

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 12, 32, and 52**

[FAC 2005–71; FAR Case 2012–031; Item
I; Docket No. 2012–0031, Sequence No. 1]

RIN 9000–AM37

**Federal Acquisition Regulation;
Accelerated Payments to Small
Business Subcontractors**

AGENCY: Department of Defense (DoD),
General Services Administration (GSA),
and National Aeronautics and Space
Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are
issuing a final rule amending the
Federal Acquisition Regulation (FAR) to
implement the policy provided by
Office of Management and Budget
(OMB) Memoranda M–12–16, dated July
11, 2012, and M–13–15, dated July 11,
2013, by incorporating a new clause to
provide accelerated payments to small
business subcontractors.

DATES: *Effective:* December 26, 2013.

FOR FURTHER INFORMATION CONTACT: Mr.
Edward N. Chambers, Procurement
Analyst, at 202–501–3221, for
clarification of content. For information
pertaining to status or publication
schedules, contact the Regulatory
Secretariat at 202–501–4755. Please cite
FAC 2005–71, FAR Case 2012–031.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published a
proposed rule in the **Federal Register** at
77 FR 75089 on December 19, 2012, to
implement OMB Memorandum M–12–
16 that will provide for the acceleration
of payments to small business
subcontractors. OMB released
Memorandum M–12–16, Providing
Prompt Payment to Small Business
Subcontractors, on July 11, 2012. This
policy memorandum outlined the steps
agencies shall take to ensure that prime
contractors pay their small business
subcontractors as promptly as possible.
OMB released Memorandum M–13–15,
Extension of Policy to Provide
Accelerated Payment to Small Business
Subcontractors, on July 11, 2013. This
policy memorandum extended the OMB
Memorandum M–12–16's expiration
date by one year to July 11, 2014.

Seven respondents submitted
comments on the proposed rule.

II. Discussion and Analysis

The Civilian Agency Acquisition
Council and the Defense Acquisition
Regulations Council (the Councils)
reviewed the comments in the
development of the final rule. A
discussion of the comments and the
changes made to the rule as a result of
those comments are provided as
follows:

A. Summary of Significant Changes

As part of the implementation of OMB
Memoranda M–12–16 and M–13–15, the
FAR is amended to add a new FAR
clause, Providing Accelerated Payments
to Small Business Subcontractors. This
new clause requires the prime
contractor, upon receipt of accelerated
payment from the Government, to make
accelerated payments to small business
subcontractors, to the maximum extent
practicable, after receipt of a proper
invoice and all proper documentation
from small business subcontractors.
This clause will be inserted into all new
solicitations issued after the effective
date of this rule and resultant contracts,
including solicitations and contracts for
the acquisition of commercial items.
This rule does not provide any new
rights under the Prompt Payment Act
and does not affect the application of
the Prompt Payment Act late payment
interest provisions.

B. Analysis of Public Comments

1. Support for the Rule

Comment: Two respondents
expressed support for the rule.

Response: The Councils note the
public support for this rule.

2. Clause Prescription

Comment: One respondent
recommended adding a paragraph to
FAR 52.212–4 to incorporate the new
clause in lieu of prescribing the clause
in FAR 12.301(d)(4).

Response: The unique nature of the
temporary guidance issued in the OMB
Memorandum M–12–16, Providing
Prompt Payment to Small Business
Subcontractors, (and as extended by
OMB Memorandum M–13–15) required
a new independent clause 52.232–40;
thus, a distinct prescription in FAR
12.301(d)(4) is intentionally created.

3. Privity of Contract

Comment: One respondent
recommended that the Government
should refrain from creating a privity of
contract between the Government and
the subcontractors. Respondent asserts
that this may lead to a cause of action
for the subcontractor against the

Government if the prime contractor
defaults on these requirements.

Response: Directing the prime
contractor, upon receipt of accelerated
payment from the Government, to
accelerate payments to subcontractors
does not create privity of contract
between the Government and the
subcontractors.

4. Compliance With the Rule

Comment: One respondent expressed
concern that the rule did not identify a
responsible Government party for
addressing the prime's failure to
accelerate payments to subcontractors.
The respondent also stated that the rule
does not provide penalties for the
prime's failure to accelerate payments.
Another respondent stated that the
proposed rule lacks clarity as to how the
Government will audit contractors to
ensure compliance, and to what
performance standards prime
contractors will be held.

Response: The rule does not create
any new remedies for subcontractor
payment issues. Subcontractors would
utilize existing remedies for non-
payment similar, but not limited, to
FAR 32.112. If, upon receipt of
accelerated payment from the
Government, the prime fails to
accelerate payments to the maximum
extent practicable, the Government may
discontinue accelerated payments to the
prime contractor. The Government may
review prime contractor payments and
procedures to ensure the required
accelerated payments to small business
subcontractors are made to the
maximum extent practicable. This
flexibility is intended to accommodate
varying prime contractor capabilities to
make accelerated payments.

