

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 2, 10, 12, 13, 19, and 25**

[FAC 2001–16; FAR Cases 2002–026 and 2002–003; Item IV]

RINS 9000–AJ54 and 9000–AJ40

**Federal Acquisition Regulation;
Procurements for Defense Against or
Recovery From Terrorism or Nuclear,
Biological, Chemical or Radiological
Attack, and Temporary Emergency
Procurement Authority****AGENCIES:** Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).**ACTION:** Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to implement section 836 of the Fiscal Year 2002 National Defense Authorization Act and sections 852 through 856 and section 858 of the Homeland Security Act. Those sections increase the amount of the micro-purchase threshold and the simplified acquisition threshold and provide expanded access to streamlined procedures for procurements of supplies or services by or for an executive agency that are to be used to facilitate defense against or recovery from terrorism or nuclear, biological, chemical, or radiological attack.

DATES: *Effective Date:* October 1, 2003.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405, (202) 501–4755, for information pertaining to status or publication schedules. For clarification of content, contact Mr. Gerald Zaffos, Procurement Analyst, at (202) 208–6091. Please cite FAC 2001–16, FAR cases 2002–026 and 2002–003.

SUPPLEMENTARY INFORMATION:**A. Background**

FAR Case 2002–026, Procurements for Defense Against or Recovery From Terrorism or Nuclear, Biological, Chemical or Radiological Attack. An interim rule implementing sections 852 through 856 and section 858 of the Homeland Security Act (Public Law 107–296) was published in the **Federal Register** at 68 FR 4048, January 27,

2003. The interim rule provided Federal emergency procurement flexibilities by increasing the amount of the micro-purchase threshold and the simplified acquisition threshold for procurements and provided expanded access to streamlined procedures for acquisitions of supplies or services by or for an executive agency that, as determined by the head of the executive agency, are to be used to facilitate defense against or recovery from terrorism or nuclear, biological, chemical, or radiological attack. The special increased thresholds and authorities under the Act apply to acquisitions resulting from solicitations issued before November 25, 2003.

A total of four comments from five commentors was received in response to the interim rule. Two commentors suggested that micropurchases should be subject to the small business reservation. This comment was not accepted.

Micropurchase authority is designed to enable agencies to make purchases in a highly simplified manner, generally without application of provisions and clauses and with minimal application of Government-unique requirements. While agencies should always actively consider the products and services of small businesses, irrespective of the size of the purchase, the Councils believe that imposition of a Government-unique regulatory buying mandate is generally inconsistent with the overall purpose of micropurchase authority. The Councils note that 41 U.S.C. 428(b) states that micro-purchases not be subject to the small business reservation: “(b) Exclusion for micro-purchases. A purchase by an executive agency with an anticipated value of the micro-purchase threshold or less is not subject to section 15(j) of the Small Business Act (15 U.S.C. 644(j)) and the Buy American Act (41 U.S.C. 10a–10c).”

Two commentors suggested that orders against GSA Schedules be subject to small business set-aside. This comment was not accepted as it was outside the scope of this case.

One commentor suggested that FAR 10.001 be revised to include language from the statute requiring use of commercially available market research methods, including use of commercial databases. This comment was partially accepted and a change was made to FAR 10.002 to add querying commercial databases as a market research technique. The balance of the recommendation was not accepted because the regulation already provides for using various market research methods.

This final rule finalizes the interim rule with the one change addressed above.

FAR Case 2002–003, Temporary Emergency Procurement Authority. This final rule also finalizes the interim rule issued in the **Federal Register** at 67 FR 56116, August 30, 2002, to implement section 836 of the Fiscal Year 2002 National Defense Authorization Act. That interim rule increased the amount of the micropurchase threshold and the simplified acquisition threshold for procurements of supplies or services by or for DoD during Fiscal Years 2002 and 2003, where those procurements are to facilitate the defense against terrorism or biological or chemical attack against the United States. Also, the rule provided that contracting officers acquiring biotechnology supplies or biotechnology services, for use to facilitate the defense against terrorism or biological or chemical attack against the United States, may treat the supplies or services as commercial items. No comments were received in response to that interim rule.

