



5001-06-P

**DEPARTMENT OF DEFENSE**

**Defense Acquisition Regulations System**

**48 CFR Parts 212, 232, and 252**

**[Docket DARS-2019-0025]**

**RIN 0750-AK25**

**Defense Federal Acquisition Regulation Supplement: Prompt Payments of Small Business Contractors (DFARS Case 2018-D068)**

**AGENCY:** Defense Acquisition Regulations System, Department of Defense (DoD).

**ACTION:** Proposed rule.

**SUMMARY:** DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2019 that provides for accelerated payments to small business contractors and subcontractors.

**DATES:** Comments on the proposed rule should be submitted in writing to the address shown below on or before **[Insert date 60 days after date of publication in the FEDERAL REGISTER]**, to be considered in the formation of a final rule.

**ADDRESSES:** Submit comments identified by DFARS Case 2018-D068, using any of the following methods:

- o *Federal eRulemaking Portal:* <http://www.regulations.gov>.

Search for "DFARS Case 2018-D068." Select "Comment Now" and

follow the instructions provided to submit a comment. Please include "DFARS Case 2018-D068" on any attached documents.

- o *Email:* *osd.dfars@mail.mil*. Include DFARS Case 2018-D068 in the subject line of the message.

- o *Fax:* 571-372-6094.

- o *Mail:* Defense Acquisition Regulations System, Attn: Jennifer D. Johnson, OUSD (A-S) DPC/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check [www.regulations.gov](http://www.regulations.gov), approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

**FOR FURTHER INFORMATION CONTACT:** Ms. Jennifer D. Johnson, telephone 571-372-6100.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

This rule proposes to revise the DFARS to implement section 852 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115-232). Section 852 provides for accelerated payments to small business contractors and to small business subcontractors by accelerating payments to their prime contractors. Specifically, section 852 requires DoD, to the

fullest extent permitted by law, to establish an accelerated payment date for small business contractors, with a goal of 15 days after receipt of a proper invoice, if a specific payment date is not established by contract. For contractors that subcontract with small businesses, section 852 requires DoD, to the fullest extent permitted by law, to establish an accelerated payment date, with a goal of 15 days after receipt of a proper invoice, if: (1) a specific payment date is not established by contract, and (2) the contractor agrees to make accelerated payments to the subcontractor without any further consideration from, or fees charged to, the subcontractor.

The requirements of section 852 are similar to current DoD policy and practice regarding payments to small business contractors and subcontractors. DFARS 232.903 states DoD's policy of assisting small businesses by paying them as quickly as possible after receipt of invoices and proper documentation, and before normal payment due dates established in the contract. In practice, the Defense Financial Accounting Service (DFAS) currently provides accelerated payments to nearly all DoD contractors, as permitted by law.

## **II. Discussion and Analysis**

This rule proposes to amend DFARS parts 212, 232, and 252 to implement section 852 of the NDAA for FY 2019. In part 232, this rule proposes to add section 232.009, Providing accelerated

payments to small business subcontractors, to address compliance with section 852. The clause at Federal Acquisition Regulation (FAR) 52.232-40, Providing Accelerated Payments to Small Business Subcontractors, already includes most of the requirements of section 852. Therefore, DoD will continue to use the FAR clause, in order to avoid unnecessary duplication. However, this rule proposes to add a new contract clause at DFARS 252.232-7XXX, Accelerating Payments to Small Business Subcontractors—Prohibition on Fees and Consideration. In accordance with section 852, this new clause prohibits contractors from requiring any further consideration from, or charging fees to, their small business subcontractors when making accelerated payments under FAR 52.232-40. The rule proposes to add this new clause to the list at section 212.301, Solicitation provisions and contract clauses for the acquisition of commercial items.

### **III. Expected Impact of the Proposed Rule**

Current DoD policy, as stated in DFARS 232.903, is to pay small business contractors as quickly as possible after receipt of invoices and proper documentation. This rule proposes to specify that DoD will provide payment as quickly as possible, to the fullest extent permitted by law, with a goal of 15 days after receipt of proper invoices and documentation, and before normal payment due dates. For items that ordinarily require

payment in less than 15 days (e.g., perishable food), DoD will provide payment as quickly as possible after receipt of proper invoices and documentation, and before the normal payment due date.

With few exceptions, DoD will provide accelerated payments to small business contractors and to other contractors that agree to provide accelerated payments to their small business subcontractors without further consideration or fees. DoD will not be able to provide accelerated payments if such payments put DoD at risk of a violation of law.