5. Definition

Comment: A number of respondents
stated that the rule is not specific as to
what constitutes "accelerated payments
to the maximum extent practicable".
Two respondents took issue with the
lack of specificity, while another
supported the flexibility offered by the
language. Two respondents questioned
what is the definition of accelerated
payments. One respondent
recommended adding to the definition
of accelerated payments that the prime
contractor would not be required to
accelerate payments equal to or less
than the accelerated payment cycle
received from the Government.

Response: The flexibility in the clause
language is intended to accommodate
varying contractor capabilities to make
accelerated payments.

6. Pre-Existing Regulatory Coverage

Comment: One respondent stated that the additional language in this FAR rule is unnecessary. The respondent finds FAR 52.232–1 sufficient to accelerate payments to small business subcontractors.

Response: FAR 52.232–1 does not address accelerated payments to prime contractors or subcontractors; it addresses general conditions for payments to prime contractors on certain fixed-price contracts.

7. Administrative Burden

Comment: One respondent stated the rule will result in increased administrative costs, and an evaluation of the existing payment environment should have preceded this rule making. Another respondent recommended adding the following language to the rule, “The proposed rule is not intended to impose any additional reporting, recordkeeping, or other information collection requirements.”

Response: The respondent did not specify what administrative costs would be increased. However, this rule is established to ensure that, upon receipt of accelerated payment from the Government, the prime contractors shall accelerate payments to small business subcontractors to the maximum extent practicable. The Government gave consideration to relevant payment environment factors prior to issuance of this rule. The addition of the recommended language is unnecessary because this rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act.

8. Commercial Practices

Comment: One respondent opined that Government prime contractors have subcontractor payment terms and payment timelines that are much more subcontractor friendly than those found in the commercial marketplace.

Response: The Councils appreciate those prime contractors who pay their subcontractors on a timely basis, and is issuing this rule to require prime contractors, upon receipt of accelerated payment from the Government, to pay their small business subcontractors in an accelerated manner to the maximum extent practicable.

9. Rule Applicability

Comment: One respondent stated that the rule forces prime contractors to accelerate payments to subcontractors on non-government programs and therefore equitable price adjustments should be expected.

Response: The rule applies to those prime contractors for which the Government provides accelerated payment. It requires prime contractors, upon receipt of accelerated payment from the Government, to accelerate payments to their small business subcontractors under Government prime contracts that include the clause; it does not require prime contractors to accelerate payments to other than their small business subcontractors on Government prime contracts.

Comment: Another respondent recommended applying this requirement to current contracts as well as existing solicitations and limiting the application of this rule to first tier subcontractors.

Response: In accordance with FAR 1.108(d), contracting officers may, at their discretion, include the FAR changes in solicitations issued before the effective date, provided award of the resulting contract(s) occurs on or after the effective date; and contracting officers may, at their discretion, include the changes in any existing contract with appropriate consideration.

The rule is not limited to first-tier subcontractors, because that is inconsistent with the OMB memo that this rule implements, and would reduce the number of small entities that may benefit from this rule.

10. Regulatory Rulemaking Process

Comment: One respondent encouraged the Government to delay the rule and hold a series of public meetings to gain a better understanding of the challenges the rule would create.

Response: The public was provided an opportunity to comment through the standard rule-making process of publication of the proposed rule in the **Federal Register**. All comments received were considered in the formation of this final rule.

11. Implementation

Comment: One respondent noted the current budgetary crisis and recommended a delay in the implementation of this rule. Another respondent recommended the rule emphasize that prime contractors be required to make accelerated payments only if the Government accelerates payments to the prime contractor.

Response: If the Government does not accelerate payment to a prime contractor, that prime contractor is under no obligation to accelerate payments to its small business subcontractors. While the clause requires the prime contractor to accelerate payments to its small business subcontractors under certain

conditions, it does not prevent the prime contractor from paying any of its subcontractors on an accelerated basis, if it elects to do so, without regard to the receipt of accelerated payments from the Government.

12. Accelerated Payments

Comment: One respondent recommended guidance that states that Government payments will not be considered accelerated if they are made beyond the Prompt Payment Act thresholds for the incurrence of interest.

Response: Payments under which prompt payment interest has been applied are not Government accelerated payments.

III. Additional Rulemaking

The Councils are considering the need for further FAR guidance relative to facilitating accelerated payments to small business subcontractors. This additional guidance could take the form of additional FAR revisions, or new FAR provisions and clauses, if appropriate. The Councils may decide to publish a Request for Information in the near future to consider its options to address accelerated payments to small business subcontractors. This will support the OMB Memorandum M–13–15, Extension of Policy to Provide Accelerated Payment to Small Business Subcontractors, requirement for the Councils to solicit public input on strategies that might be used over the longer term to help maintain effective cash flow and prompt payment to small business subcontractors.

IV. 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 a significant regulatory action and, therefore, was 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.

