



DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary
Washington, D.C. 20201

April 6, 2020

MEMORANDUM FOR: Heads of Contracting Activity

FROM: David R. Dasher //s//

Deputy Assistant Secretary for the Office of Acquisitions
Senior Procurement Executive

SUBJECT:

Class Deviation (2020-02) from the Federal Acquisition Regulation Regarding
Accelerated Payments to Small Business Contractors and Subcontractors

PURPOSE:

This memorandum approves a class deviation from the Federal Acquisition Regulation (FAR) to provide for accelerated payments to small business contractors and subcontractors.

EFFECTIVE DATE:

Immediately

EXPIRATION DATE:

This FAR class deviation is effective upon signature and remains in effect until it is incorporated in the FAR or is otherwise rescinded.

BACKGROUND:

The Civilian Agency Acquisition Council (CAAC) has issued CAAC Letter 2020-02, dated April 6, 2020, allowing agencies to authorize a class deviation to implement Section 873 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2020 [(Pub. L. 116-92), which amended 31 U.S.C. 3903], to provide for accelerated payments to contractors that are small businesses, and to small business subcontractors by accelerating payments to their prime contractors.

AUTHORITY:

This class deviation is issued under the authority of FAR 1.404 and HHSAR 301.4. This deviation is issued following consultation with the Chair of the Civilian Agency Acquisition Council (CAAC) in accordance with FAR 1.404(a) and the HHS Senior Procurement Executive in accordance with HHSAR 301.401.

DEVIATION:

The areas of the FAR being amended by this class deviation are shown in the Attachment to this Memorandum.

APPLICABILITY:

This class deviation applies to all solicitations and contracts.

CAAC CONSULTATION:

The attached memorandum from the Chairman of the Civilian Agency Acquisition Council constitutes the consultation required by FAR 1.404 for class deviations.

Questions or comments pertaining to this class deviation may be directed to Shari Shor, Office of Acquisition Policy at 202-731-3382 or Shari.Shor@hhs.gov .

Attachment: CAAC LETTER 2020-02, including Attachment – FAR Deviation Text.

(Class Deviation 2020-02)



GSA Office of Governmentwide Acquisition Policy

CAAC LETTER 2020-02

MEMORANDUM FOR CIVILIAN AGENCIES

FROM: WILLIAM CLARK
CHAIR
CIVILIAN AGENCY ACQUISITION COUNCIL (CAAC)

SUBJECT: Class Deviation from the Federal Acquisition Regulation (FAR) to provide for accelerated payments to small business contractors and subcontractors.

This CAAC letter is being issued to serve as consultation in accordance with FAR 1.404 allowing agencies to authorize a class deviation to implement a section of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2020 to provide for accelerated payments to contractors that are small businesses, and to small business subcontractors by accelerating payments to their prime contractors.

The objective of this deviation is to implement section 873 of the NDAA for FY 2020 (Pub. L. 116-92), which amended 31 U.S.C. 3903. The Department of Defense already had similar coverage at 10 U.S.C. 2307.

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration have undertaken rulemaking to formally incorporate this change. The attached FAR text identifies the additions and deletions anticipated to implement section 873 of the FY 2020 NDAA in the FAR. These rulemaking changes will be published in the Federal Register. Pending publication of the amendment to the FAR via FAR Case 2020-007, Accelerated Payments Applicable to Contracts with Certain Small Business Concerns, agencies may authorize a class deviation to provide for accelerated payments to contractors that are small businesses, and to small business subcontractors by accelerating payments to their prime contractors. (See Attachment).

This CAAC letter constitutes consultation with the Chair of the CAAC required by FAR 1.404(a)(1). Once processed,

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1800 F Street, NW
Washington, DC 20405
www.gsa.gov

agencies are requested to share the deviation widely among their workforces to ensure full awareness of and compliance with section 873 of FY 2020 NDAA. It is recommended that the deviation be made effective until the FAR is amended by the FAR case.

Agencies are reminded that FAR 1.404 requires agencies to furnish a copy of each approved class deviation to the Regulatory Secretariat. In light of the evolving situation concerning COVID-19, agencies should email the deviation to GSAREgSec@gsa.gov.

If you have any questions or require additional information about this Letter, please contact Zenaida Delgado on (202) 969-7207 or at zenaida.delgado@gsa.gov.