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 rule may 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 affects the pool of acquisitions that are reserved for small businesses. We have prepared a Final Regulatory Flexibility Analysis. The analysis is summarized as follows:

This rule finalizes two interim rules that amend the Federal Acquisition Regulation (FAR) to implement Section 836 of the Fiscal Year 2002 National Defense Authorization Act and Sections 852 through 856 and Section 858 of the Homeland Security Act (Public Law 107–296). Those sections increase the amount of the micro-purchase threshold and the simplified acquisition threshold and provide expanded access to streamlined procedures for procurements of supplies or services by or for an executive agency that are to be used to facilitate defense against or recovery from terrorism or nuclear, biological, chemical, or radiological attack. The rule affects the pool of acquisitions subject to the small business reservation by raising the threshold for application of the reservation for specified acquisitions to the increased micro-purchase threshold (from \$2,500 to \$7,500/\$15,000) and correspondingly increasing the limitation to the increased simplified acquisition threshold (from \$100,000 to

\$200,000/\$250,000). No comments were received in response to the Initial Regulatory Flexibility Analysis for either case. The increased thresholds are limited to specified procurements. In addition, the special authorities are only available for a short period of time. There are no data available on the number of procurements that will be eligible. However, we expect the number of small entities that will be impacted by the increased thresholds to this limited class of procurements to be very small.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 2, 10, 12, 13, 19, and 25

Government procurement.

Dated: September 24, 2003.

Laura G. Auletta,

Director, Acquisition Policy Division.

Interim Rules Adopted as Final With Changes

■ Accordingly, DoD, GSA, and NASA adopt the interim rules amending 48 CFR parts 2, 10, 12, 13, 19, and 25, which were published in the **Federal Register** at 67 FR 56116, August 30, 2002, and 68 FR 4048, January 27, 2003, as a final rule with the following change:

PART 10—MARKET RESEARCH

■ 1. The authority citation for 48 CFR part 10 is revised to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

10.002 [Amended]

■ 2. Amend section 10.002 in paragraph (b)(2)(iv) by removing “Government” and adding “Government and commercial” in its place.

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 12, 32, and 52

[FAC 2001-16; FAR Case 2001-005; Item V]

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: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to require the contractor to notify the contracting officer if the Government overpays when making an invoice payment or a contract financing payment under either a commercial item or noncommercial item contract.

DATES: *Effective Date:* October 31, 2003.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC, 20405, (202) 501-4755, for information pertaining to status or publication schedules. For clarification of content, contact Ms. Jeritta Parnell, Procurement Analyst, at (202) 501-4082. Please cite FAC 2001-16, FAR case 2001-005.

SUPPLEMENTARY INFORMATION:

A. Background

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 67 FR 55676, August 29, 2002, with request for comments. Two respondents submitted public comments. A discussion of the comments is provided below. Differences between the proposed and the final rule are discussed in paragraph 4 below.

1. *Comment:* There is concern that credit invoices, due to a revision of indirect billing rates, contractual actions impacting negotiated price, adjustments to progress payments as a result of change in the contract's estimated cost at completion, and authorized borrow-payback transfers will all be potentially misconstrued as overpayments because they may result in a need for the contractor to pay a sum back to the

Government as a result of the normal and expected operation of contractual terms and conditions. Therefore, the following definition should be added at the beginning of each of the proposed paragraphs imposing a notification requirement:

An overpayment is a payment of an amount greater than the value the contractor is entitled to receive at the time of the payment.

Councils' response: Do not concur. The intent of the rule is to require contractors to notify the Government when they become aware that an incorrect payment has been made. The Councils do not believe there is a demonstrated need for such a definition. First, the term “overpayment” is used in Government contracting in a variety of contexts, and we are concerned that establishing a definition in the payment clauses could have unintended consequences. Second, when a contract is modified to reflect the incorporation of new billing rates, or some other contract administration action, the contract modification should identify whether a credit is due the Government. The Councils do not anticipate that a contracting officer would issue a notification of overpayment in these instances. If, in the future, it becomes apparent that, in practice, contracting officers are taking an overly broad and needlessly burdensome interpretation of what constitutes an overpayment for the purposes of this notification requirement, then the Councils will revisit this issue.

2. *Comment:* A dollar threshold of \$25,000, or some other reasonable threshold, should be established for the notification of overpayment requirement. The requirement for providing a notification for any overpayment, no matter how small or insignificant in amount, is not cost-effective. In addition, instead of immediate notification, DoD should give contractors thirty days to notify the contracting officer, after the overpayment has been verified to source documents. Finally, the contract should require that the disposition instructions provided by the contracting officer be broadened, *i.e.*, that the payment office be required to provide both the contractor and contracting officer with appropriation-level detail of how all overpayment refunds are posted back to the contract.

Councils' response: The Councils do not agree with the premise that a threshold is needed. Many, if not most, contractors now provide notice to the Government when they believe an overpayment, or any other payment