



February 27, 2013

MEMORANDUM FOR LINDA NEILSON
DEPUTY DIRECTOR
DEFENSE PROCUREMENT

THRU: WILLIAM CLARK
ACTING DIRECTOR
FEDERAL ACQUISITION POLICY DIVISION

FROM: HADA FLOWERS
DIVISION DIRECTOR
REGULATORY SECRETARIAT DIVISION

SUBJECT: FAR Case 2012-031 Accelerated Payments to Small Business
Subcontractors

Attached is a late comment received on the subject FAR case published at 77 FR 75089, December 19, 2012. The comment closing date was February 19, 2013.

<u>Response Number</u>	<u>Date Received</u>	<u>Commenter</u>	<u>Organization</u>
2012-031-7	02/22/2013	A.R. "Trey Hodgkins, III Alan Chvotkin Richard L. Corrigan	CODSIA

Attachment

2012-031-1

COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS
4401 Wilson Boulevard, Suite 1110
Arlington, Virginia 22203
703-875-8059

February 19, 2013

Ms. Hada Flowers
Administration, Regulatory Secretariat
General Services Administration
1275 First Street NE, 7th Floor
Washington, D.C. 20417

Re: FAR Case 2012-031. Accelerated Payments to Small Business Subcontractors
CODSIA Case 01-15

Dear Ms. Flowers:

The undersigned members of the Council of Defense and Space Industry Associations (CODSIA)¹ are pleased to submit these comments in response to the proposed rule dated December 19, 2012 (the "Proposed Rule") issued by the Department of Defense ("DoD"), the National Aeronautics and Space Administration, and the General Services Administration (collectively, the "FAR Council" or the "Council") in Federal Acquisition Regulation ("FAR") Case 2012-031. The proposed rule implements a temporary Office of Management and Budget policy published on July 11, 2012 to encourage agencies to accelerate payments to prime contractors to the maximum extent practical to allow the prime contractors to in turn make prompt payments to their small business subcontractors.

The proposed clause, 52.232-XX, reflects the language in OMB's July 11, 2012, Policy Memorandum M-12-16. CODSIA and its member associations support these efforts to speed payments and assist companies with cash flow concerns in these challenging economic times. However, we do have recommendations to clarify and improve upon the rule to insure that the good intentions of the policy can be achieved.

In our view, the key to achieving successful implementation of this policy and rule lies in providing flexibility of application and in better defining what is and is not an "accelerated payment."

¹ CODSIA currently consists of six industry trade associations and thus represents the comments of thousands of federal government contractors nationwide on acquisition policy issues. A CODSIA comment letter is not a letter from a single organizational entity but from thousands of affected stakeholders. This unique status as the conveyor of regulatory comments for some of the largest trade associations working on acquisition policy also represents the collective expertise of these associations and the companies they represent.

"Accelerated Payments"

Is the intent of the phrase "accelerated payments" to mean payments accelerated in terms of a specified number of days or a certain and measurable difference between the contractually agreed to payment terms between the contractor and the small business subcontractor? For example, must the accelerated payments be measurable or equate to a 20% improvement. If existing payment terms are at 60 days with a supplier, accelerating to 15 days is a significant change, but if the 60 day period is improved by some other measure, it would be more manageable and still meet the intent of the Administration's initiative. There is concern that contractors may interpret, and small businesses may expect, to be paid based on the same timing as the USG pays the prime contractor. We request that the guidance or definition specifically state that the accelerated payments to a small business subcontractor do not need to equate to the number of days the USG took to pay the prime contractor.

CODSIA recommends that the rule emphasize that prime contractors will be required to make accelerated payments to small business subcontractors only when they have received accelerated payment from the Government themselves.

In cases where government acceptance of a valid invoice stretches beyond (in some cases well beyond) these normative service levels, contractors should not be held to a payment standard for their small business subcontractors by the proposed FAR clause, even though the government payment office may consider its satisfaction of payment terms to the prime contractor to have been accelerated. As an example, a payment received 45 days after the submission of a valid invoice should not be considered to have been accelerated if a contracting officer required 30 days to accept and approve the invoice for payment.

