

Council of Defense and Space Industry Associations
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CODSIA Case 2019-004

July 30, 2019

Defense Acquisition Regulations System
ATTN: Jennifer D Johnson
OUSD(A&S) DPC/DARS
3060 Defense Pentagon, Room 3B941
Washington, DC 20301-3060

Re: Defense Federal Acquisition Regulation Supplement Case 2018-D068, “Prompt Payments of Small Business Contractors”

Dear Ms. Johnson:

On behalf of the undersigned member associations of the Council of Defense and Space Industry Associations (CODSIA),¹ we are pleased to submit these comments on the DFARS proposed rule “Prompt Payments of Small Business Contractors” published in the *Federal Register* on May 31, 2019. The rule proposes to implement Section 852 of the FY2019 National Defense Authorization Act that provides for accelerated payments to DoD’s small business prime contractors and DoD small business subcontractors directly supporting/charged to a DoD contract in which the prime contractor is receiving accelerated payments. We generally support the rule with the modifications recommended here.

The initiative for accelerated payments for small business primes was originally established in 2011 by Office of Management and Budget (OMB) Memorandum M-11-32, “Accelerating Payments to Small Business for Goods and Services,”² and for small business subcontractors in OMB memo M-12-16.³ The policy was extended several times,⁴ most recently through OMB Memorandum M-17-13, “Extension of Policy to Provide Accelerated Payments to Small Business and Small Business Subcontractors.”⁵ All editions of the OMB memos had applicability government-wide. Unfortunately, while the provision for accelerated payment to small business prime contracts remains in

¹ CODSIA was formed in 1964 by industry associations with common interests in federal procurement policy issues at the suggestion of the Department of Defense. CODSIA consists of seven associations – Aerospace Industries Association (AIA), American Council of Engineering Companies (ACEC), Associated General Contractors (AGC), Information Technology Industry Council (ITI), National Defense Industrial Association (NDIA), Professional Services Council (PSC), and U.S. Chamber of Commerce. CODSIA’s member associations represent thousands of government contractors nationwide. The Council acts as an institutional focal point for coordination of its members’ positions regarding policies, regulations, directives, and procedures that affect them. A decision by any member association to abstain from participation in a particular case is not necessarily an indication of dissent.

² Available at <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2011/m11-32.pdf>

³ Available at GET

⁴ See OMB memos M-13-15; M-14-10 and M-16-07.

⁵ Available at <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/m-17-13.pdf>

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effect, OMB did not renew the subcontract payment portion of the directive, which lapsed on December 31, 2017. Many associations asked OMB to renew the subcontract payment provision.

Section 852 provides two types of accelerated payments, but both are applicable to DoD only. First, it provides accelerated payments to small business prime contractors, “to the fullest extent permitted by law,” with a goal of making payments within 15 days after receipt of a proper invoice unless the contract provides for another date for such payment. Second, it provides accelerated payments to any DoD prime contractor that subcontracts with small businesses, to the fullest extent permitted by law, with a goal of fifteen days after receipt of a proper invoice if (a) a specific payment date is not established in the contract; and (b) the prime contractor agrees to make accelerated payment to a small business subcontractor without any further consideration from, or fees charged to, the subcontractor.

The Supplementary Information accompanying the proposed rule indicates that DoD intends to continue to rely on FAR 52.232-40, Providing Accelerated Payments to Small Business Subcontractors. We prefer that both elements of the rule be made applicable government-wide, as the multiple OMB memos provided. At a minimum, the rule should acknowledge the government-wide application of making accelerated payments to small business primes, as provided in FAR 52.232-25.

FAR 52.232-40 does not provide for the 15-day payment goal “to the fullest extent permitted by law.” However, the continued reliance on FAR 52.232-40 for accelerated payments to small business subcontractors fails to adopt the specific 15-day goal that Section 852 directs DoD to adopt. We recommend that a new DFARS prescription and clause to supplement FAR 52.232-40 be added that provides for the 15-day payment goal “to the fullest extent permitted by law.” We support the revision to DFARS 232.903 to comport with the provisions of Section 852 with respect to small business prime contractors.

Furthermore, the proposed rule would add a new prescription in DFARS 232.009, Providing Accelerated Payments to Small Business Subcontractors and a new DFARS Clause 252.232-7XXX, Accelerated Payments to Small Business Subcontractors – Prohibition on Fees and Consideration. The heading to the 232.009 should be modified to add “small business contractors and” before the phrase “small business subcontractors” since the provision at 232.009-1, General, adds coverage for both small business “contractors” and small business subcontractors. In both places, it may be clearer to use the term “primes” rather than “contractors.” It should also be clarified that for the purposes of accelerated payments, “small business subcontractors” are those that are directly supporting/charged to a DoD contract in which the prime contractor is receiving accelerated payments (i.e., not those supporting indirect, commercial, or

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foreign direct efforts by the prime contractor). We support the creation of that portion of the new DFARS prescription at 232.009 and the clause at 252.232-7XXX, Prohibition on Fees and Consideration, since both fully comply with the Section 852 restriction.

While DFARS 232.903 contains the fifteen-day benchmark goal for small business primes, neither the FAR nor the DFARS provide for the availability of the accelerated payments to primes that in turn accelerate payments to small business subcontractors when the conditions in Section 852 are met.

In addition, the proposed rule signals that DoD intends to apply the accelerated payment clause to both purchases below the Simplified Acquisition Threshold and to commercial items, including COTS. CODSIA generally supports limiting the application of government unique terms and conditions to commercial items, including COTS items. Here, however, we support its application because of the significant benefits that will flow to both small business prime contractors and small business subcontractors. In addition, FAR clause at 52.244-6 makes the clause at 52.232-40 applicable to commercial items.

We prefer that both elements of the rule be made applicable government-wide, as the previous OMB memos provided. At a minimum, the rule should acknowledge the government-wide application of making accelerated payments to small business primes, as provided in FAR 52.232-25.

Thank you for your attention to these comments. If you have any questions or need any additional information, please do not hesitate to contact Alan Chvotkin, Executive Vice President and Counsel of the Professional Services Council, who serves as our project officer for this case. He can be reached at (703) 875-8148 or at Chvotkin@pscouncil.org.

Sincerely,



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