.