Since the proposed FAR clause's intent is to improve normative cash flows for government small business subcontractors, any benefit under this clause should not be considered to exist if the government fails to accelerate payments relative to the date on a valid invoice.

CODSIA recommends adding guidance that states that payments will not be considered accelerated if government payment to the prime goes beyond the thresholds established by the Prompt Payment Act. A prime contractor should not be placed in a situation where it is expected to accelerate payments to its small business subcontractors while its invoices are being held up in extended government customer review cycles. Such a delay would amount to a de facto loan to the government by the prime in the amount of the subcontractor payments when the prime has not yet been paid or been paid in an accelerated fashion.

Flexibility

CODSIA is extremely pleased that the proposed rule takes into account that situations will vary on a case by case basis in implementing this rule. The inclusion of the clause "maximum extent practicable" is applauded. Without this flexibility, the costs and burdens associated with this new policy would greatly increase.

Government Primes sometimes have subcontract payment terms and payment timeliness results that are much more subcontractor friendly than in the commercial marketplace. Regardless of what the subcontract payment terms are, the clause requires contractors to accelerate the payments "otherwise required under the applicable contract or subcontract". What if a contractor historically gives certain small subcontractors extremely favorable payment terms, for example 14 days? Would the rule then require the contractor to further accelerate its payments to those subcontractors? CODSIA recommends the following language:

"(a) upon receipt of accelerated payments from the Government, the Contractor shall make accelerated payments to a small business subcontractor, to the maximum extent practicable equal to or less than the accelerated payment cycle received from the Government, after receipt of a proper invoice and all other required documentation from the small business subcontractor."

Additional Burdens

To fully maximize the potential benefits and limit the administrative costs and burden associated with this proposed rule, we propose that the applicability be expanded to include current contracts by modifying existing solicitations to the extent feasible. This was included in the Defense Department's class deviation on the topic (DARS Tracking number 2012-00014) and should be carried over to the proposed FAR rule.

We would qualify that suggestion, however, so that the requirement only applies at the first-tier. It seems there could be an unintended negative impact on small businesses when the clause flows to lower-tiers and only to those subcontracts with small business concerns. Those small business concerns may not have the administrative rigor to manage the requirement to adjust payment terms. This change can be accomplished by simply inserting the words "first tier subcontractors" in section (c) of the clause or by changing the word "including" to "excluding" in that same clause.

The proposed rule also lacks clarity as to how the Government will audit contractors to ensure compliance with this initiative. So far, there has been little, if any, guidance in this area and as a result, no protocols have been established or best practices identified. CODSIA believes that the proposed rule should be clarified to specifically reflect the following: "The proposed rule is not intended to impose any additional "reporting, recordkeeping or other information collection requirements."

There is considerable concern that contractors will be audited to some performance standard under this rule by the Defense Contract Audit Agency (DCAA). If this was to come to pass and DCAA was to audit compliance, it would negate one stated intention of the proposed FAR clause by decreasing, not increasing, efficiency and reducing, not increasing, cash flows because of the increased government compliance requirements. Performance under the FAR clause should only be assessed via customer reviews and their performance assessments and not through extended audit processes which impose significant documentation, recordkeeping and reporting requirements on the contractor. To avoid this negative outcome, the FAR proposal should specifically include this stated intent.

CODSIA appreciates this opportunity to comment on the Proposed Rule, and we would be pleased to respond to any questions the Council may have on these comments.

We welcome the opportunity to discuss these comments further and to respond to any questions the Council may have. Trey Hodgkins of TechAmerica serves as CODSIA's project lead on this case and he can be reached at 703-284-5010 or at thodgkins@techamerica.org. Bettie McCarthy, CODSIA's administrative officer, can serve as an additional point of contact and can be reached at codsia@pscouncil.org or at (703) 875-8059.

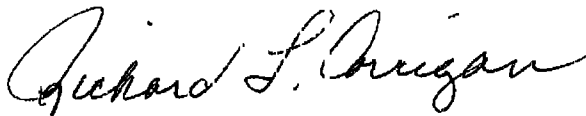
Sincerely,



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Senior Vice President, Global Public Sector
TechAmerica



Alan Chvotkin
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Professional Services Council



Richard L. Corrigan
Policy Committee Representative
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