DoD estimates that 40,282 contractors (including 30,498 small businesses) will receive accelerated payments each year, based on data obtained from the Federal Procurement Data System and input from subject matter experts. Specifically, DoD awarded contracts to an average of 40,689 unique entities (including 30,806 small businesses) each year from FY 2016 through FY 2018. Subject matter experts estimated that DoD would not provide accelerated payments to approximately 1 percent (407, including 308 small businesses) of these contractors because such payments would put DoD at risk of a violation of law. Therefore, approximately 40,282 contractors (including 30,498 small businesses) per year would receive accelerated payments.

The clause at FAR 52.232-40, Providing Accelerated Payments to Small Business Subcontractors, currently requires contractors to

provide accelerated payments to their small business subcontractors when the Government provides accelerated payments to the contractors. DoD contracting officers are required to include this clause in DoD contracts. As a result, DoD contractors should already be providing accelerated payments to small business subcontractors.

In accordance with section 852 of the NDAA for FY 2019, this rule proposes to prohibit contractors from requiring any further consideration from, or charging fees to, their small business subcontractors when making accelerated payments. This prohibition will be communicated to contractors in a new contract clause at DFARS 252.232-7XXX, Accelerating Payments to Small Business Subcontractors—Prohibition on Fees and Consideration. This prohibition would benefit small business subcontractors who have been required to provide consideration or pay fees to the prime contractor in order to receive accelerated payments. Any costs for prime contractors to implement the prohibition on fees and consideration are expected to be de minimis since DoD expects that only a small number of contractors have required such consideration or fees from their small business subcontractors.

It is not possible for DoD to estimate the number of small business subcontractors who have been required to provide consideration or pay fees for accelerated payments from prime

contractors, nor is it possible to estimate the dollar value of the consideration provided or fees paid. The lack of available data makes it difficult to predict the impact of the proposed rule. Depending on the extent to which small business subcontractors have been required to provide consideration or pay fees to receive accelerated payments, the proposed prohibition could result in cost savings. DoD invites public comment regarding the number of small businesses required to provide such consideration or fees to prime contractors, the basis for such estimates, and the cost impact of the consideration or fees.

#### **IV. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items**

DoD intends to apply the requirements of section 852 of the NDAA for FY 2019 to contracts at or below the simplified acquisition threshold (SAT) and to contracts for the acquisition of commercial items, including commercially available off-the-shelf (COTS) items.

##### **A. Applicability to Contracts at or Below the SAT**

41 U.S.C. 1905 governs the applicability of laws to contracts or subcontracts in amounts not greater than the simplified acquisition threshold. It is intended to limit the applicability of laws to such contracts or subcontracts. 41

U.S.C. 1905 provides that if a provision of law contains criminal or civil penalties, or if the FAR Council makes a written determination that it is not in the best interest of the Federal Government to exempt contracts or subcontracts at or below the SAT, the law will apply to them. The Principal Director, Defense Pricing and Contracting (DPC), is the appropriate authority to make comparable determinations for regulations to be published in the DFARS, which is part of the FAR system of regulations.

Given that the requirements of section 852 of the NDAA for FY 2019 were enacted to provide accelerated payments to small business contractors and subcontractors, and since approximately 96 percent of DoD contracts are valued at or below the SAT, DoD intends to determine that it is in the best interest of the Federal Government to apply the rule to contracts at or below the SAT. An exception for contracts at or below the SAT would exclude contracts intended to be covered by the law, thereby undermining the overarching public policy purpose of the law.

B. Applicability to Contracts for the Acquisition of Commercial Items, Including COTS Items

10 U.S.C. 2375 governs the applicability of laws to DoD contracts and subcontracts for the acquisition of commercial items, including COTS items, and is intended to limit the applicability of laws to contracts and subcontracts for the



acquisition of commercial items, including COTS items. 10 U.S.C. 2375 provides that if a provision of law contains criminal or civil penalties, or if the Under Secretary of Defense for Acquisition and Sustainment (USD(A&S)) makes a written determination that it is not in the best interest of the Federal Government to exempt commercial item contracts, the provision of law will apply to contracts for the acquisition of commercial items. Due to delegations of authority from USD(A&S), the Principal Director, DPC, is the appropriate authority to make this determination.

Given that the requirements of section 852 of the NDAA for FY 2019 were enacted to provide accelerated payments to small business contractors and subcontractors, and since more than half of DoD's contractors are small businesses providing commercial items, including COTS items, DoD intends to determine that it is in the best interest of the Federal Government to apply the rule to contracts for the acquisition of commercial items, including COTS items, as defined at FAR 2.101. An exception for contracts for the acquisition of commercial items, including COTS items, would exclude the contracts intended to be covered by the law, thereby undermining the overarching public policy purpose of the law.