V. Regulatory Flexibility Act

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory

Flexibility Act, 5 U.S.C. 601, *et seq.* The FRFA is summarized as follows:

Although it may have a positive impact on small business subcontractors, DoD, GSA, and NASA do not expect this rule to 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.*, because this rule implements the temporary policy provided by OMB Policy Memoranda M–12–16, Providing Prompt Payment to Small Business Subcontractors, dated July 11, 2012 and M–13–15, Extension of Policy to Provide Accelerated Payment to Small Business Subcontractors, on July 11, 2013, which are designed to accelerate payment from Federal contractors to their small business subcontractors. The rule imposes no reporting, recordkeeping, or other information collection requirements. The rule does not duplicate, overlap, or conflict with any other Federal rules, and there are no known significant alternatives to the rule.

This final rule adds a FAR clause that will provide for accelerated payments from the prime contractor to its small business subcontractors when the prime contractor receives an accelerated payment from the Government thus implementing this OMB policy. This rule requires prime contractors, upon receipt of accelerated payments from the Government, to make accelerated payments to their small business subcontractors, improving small business cash flow overall.

No comments were filed by the Chief Counsel for Advocacy of the Small Business Administration in response to the rule and no changes were made to the rule.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat. The Regulatory Secretariat has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

VI. Paperwork Reduction Act

The final 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 12, 32, and 52

Government procurement.

Dated: November 18, 2013.

William Clark,

Acting Director, Office of Government-Wide Acquisition Policy, Office of Acquisition Policy, Office of Government-Wide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 12, 32, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 12, 32, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 12—ACQUISITION OF COMMERCIAL ITEMS

■ 2. Amend section 12.301 by adding paragraph (d)(4) to read as follows:

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

* * * * *

(d) * * *

(4) Insert the clause at 52.232–40, Providing Accelerated Payments to Small Business Subcontractors, as prescribed in 32.009–2.

* * * * *

PART 32—CONTRACT FINANCING

32.002 [Amended]

■ 3. Amend section 32.002 by removing from paragraph (a)(1) “32.005” and adding “32.009” in its place.

■ 4. Add section 32.009 to read as follows:

32.009 Providing accelerated payments to small business subcontractors.

32.009–1 General.

Pursuant to the policy provided by OMB Memorandum M–12–16, Providing Prompt Payment to Small Business Subcontractors (and as extended by OMB Memorandum M–13–15, Extension of Policy to Provide Accelerated Payment to Small Business Subcontractors), agencies shall take measures to ensure that prime contractors pay small business subcontractors on an accelerated timetable to the maximum extent practicable, and upon receipt of accelerated payments from the Government. This acceleration does not provide any new rights under the Prompt Payment Act and does not affect the application of the Prompt Payment Act late payment interest provisions.

32.009–2 Contract clause.

Insert clause 52.232–40, Providing Accelerated Payments to Small Business Subcontractors, in all solicitations and contracts.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 5. Amend section 52.213–4 by—

■ a. Revising the date of the clause;

■ b. Redesignating paragraphs (a)(2)(vi) through (a)(2)(viii) as paragraphs (a)(2)(vii) through (a)(2)(ix), respectively;

■ c. Adding a new paragraph (a)(2)(vi).

The revision and addition read as follows:

52.213–4 Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items).

* * * * *

Terms and Conditions—Simplified Acquisitions (Other than Commercial items) (Dec 2013)

* * * * *

(a) * * *

(2) * * *

(vi) 52.232–40, Providing Accelerated Payments to Small Business Subcontractors (Dec 2013)

* * * * *

■ 6. Add section 52.232–40 to read as follows:

52.232–40 Providing Accelerated Payments to Small Business Subcontractors.

As prescribed in 32.009–2, insert the following clause:

Providing Accelerated Payments to Small Business Subcontractors (Dec 2013)

(a) Upon receipt of accelerated payments from the Government, the Contractor shall make accelerated payments to its small business subcontractors under this contract, to the maximum extent practicable and prior to when such payment is otherwise required under the applicable contract or subcontract, after receipt of a proper invoice and all other required documentation from the small business subcontractor.

(b) The acceleration of payments under this clause does not provide any new rights under the Prompt Payment Act.

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

(End of clause)

■ 7. Amend section 52.244–6 by—

■ a. Revising the date of the clause;

■ b. Redesignating paragraph (c)(1)(x) as paragraph (c)(1)(xi); and

■ c. Adding a new paragraph (c)(1)(x).

The revision and addition read as follows:

52.244–6 Subcontracts for Commercial Items.

* * * * *

Subcontracts for Commercial Items (Dec 2013)

* * * * *

(c)(1) * * *

(x) 52.232–40, Providing Accelerated Payments to Small Business Subcontractors (Dec 2013), if flow down is required in accordance with paragraph (c) of FAR clause 52.232–40.

* * * * *

[FR Doc. 2013–28053 Filed 11–22–13; 8:45 am]

BILLING CODE 6820–EP–P