

DATES: Comments must be submitted on or before September 11, 1995, to be considered in the formulation of a final rule.

ADDRESSES: Interested parties should submit written comments to: Defense Logistics Agency, Directorate of Procurement, AQLPC, ATTN: Mary Massaro, Room 4D175, Cameron Station, Alexandria, VA 22304-6100.

FOR FURTHER INFORMATION CONTACT: Mary Massaro, Defense Logistics Agency, AQLPC, (703) 274-6307.

SUPPLEMENTARY INFORMATION:

Background

From 1989 to 1993, the Office of the DoD Inspector General (DoDIG) conducted six audits dealing in some measure with the DoD product quality deficiency reporting (PQDR) program. The DoDIG has concluded that DoD does not have effective remedies to obtain reimbursement or replacement for major and critical nonconforming products. Current FAR coverage and clauses allow the Government to require contractor corrections of latent, but not patent, nonconformances discovered after acceptance of supplies delivered under fixed-price contracts. In order to correct this situation, the DoDIG has suggested certain regulatory and procedural changes regarding Government acceptance. The Director of Defense Procurement (USD(A&T)) has agreed to permit DLA to test changes to acceptance procedures in accordance with the DoDIG's general recommendations to determine whether such changes are effective, cost-beneficial, and capable of widespread implementation. The proposed rule presents such a mechanism: a clause, not unlike a warranty, which provides that, notwithstanding acceptance of items, the Government can require the contractor to remedy any nonconformance determined to have been contractor-caused. Such a nonconformance must have been discovered either via testing at a Government-designated laboratory or by a completed, validated product quality deficiency report investigation; even in the latter case, lab testing may be used, as appropriate, for validation purposes. Any Government action for recoupment must have been initiated within one year of the date of acceptance. The clause will be used by three of DLA's buying activities, the Defense Construction Supply Center (DCSC), the Defense Electronics Supply Center (DESC), and the Defense Industrial Supply Center (DISC). In the former two, the clause will be incorporated in contracting actions for the purchase of

supplies in certain federal supply classes (FSCs) that have yielded high or disproportionate rates of nonconformance in the recent past. At DISC, because of the wide variety and large numbers of individual items within FSCs, that Center will implement the test for selected national stock numbers (items) within two of the FSCs listed below, and for all the items within a third FSC. The FSCs to be included are:

DCSC-2520—Vehicular Power Transmission Components, 2815—Diesel Engines and Components, 4320—Power and Hand Pumps

DESC-5965—Headsets, Handsets, Microphones and Speakers

DISC-5307—Studs (all items), 5310—Nuts & Washers (Class 3 self-locking nuts IAW MIL-N-25027, only), 5340—Hardware, Misc. (zinc anodes only)

The proposed coverage will be included in the Defense Logistics Agency Acquisition Regulation (DLAR) 4105.1, which implements and supplements the Federal Acquisition Regulation (FAR), the Defense Federal Acquisition Regulation Supplement (DFARS), and other DOD publications and, pursuant to FAR 1.304, establishes DLA procedures relating to the acquisition of supplies and services under the authority of 10 U.S.C. 301. This supplementary coverage and clause are designed to give contracting officers an effective tool for dealing with contractor-caused patent nonconformances.

Regulatory Flexibility Act

The proposed additions to 48 CFR parts 5446 and 5452 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 they provide a means of recoupment for patently defective items when these nonconformances are discovered after Government acceptance. This remedy is provided against both small and large entities under the proposed rule. An Initial Regulatory Flexibility Analysis has been prepared and is summarized as follows:

A limited number of procurements was selected for the test to provide valid test results while minimizing the impact on industry.

Eliminating small business from the test would invalidate the test results. Most DLA contractors are small businesses.

The proposed coverage at 48 CFR parts 5446 and 5452 is required in order to provide DLA with a means of recoupment for patently defective items

when these nonconformances are discovered after Government acceptance. The proposed rule will apply to all businesses, large and small, that enter into contracts with DLA field activities for the covered FSCs/items. Although the rule will apply to all and cannot be waived or relaxed for small entities, it will only have an adverse impact on those contractors that provide items with patent nonconformances. The proposed rule does not contain any information collection and recordkeeping requirements which require the approval of OMB under 44 U.S.C. 3501, *et seq.* Costs of compliance are dependent upon numbers of nonconforming items/lots delivered within the affected FSCs, and cannot be estimated at the present time. There are no alternatives to the proposed rule that will accomplish the stated objectives.

A copy of the Initial Regulatory Flexibility Analysis has been submitted to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the individual listed above. Comments from small entities concerning the affected DLAR Subparts will be considered in accordance with Section 610 of the Act.

Paperwork Reduction Act

The proposed rule does not impose any reporting or recordkeeping requirements which require the approval of OMB under 44 U.S.C. 3501 *et seq.* and, therefore, the Paperwork Reduction Act does not apply.

Public Participation

Public participation in the rulemaking will be handled by means of the Defense Logistics Agency's consideration of written comments mailed to the address set forth above.

Government procurement.

List of Subjects in 48 CFR Parts 5446 and 5452

Therefore, it is proposed that 48 CFR chapter 54 be amended as follows:

1. Part 5446 is added to read as follows:

PART 5446—QUALITY ASSURANCE

Authority: 5 U.S.C. 301, 10 U.S.C. 2202, 48 CFR Part 1, subpart 1.3 and 48 CFR part 201 subpart 201.3

5446.393 Remedies for post-acceptance discovery of nonconformance.

The contracting officer shall insert the clause at 5452.246-9005, Remedies for Post-Acceptance Discovery of Nonconformances (Test), in solicitations and contracts in accordance with 5446.590.