#### **V. Executive Orders 12866 and 13563**

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

#### **VI. Executive Order 13771**

This rule is not expected to be subject to the requirements of E.O. 13771, because this rule is not a significant regulatory action under E.O. 12866.

#### **VII. Regulatory Flexibility Act**

DoD expects that this proposed rule 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. Therefore, an initial regulatory flexibility analysis has been performed and is summarized as follows:

DoD is proposing to amend the DFARS to implement section 852 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115-232). Section 852 requires DoD, to the fullest extent permitted by law, to establish an accelerated payment date for small business contractors, with a goal of 15 days after receipt of a proper invoice, if a specific payment date is not established by contract. For contractors that subcontract with small businesses, section 852 requires DoD, to the fullest extent permitted by law, to establish an accelerated payment date, with a goal of 15 days after receipt of a proper invoice, if- (1) a specific payment date is not established by contract and (2) the contractor agrees to make accelerated payments to the subcontractor without any further consideration from, or fees charged to, the subcontractor.

The objective of the rule is to provide accelerated payments to small business contractors and subcontractors. The legal basis is section 852 of the NDAA for FY 2019.

According to data obtained from the Federal Procurement Data System, DoD awarded contracts to an average of 30,806 unique small entities each year from FY 2016 through FY 2018. DoD estimates that it may not be possible to provide accelerated payments to approximately 308 small contractors (1%) because such payments would put DoD at risk of a violation of law.

Therefore, approximately 30,498 small contractors per year would receive accelerated payments.

This rule does not impose any new reporting, recordkeeping or other compliance requirements for small entities.

This rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no known alternatives that would accomplish the stated objectives of the applicable statute.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C 610 (DFARS Case 2018-D068), in correspondence.

#### **VIII. Paperwork Reduction Act**

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

#### **List of Subjects in 48 CFR Parts 212, 232, and 252**

Government procurement.

**Jennifer Lee Hawes,**

*Regulatory Control Officer, Defense Acquisition Regulations System.*

Therefore, 48 CFR Parts 212, 232, and 252 are proposed to be amended as follows:

1. The authority citations for 48 CFR part 212, 232, and 252 continue to read as follows:

**Authority:** 41 U.S.C. 1303 ad 48 CFR chapter 1

**PART 212—ACQUISITION OF COMMERCIAL ITEMS**

2. Amend section 212.301 by adding paragraph (f)(xiii)(G) to read as follows:

**212.301 Solicitation provisions and contract clauses for the acquisition of commercial items.**

\* \* \* \* \*

(f) \* \* \*

(xiii) \* \* \*

(G) Use the clause at 252.232-7XXX, Accelerating Payments to Small Business Subcontractors—Prohibition on Fees and Consideration, as prescribed in 232.009-2(2).

\* \* \* \* \*

**PART 232—CONTRACT FINANCING**

3. Add sections 232.009, 232.009-1, and 232.009-2 to read as follows:

**232.009 Providing accelerated payments to small business subcontractors.**

**232.009-1 General.**

Section 852 of the National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115-232) requires DoD to provide accelerated payments to small business contractors and subcontractors, to the fullest extent permitted by law, with a goal of 15 days.

**232.009-2 Contract clause.**

Use the clause at 252.232-7XXX, Accelerating Payments to Small Business Subcontractors—Prohibition on Fees and Consideration, in solicitations and contracts, including those using FAR part 12 procedures for the acquisition of commercial items, that include the clause at FAR 52.232-40, Providing Accelerated Payments to Small Business Subcontractors.

**SUBPART 232.9—PROMPT PAYMENT**

4. Revise section 232.903 to read as follows:

**232.903 Responsibilities.**

In accordance with section 852 of the National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115-232), DoD shall assist small business concerns by providing payment as quickly as possible, to the fullest extent permitted by law, with a goal of 15 days after receipt of proper invoices and all required documentation, including acceptance, and before normal payment due dates established in the contract (see 232.906(a)).

**PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

5. Add section 252.232-7XXX to read as follows:

**252.232-7XXX Accelerating Payments to Small Business**

**Subcontractors—Prohibition on Fees and Consideration.**

As prescribed in 232.009-2, use the following clause:

ACCELERATING PAYMENTS TO SMALL BUSINESS SUBCONTRACTORS—

PROHIBITION ON FEES AND CONSIDERATION (DATE)

(a) In accordance with section 852 of Public Law 115-232, the contractor shall not require any further consideration from or charge fees to the small business subcontractor when making accelerated payments to subcontractors under the clause at FAR 52.232-40, Providing Accelerated Payments to Small Business Subcontractors.

(b) Include the substance of this clause, including this paragraph (b), in all subcontracts with small business concerns, including those for the acquisition of commercial items.

(End of clause)

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