

DOD Accelerates Small Business Subcontractor Payment Acceleration

Written by Nick Sanders

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We shall endeavor to be brief. Pithy, even.

In [this article](#) , we told readers about an OMB Memo issued on July 11, 2012. The OMB Memo directed Executive Branch agencies to temporarily (for a period of one year) accelerate payments to Prime Contractors (“to the full extent permitted by law”) so that those Prime Contractors could accelerate payments to their small business contractors. The Primes were to be paid within 15 days, so that they could pay their small business subcontractors within 15 days.

We had more to say about OMB’s direction to modify existing Prime Contracts. We noted a least one carrot and one stick in the OMB’s language. But the key thing we noted was OMB’s definition of “subcontractor”. As OMB defined the term, a “subcontractor” means any person or entity (other than the prime contractor itself) that furnishes supplies, materials, equipment, or services of any kind—*either in connection with a prime contract or in connection with the provision of “general supplies” to a prime contractor or higher-tier subcontractor.*

So we think that when OMB says it expects Prime Contractors to pay their small business subcontractors more quickly, they are thinking about *all small business vendors*, not just the actual “subcontractors” who are supporting a prime contract’s statement of work.

Let that concept percolate for a while.

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But the point of this article is not to recap the previous article (though we think not enough folks actually read that article.) The point of this article is to inform you that DOD has gotten a jump on the issue. Rather than waiting for the pokey FAR Councils to issue a new contract clause for inclusion in prime contract modifications, the speed demons at the Defense Procurement and Acquisition Policy (DPAP) Directorate decided to issue a DFARS [Class Deviation](#) on August 15, 2012, for use by DCMA Contracting Officers.

The Class Deviation provided a new contract clause (entitled 52.232-99, "Providing Accelerated Payment to Small Business Subcontractors—DEVIATION," August 2012). The clause stated—

1.

Upon receipt of accelerated payments from the Government, the contractor is required to make accelerated payments to small business subcontractors to the maximum extent practicable after receipt of a proper invoice and all proper documentation from the small business subcontractor.

2.

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

We were *fascinated* to see the DPAP policy-makers absolutely elide the issue created by OMB's problematic definition of "subcontractor". Indeed, making the contract clause a "mandatory flow-down" actually *undercuts* the OMB definition, since the only subcontracts to which the flow-down requirement can apply are those specifically identified to a DOD Prime Contract. Any small business provider of "general supplies" will not be subject to the flow-down requirement, since the DOD does not have "privity of contract" with those general (indirect) suppliers.

We predict this issue is going to grow into a potential compliance challenge. Stay tuned for more on accelerated small business subcontractor payments.