



March 21, 2016

General Services Administration  
Regulatory Secretariat Division (MVCB)  
Attn: Ms. Hada Flowers  
1800 F Street, N.W., Second Floor  
Washington, D.C. 20405

Subject: FAR Case 2014–004, Payment of Subcontractors

Dear Ms. Flowers:

Thank you for the opportunity to provide comments in response to the proposed rule amending the Federal Acquisition Regulation (FAR) to implement new requirements for the *Payment of Subcontractors*.

The Coalition for Government Procurement (“The Coalition”) is a non-profit association of firms selling commercial services and products to the Federal Government. Our members collectively account for a significant percentage of the sales generated through the GSA Multiple Award Schedules (MAS) program and about half of the commercial item solutions purchased annually by the Federal Government. Coalition members include small, medium, and large business concerns. The Coalition is proud to have worked with Government officials for more than 35 years towards the mutual goal of common sense acquisition.

The Payment of Subcontractors proposed rule implements Section 1334 of the Small Business Jobs Act of 2010. The statute requires prime contractors to notify the contracting officer (CO) when reduced or late payments are made to subcontractors. Further, COs are to report prime contractors with a history of late or reduced payments to small business subcontractors in the Federal Awardee Performance and Integrity Information System (FAPIIS). The rule requires COs to report any prime contractors into FAPIIS with three reduced or late payments in a period of twelve months.

The Coalition supports the intent of Section 1334 of the Small Business Jobs Act to improve timely payment to small business subcontractors in the Federal market. These comments provide recommendations for the implementation of the rule so that small business subcontractors receive more timely payments *and* contracting officers and prime contractors have clearer guidance about

when and how to conduct reporting. The Coalition's comments also provide feedback to the FAR Council on the analysis of the application of the rule to commercial item acquisitions.

## **I. Applicability to Commercial Item Acquisitions**

In Section II of the proposed rule, a preliminary determination was made that the rule applies to payments to subcontractors under contracts for the acquisition of commercial items. The FAR Council's assessment as to whether the proposed rule should apply to commercial item acquisitions considered:

1. The benefits of the policy in furthering Administration goals,
2. The extent to which the benefits of the policy would be reduced if an exemption is provided for commercial items, and
3. The burden on contractors if the policy is applied to acquisitions for commercial items.

The FAR Council has stated that the third factor, the burden on commercial item contractors, was determined with "limited information" and that the FAR Council needs more insight into the process. The Coalition recommends that the FAR Council wait to make a determination as to whether Section 1334 of the Small Business Jobs Act should apply to commercial item acquisitions until more information can be gathered on the impact of this rule.

Unfortunately, over the last decade, the procurement community has seen the erosion of commercial item contracting (in accordance with 41 U.S.C. 1906) and the benefits attendant thereto. Specifically, the government has layered onto the commercial item contracting process government unique requirements that have increased costs and raised barriers to entry into the federal marketplace. The Coalition is concerned that the FAR Council's decision to apply the proposed rule to commercial item contracts adds a government-unique requirement that could raise the cost of commercial item contracting. Streamlining and risk reduction in federal acquisition is achieved by eliminating, to the maximum extent practicable, government unique requirements that are inconsistent with the commercial practices that those firms encounter in the normal course of their business.

Since the Small Business Jobs Act of 2010 does not specifically require that the subcontractor payment clause apply to commercial contracts, the Coalition recommends that the FAR Council seek additional information about the burden on contractors before a determination is made to apply the payment of subcontractors requirements to commercial item acquisitions. We do not find that the availability of limited information indicates that the burden may not be significant, as described in the proposed rule. Rather, initial feedback from Coalition members suggests that the burdens associated with reporting under the rule will have a significant impact.

## **II. Lack of Guidance for Contracting Officers**

According to the proposed rule, COs must report a prime contractor to the FAPIIS system if the prime contractor has three late or reduced payments in the period of a year.

The Coalition believes that the proposed rule, as written, provides unclear guidance to COs, because the definition of “unjustified reduced or untimely payments” is vague. The FAR Council should provide a more complete definition of what constitutes an unjustified payment. For example, it should clarify how systems errors, third-party errors, or administrative errors would be classified if they lead to late payments.

The lack of concrete guidance creates an unnecessary and increased burden for the CO. We expect that because the rule is vague, prime contractors and subcontractors will interpret the rule in different ways. This will leave COs to mediate between disparate views to determine which payments are unjustified. This creates a burden, which can be avoided through appropriate guidance.

Coalition members have also expressed concern about the proposed rule’s instruction that COs report a prime contractor to FAPIIS after three unjustified reduced or late payments to a subcontractor. Setting a threshold at three seems arbitrary and no explanation had been provided by the government for why three was chosen. For example, prime contractors can have as many as 10,000 payments to subcontractors per year. If one of these prime contractors had 4 unjustified payments during the course of year, it would mean a successful payment rate of 99.97%. Whereas another prime contractor that makes 10 payments to subcontractors, but is late on 4 of those payments would have a payment rate of 60%, yet both prime contractors would face the same penalty.

Coalition members have also expressed concern about how information about untimely or reduced payments will be used once it is entered into FAPIIS. The FAR Council should provide guidance for what impact this FAPIIS entry may have upon a prime contractor. Ideally, COs should receive training and guidance that specifically outlines what unjustified or late payments mean for the prime contractors who are responsible for them.

## **III. Burden of the Proposed Rule**

The FAR Council estimated the burden of the proposed rule as 912 hours annually. This estimate includes the time spent by prime contractors on reporting unjustified payments. The Coalition believes that this estimate is incomplete.

First the estimate does not account for the start-up burden associated with the proposed rule. Coalition members have expressed that their internal accounting systems are not sufficiently

detailed to track untimely or reduced payment by size status. This means that prime contractors will either have to update the accounting systems or track this information manually on an ongoing basis. Also it is not clear why the expected number of respondents is so low. The Federal Register estimates 456 respondents. The GSA Schedules program alone has approximately 3,000 large business contractors; for purposes of evaluation GSA considers all large businesses to exceed the threshold for requiring a subcontracting plan.

As explained in the previous section, this proposed rule is likely to lead to more disputes between prime contractors and subcontractors, which will have to be resolved by COs. The time and cost burdens of these disputes should also be accounted for in the expected burden of the rule.

We also request that a more detailed explanation of the burden estimate be provided, specifically on the expectation that reporting will only take 2 hours per respondent. The actual reporting of the incident would probably average 2 hours per respondent, but prime contractors are going to devote time internally to determine whether a payment should be reported before reporting it to a CO.

The Coalition recommends that the FAR Council consider the following factors when updating the contractor burden:

- the burden for updating accounting systems,
- the burden associated with settling disputes between prime and subcontractors,
- and the burden associated with companies investigating and then providing written explanation as to why the payment was either late or reduced so that the CO can make a determination as to whether it was “unjustified”.

## **IV. Recommendations**

The Coalition has three recommendations for the FAR Council on this proposed rule.

### **a. Convene an Industry Working Group**

The Coalition recommends that the FAR Council convene an industry working group in order to gain a better understanding of some of the more nuanced aspects of the subcontractor payment requirements. The working group would focus on the amount of reduced or late payments that should lead to a report and the details concerning the circumstances in which payments would be unjustified. The working group should also provide additional information and estimates to the FAR Council about the burden of the rule on contractors so that a determination can be made as to whether it is in the best interest of the government to apply the payment of subcontractors rule to commercial item contracts.

## **b. Rolling Scale of Unjustified Payments**

The proposed rule creates a threshold for the number of unjustified payments at three before a prime contract is reported in FAPIIS. The Coalition recommends that the FAR Council adopt a rolling scale which would set the threshold for reporting as a ratio based on the number of payments prime contractors submits to subcontractors. This would create a more effective system of identifying non-compliant contractors while protecting ethical contractors from being negatively impacted as well.

## **c. Provide More Clarification for Contracting Officers**

The FAR Council should clarify the areas within the proposed rule that could use greater clarification to help COs make effective decisions, for example:

- Under what specific circumstances a payment should be considered unjustified
- How vendors with unjustified payments should be treated when making responsibility determinations for the award of future contracts
- How COs should handle disputes between prime contractors and subcontractors

The Coalition requests that the FAR Council develop specific guidance to address these areas to improve implementation and compliance of the rule so that both COs and contractors can work more efficiently to ensure that subcontractors are receiving payments in due time.

Thank you for considering the Coalition's comments in response to the proposed rule on subcontractor payments. If there are any questions, please contact me at (202) 331-0975 or [rwaldron@thecgp.org](mailto:rwaldron@thecgp.org).

Sincerely,



Roger Waldron  
President