
New Federal Acquisition Regulation Rule - Reporting Reduced or Untimely Payments to Small Business Subcontractors

By Jeffrey M. Gallant / Jan 11, 2017

The FAR Council has issued a final rule amending the Federal Acquisition Regulation ("FAR") to implement a section of the Small Business Jobs Act of 2010. The new rule, which goes into effect on January 19, 2017, will require certain prime contractors to "self-report" to their contracting officers all reduced or untimely payments to their small business subcontractors within 14 days of when the payment was due and the reason for the reduced or untimely payment.

Specifically, the contract will contain a new FAR clause, 52.242-5, which will state:

(a) Definitions. As used in this clause-

Reduced payment means a payment that is for less than the amount agreed upon in a subcontract in accordance with its terms and conditions, for supplies and services for which the Government has paid the prime contractor.

Untimely payment means a payment that is more than 90 days past due under the terms and conditions of a subcontract, for supplies and services for which the Government has paid the prime contractor.

(b) Notice. The Contractor shall notify the Contracting Officer, in writing, not later than 14 days after-

(1) A small business subcontractor was entitled to payment under the terms and conditions of the subcontract; and

(2) The Contractor-

(i) Made a reduced or untimely payment to the small business subcontractor; or

(ii) Failed to make a payment, which is now untimely.

(c) Content of Notice. The Contractor shall include the reason(s) for making the reduced or untimely payment in any Notice required under paragraph (b) of this clause.

FAR 52.242-5 only applies to contracts where prime contractors are required to develop and implement small business subcontracting plans (i.e. FAR 52.219-9). The clause also only applies to payments between the prime contractor and small business subcontractor and does not include lower tier subcontractor payments.

Under the amended policy provision, FAR 42.1502, Contracting Officers are required to report to the Federal Awardee Performance and Integrity Information System (FAPIIS) when the prime contractor has reported three or more occasions of unjustified reduced or untimely payments under a single contract within a 12 month period. The following payment or nonpayment situations are not considered to be unjustified:

(A) There is a contract dispute on performance;

(B) A partial payment is made for amounts not in dispute;

(C) A payment is reduced due to past overpayments;

(D) There is an administrative mistake; and/or

(E) Late performance by the subcontractor leads to later payment by the prime contractor.

A report to the FAPIIS may result in a negative rating on the prime contractor's past performance evaluation under the "Small Business Subcontracting Evaluation Factor" in the Contractor Performance Assessment Reporting System (CPARS). A negative rating, especially "unsatisfactory," may impact the prime contractor's ability to qualify for new federal contracts. Further, the prime contractor may be subject to liquidated damages if provided for in the Small Business Subcontracting Plan.

If you have any questions about the subject matter of this e-alert, please contact Jeffrey M. Gallant at jgallant@clarkhill.com or (313) 967-4071, or contact any member of Clark Hill's Construction Law Practice Group.