

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 12, 32, and 52****[FAR Case 2001-005]****RIN 9000-AJ20****Federal Acquisition Regulation;
Notification of Overpayment, Contract
Financing Payments**

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are proposing to amend the Federal Acquisition Regulation (FAR) to require the contractor to notify the contracting officer if the Government overpays the contractor when making an invoice payment or a contract financing payment under both commercial item and non-commercial item contracts.

DATES: Interested parties should submit comments in writing on or before October 28, 2002 to be considered in the formulation of a final rule.

ADDRESSES: Submit written comments to: General Services Administration, FAR Secretariat (MVA), 1800 F Street, NW., Room 4035, ATTN: Laurie Duarte, Washington, DC 20405. Submit electronic comments via the Internet to: farcase.2001-005@gsa.gov. Please submit comments only and cite FAR case 2001-005 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC, 20405, at (202) 501-4755 for information pertaining to status or publication schedules. For clarification of content, contact Mr. Jeremy Olson, at (202) 501-3221. Please cite FAR case 2001-005.

SUPPLEMENTARY INFORMATION:**A. Background**

In July 1999, the General Accounting Office (GAO) published a report (GAO/NSIAD-99-131) entitled Greater Attention Needed to Identify and Recover Overpayments. After examining the process for identifying and collecting overpayments, GAO concluded in their report that "Under current law, there is no requirement for contractors who have been overpaid to

notify the Government of overpayments or to return overpayments prior to the Government issuing a demand letter" (i.e., formal notification to the contractor to pay money owed to the Government). One of the recommendations of the report was that DoD requires contractors to promptly notify the Government of overpayments made to them.

DoD, GSA, and NASA published a proposed FAR rule 1999-023, in the **Federal Register** at 65 FR 52244, August 28, 2000. The rule proposed modifying the prompt payment clauses at FAR 52.232-25, Prompt Payment; FAR 52.232-26, Prompt Payment for Fixed-Price Architect-Engineer Contracts; and FAR 52.232-27, Prompt Payment for Construction Contracts, to require the contractor to notify the contracting officer if the contractor becomes aware of an overpayment. A final rule, FAR Case 1999-023, was published in the **Federal Register** at 66 FR 65353, December 18, 2001.

One of the respondents that submitted public comments in response to the proposed rule recommended that overpayments on financing payments should be provided similar treatment as overpayments on invoice payments, i.e., the contractor should be required to immediately notify the contracting officer of a duplicate payment or overpayment on contract financing payments. The Councils have opened FAR Case 2001-005 to consider this recommendation. Accordingly, the proposed rule further modifies the FAR to extend the policy regarding notification of overpayments to contract financing payments. The proposed rule also makes the policy applicable to both contract financing and invoice payments under contracts for commercial items.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The Councils do not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because it is not expected that this change will impact a substantial number of small entities since the overpayments cited by GAO in its report GAO/NSIAD-99-131, were all related to large businesses. An Initial Regulatory Flexibility Analysis has, therefore, not been performed. We

invite comments from small businesses and other interested parties. The Councils will consider comments from small entities concerning the affected FAR parts 12, 32 and 52 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (FAR case 2001-005), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 104-13) applies because the proposed rule contains information collection requirements. The rule requires the contractor to notify the contracting officer if the contractor becomes aware that the Government has overpaid on a financing payment under a contract for noncommercial items, and on financing and invoice payments under a contract for commercial items. Although this estimated burden requires approval under the Act, it is so small that it does not impact the estimated total burden under OMB Control Number 9000-0070.

Annual Reporting Burden: Public reporting burden for this collection of information is estimated to average .5 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

The annual reporting burden is estimated as follows:

Respondents: 840.

Responses per respondent: 1.

Total annual responses: 420.

Preparation hours per response: .5.

Total response burden hours: 420.

**D. Request for Comments Regarding
Paperwork Burden**

Submit comments, including suggestions for reducing this burden, not later than October 28, 2002 to: FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503, and a copy to the General Services Administration, FAR Secretariat (MVA), 1800 F Street, NW, Room 4035, Washington, DC 20405.

Public comments are particularly invited on: whether this collection of information is necessary for the proper performance of functions of the FAR, and will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of

appropriate technological collection techniques or other forms of information technology.

