



July 30, 2019

VIA ELECTRONIC SUBMISSION

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

Re: Defense Federal Acquisition Regulation Supplement: Prompt Payments of Small Business Contractors (DFARS Case 2018-D068), 84 Federal Register 25225 (May 31, 2019)

Dear Ms. Johnson:

The Office of Advocacy of the U.S. Small Business Administration (Advocacy) submits these comments on the Department of Defense's proposed rule, Defense Federal Acquisition Regulation Supplement: Prompt Payments of Small Business Contractors (DFARS Case 2018-D068).

Advocacy urges the DFAR Council to revisit, revise, and re-publish for comment a supplemental Initial Regulatory Flexibility Analysis (IRFA) to ensure proper alternatives are discussed, to describe better the regulated entities and the costs that the rule would impose on them, and to resolve the apparent conflicts in the FAR for accelerated payment to prime and subcontractor small businesses. DOD should not go forward with this rule until it has considered the comments on the supplemental IRFA.

The Office of Advocacy

Congress established Advocacy under Pub. L. 94-305 to represent the views of small entities before Federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA); as such the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),¹ as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),² gives small

¹ 5 U.S.C. §601 et seq.

² Pub. L. No. 104-121, Title II, 110 Stat. 847, 857 (1996) (codified in various sections of 5 U.S.C. §601 et seq.).



entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.³ The agency must include, in any explanation or discussion accompanying the final rule's publication in the *Federal Register*, the agency's response to these written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.⁴

Background

This rule proposes to revise the DFARS to implement section 652 of the National Defense Authorization Act (NDAA) for Fiscal Year 2019 (Public Law 115-232, 132 Stat. 1636). Public Law 115-232 provides accelerated payments to small business prime and subcontractors. Section 852 of Public Law 115-232 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: (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.

Analysis

Advocacy is concerned that the Initial Regulatory Flexibility Analysis lacks required elements that would provide small businesses with an adequate amount information to determine the impact of the rule.

Section 603(a) of the RFA requires agencies to assess the impact of any proposed rule on small entities, including small businesses, small nonprofit organizations, and small jurisdictions with populations of less than 50,000. Section 603(b) sets out the required elements of an initial regulatory flexibility analysis; these include (1) a description and the number of the small entities to be regulated by the rule; (2) a description of the projected costs of the rule; and (3) an identification of "all Federal rules which may duplicate, overlap, or conflict with the proposed rule."

(1) The proposed rule does not describe the number of small businesses that will be subject to the rule, nor does it describe any other class of small entities that might also be subject to the rule. The proposed rule states that 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.⁵

³ Small Business Jobs Act of 2010, Pub. L. No. 111-240, §1601, 124 Stat.2504, 2551.

⁴ *Id.*

⁵ 84 Fed. Reg. at 25226.

(2) Notwithstanding this inability to estimate potential impacts, DOD concludes the proposed prohibition could result in cost savings. However, without sound data, one could also conclude that the opposite would be true, that is, the provision could result in such a high cost that small business subcontractors will be deterred from entering the Federal marketplace. While DOD should be commended for asking the public to comment on this provision, more analysis is needed by DOD to produce a proper IRFA before moving forward with this rulemaking.

(3) The IRFA states that this proposed rule does not conflict with any other federal rule or law,⁶ but the rule as proposed does conflict with several sections in the Federal Acquisition Regulations (FAR) that provide for accelerated payment to small business subcontractors. FAR 52.232-40 does not require payment within 15 days as required by the law and as being proposed by this regulation. DOD is proposing to continue to rely on this FAR provision while implementing a conflicting DFARS. The IRFA of this proposed regulation does not inform small entities how the FAR and the DFARS will work together.

According to DOD, subject matter experts have estimated that DOD would not provide accelerated payments to approximately one percent of contractors, including 308 small businesses because such payments would put DOD at risk of a violation of law. First, DOD does not qualify these individuals as subject matter experts, nor do these experts provide the bases or assumptions that support their conclusions. More importantly however, even if one is to assume this position is correct, DOD has not provided the small businesses with any information on what will constitute a violation. Finally, the rule does not provide a sound action plan for these small businesses who may be denied the legal right to accelerated payments. The IRFA should be amended to provide this plan of action, so that the regulated small entities will know how expensive it will be to seek the payments to which they are entitled.

Conclusion

Advocacy been a long-time advocate for accelerated payment to small business subcontractors. Public Law 115-232 is a sound step in recognizing the importance of small business subcontractors to our economy. However, the regulation implementing this law must also provide these businesses with a strong foundation for a level playing field and a level of certainty for them to design a profitable business model. The proposed IRFA should be revised and republished to address the areas of concern as outlined above.

⁶ Id.

Thank you for the opportunity to comment on this important issue for small businesses. If you have any question regarding these comments or if Advocacy can be of any assistance, please do not hesitate to contact me at (202) 205-7150.

Sincerely,

/s/

Major L. Clark, III
Acting Chief Counsel for Advocacy

Copy to: Paul Ray, Acting Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget