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Contractors Must Notify Their Contracting Officers When They Receive an Overpayment

*If you have any questions or
would like additional information
on the material covered in this
Bulletin, please contact
the author:*

*Patricia H. Wittie
(Washington, DC)
202.414.9210
pwittie@reedsmith.com*

*...or any of the Reed Smith
attorneys with whom you
regularly work.*

As part of the fallout from recent scandals involving the government's inadequate controls over contract payments, a new paragraph has been added to the Federal Acquisition Regulation ("FAR"), requiring all contractors to notify their contracting officers if they receive an overpayment on an invoice submitted to the government.

Effective February 19, 2002, the following new paragraph will be added to the FAR Prompt-Payment Clause at 52.232-25(d), 52.232-26(c), and 52.232-27(l).

If the Contractor becomes aware of a duplicate payment or that the Government has otherwise overpaid on an invoice payment, the Contractor shall immediately notify the Contracting Officer and request instructions for disposition of the overpayment.

This addition to the Prompt Payment Clause is significant because:

- It is mandatory.
- It places the burden of identifying duplicate payments or overpayments squarely on the shoulders of contractors, not the government.
- It requires "immediate" notification, without defining what "immediate" means.
- It applies—for the time being—to all contracts, including those below the simplified acquisition threshold, except for commercial item acquisitions where the clause at FAR 52.212-4 is included.
- It is—for the time being, at least—limited to duplicate payments and overpayments on *invoices*, not other types of payments or financing.

It is expected that this requirement will be extended to commercial items in the near future, and will also be extended to cover non-invoice payments and financing.

The issues addressed by this new requirement may arise in a number of ways. For example, contractors who receive progress payments which are then liquidated against deliveries, and who show the contract price as well as the liquidation amount on their invoices, must immediately report to the government if the full contract price is paid, without liquidation. Similarly, if the government inadvertently pays twice for the same invoice, or mis-reads the invoice amount and pays more than is being billed, the contractor must report that fact to its contracting officer. These situations are inevitably complicated on long-term contracts with multiple modifications that add or delete work, increase or decrease the price, and adjust other contract terms that affect the timing and amount of payment.

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Although this notification requirement may appear reasonable on its face, in fact it does little to address the real issues behind the new rule. As noted above, the requirement was implemented because of scandals within the Department of Defense ("DoD") caused by the failure of the Defense Contract Management Command ("DCMC") to perform timely final reconciliations of thousands of contracts. With no final reconciliation, the government was not able to issue demand letters requesting repayment. A series of GAO reports noted that overpayment amounts during the 1990s amounted to billions of dollars, much of which was held by contractors for *years* before repayment. See, "DoD Contract Management—Greater Attention Needed to Identify and Recover Overpayments," GAO/NSIAD-99-131 (July 1999), available at <http://www.gao.gov/index.htm>.

Contractors who had been overpaid through no fault of their own did not routinely notify the government, choosing instead to wait for a formal demand letter or a final reconciliation. The most often-cited reason for this approach was that, without a demand letter or similar request from the government, contractors believed—in many cases based on actual experience—that their repayments would be applied to the wrong account, and they would have to devote dozens if not hundreds of manhours to sorting out the resulting confusion. This problem is not solved by the new FAR notification requirement; it will only be solved if DCMC and other payment agencies are able to stay current with their recordkeeping—which historically they have not been able to do.

In addition to the problems of proper application of any reimbursements, contractors who believe they have been overpaid are not always right. Final reconciliations may disclose errors in the internal accounts of either party, and contract close-outs often involve a back-and-forth process between the government and the contractor while discrepancies are identified and resolved. If there is a disagreement over whether a contractor has been overpaid, contractors prefer to wait for final reconciliation before writing a check—because getting that money back again in the event of an error can take months. The new FAR notification requirement does not address this problem either; again, the only solution is increased timeliness and accuracy within the government's accounting systems.

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