Requester may obtain a copy of the justification from the General Services Administration, FAR Secretariat (MVA), Room 4035, Washington, DC 20405, telephone (202) 501-4755. Please cite OMB Control Number 9000-0070, FAR Case 2001-005, Notification of Overpayment, Contract Financing Payments, in all correspondence.

List of Subjects in 48 CFR Parts 12, 32, and 52

Government procurement.

Dated: August 20, 2002.

Al Matera,

Director, Acquisition Policy Division.

Therefore, DoD, GSA, and NASA propose amending 48 CFR parts 12, 32, and 52 as set forth below:

1. The authority citation for 48 CFR parts 12, 32, and 52 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 12—ACQUISITION OF COMMERCIAL ITEMS

2. Add section 12.215 to read as follows:

12.215 Notification of overpayment.

If the Contractor notifies the contracting officer of a duplicate contract financing or invoice payment or that the Government has otherwise overpaid on a contract financing or invoice payment, the contracting officer must provide instructions to the contractor, in coordination with the cognizant payment office, regarding disposition of the overpayment.

3. Add section 32.008 to read as follows:

PART 32—CONTRACT FINANCING

32.008 Notification of overpayment.

If the Contractor notifies the contracting officer of a duplicate contract financing or invoice payment or that the Government has otherwise overpaid on a contract financing or invoice payment, the contracting officer must provide instructions to the contractor, in coordination with the

cognizant payment office, regarding disposition of the overpayment.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

4. Amend section 52.212-4 by revising the date of the clause and paragraph (i) to read as follows:

52.212-4 Contract Terms and Conditions—Commercial Items.

* * * * *

Contract Terms and Conditions—Commercial Items (Date)

* * * * *

(i) *Payment.* (1) *Items accepted.* Payment shall be made for items accepted by the Government that have been delivered to the delivery destinations set forth in this contract.

(2) *Prompt payment.* The Government will make payment in accordance with the Prompt Payment Act (31 U.S.C. 3903) and Prompt Payment regulations at 5 CFR part 1315.

(3) *Electronic Funds Transfer (EFT).* If the Government makes payment by (EFT), see 52.212-5(b) for the appropriate EFT clause.

(4) *Discount.* In connection with any discount offered for early payment, time shall be computed from the date of the invoice. For the purpose of computing the discount earned, payment shall be considered to have been made on the date which appears on the payment check or the specified payment date if an electronic funds transfer payment is made.

(5) *Overpayments.* If the Contractor becomes aware of a duplicate contract financing or invoice payment or that the Government has otherwise overpaid on a contract financing or invoice payment, the Contractor shall immediately notify the Contracting Officer and request instructions for disposition of the overpayment.

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5. Amend section 52.213-4 by revising the date of the clause and paragraph (a)(2)(iv) to read as follows:

52.213-4 Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items).

* * * * *

Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items) (Date)

(a) * * *

(2) * * *

(iv) 52.232-25, Prompt Payment (Date).

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6. Amend section 52.232-25 by revising the date of the clause and paragraph (d) to read as follows:

52.232-25 Prompt Payment.

* * * * *

Prompt Payment (Date)

* * * * *

(d) *Overpayments.* If the Contractor becomes aware of a duplicate contract financing or invoice payment or that the Government has otherwise overpaid on a contract financing or invoice payment, the Contractor shall immediately notify the Contracting Officer and request instructions for disposition of the overpayment. (End of clause)

7. Amend section 52.232-26 by revising the date of the clause and paragraph (c) to read as follows:

52.232-26 Prompt Payment for Fixed-Price Architect-Engineer Contracts.

* * * * *

Prompt Payment for Fixed-Price Architect-Engineer Contracts (Date)

* * * * *

(c) *Overpayments.* If the Contractor becomes aware of a duplicate contract financing or invoice payment or that the Government has otherwise overpaid on a contract financing or invoice payment, the Contractor shall immediately notify the Contracting Officer and request instructions for disposition of the overpayment. (End of clause)

8. Amend section 52.232-27 by revising the date of the clause and paragraph (l) to read as follows:

52.232-27 Prompt Payment for Construction Contracts.

* * * * *

Prompt Payment for Construction Contracts (Date)

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(l) *Overpayments.* If the Contractor becomes aware of a duplicate contract financing or invoice payment or that the Government has otherwise overpaid on a contract financing or invoice payment, the Contractor shall immediately notify the Contracting Officer and request instructions for disposition of the overpayment. (End of clause)

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