Attachment

FAR Deviation Text

Baseline is FAC 2020-05, published in the Federal Register on February 27, 2020.

Deviations are shown by **[bracketed bold additions]** and ~~strikeouts~~.

FAR text unchanged shown as asterisks *** or *****

PART 12-ACQUISITION OF COMMERCIAL ITEMS

*** * * * ***

Subpart 12.3-Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Items

*** * * * ***

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

*** * * * ***

(d) ***

~~(12) Insert the clause at 52.232-40, Providing Accelerated Payments to Small Business Subcontractors, as prescribed in 32.009-2.~~

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PART 32-CONTRACT FINANCING

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32.009 Providing accelerated payments to small business [contractors and to prime contractors that subcontract with a small business concern]subcontractors.

32.009-1 General.

[(a) Pursuant to 31 U.S.C. 3903(a) and 10 U.S.C. 2307(a), agencies shall provide accelerated payments, to the fullest extent permitted by law, with a goal of 15 days after receipt of a proper invoice and all other required documentation, if a specific payment date is not established by contract, to—

1) Small business contractors, and

2) Prime contractors that subcontract with a small business concern, if the prime contractor agrees to make payments to the small business subcontractor in accordance with the accelerated payment date, to the maximum extent practicable, without any further consideration from or fees charged to the subcontractor.] ~~Pursuant to the policy provided by OMB Memorandum M-12-16, Providing Prompt Payment to Small Business Subcontractors (and as extended by OMB Memoranda M-13-15 and M-14-10, both titled 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.~~

[(b)] 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.

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SUBPART 32.9—PROMPT PAYMENT

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32.903 Responsibilities.

(a) * * *

(5) May authorize the use of the accelerated payment methods specified at 5 CFR 1315.5 [(but see 32.009-1(a))].

* * * * *

32.906 Making payments.

(a) * * *

(2) That the use of accelerated payment methods are necessary (see 32.903(a)(5)) [(but see 32.009-1(a))].

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PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

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Subpart 52.2—Text of Provisions and Clauses

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52.212-5 Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items.

As prescribed in 12.301(b)(4), insert the following clause:

CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES OR EXECUTIVE ORDERS—COMMERCIAL ITEM (MAR 2020) [(DEVIATION APR 2020)]

* * * * *

(b) * * *

___ (60) [52.232-40, Providing Accelerated Payments to Small Business Subcontractors (DEC 2013) (DEVIATION APR 2020) (31 U.S.C. 3903 and 10 U.S.C. 2307)].

___ (61)] 52.239-1, Privacy or Security Safeguards (AUG 1996) (5 U.S.C. 552a).

___ ([62]61) 52.242-5, Payments to Small Business Subcontractors (JAN 2017) (15 U.S.C. 637(d)(13)).

___ ([63]62) (i) 52.247-64, Preference for Privately Owned U.S.-Flag Commercial Vessels (Feb 2006) (46 U.S.C. Appx. 1241(b) and 10 U.S.C. 2631).

___ (ii) Alternate I (Apr 2003) of 52.247-64.

___ (iii) Alternate II (Feb 2006) of 52.247-64.

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

As prescribed in 13.302-5(d), insert the following clause:

TERMS AND CONDITIONS—SIMPLIFIED ACQUISITIONS (OTHER THAN COMMERCIAL ITEMS (JAN 2020) [(DEVIATION APR 2020)]

(a) ***

(2) ***

(vi) 52.232-40, Providing Accelerated Payments to Small Business Subcontractors (DEC 2013) [(DEVIATION APR 2020) (31 U.S.C. 3903 and 10 U.S.C. 2307)].

(viii) 52.244-6, Subcontracts for Commercial Items (AUG 2019) [(DEVIATION APR 2020)].

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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) [(DEVIATION APR 2020)]

(a) [(1) In accordance with 31 U.S.C. 3903 and 10 U.S.C. 2307, u]Upon receipt of accelerated payments from the Government, the Contractor shall make accelerated payments to its small business subcontractors under this contract [in accordance with the accelerated payment date established], to the maximum extent practicable and prior to when such payment is otherwise required under the applicable contract or subcontract, [with a goal of 15 days] after receipt of a proper invoice and all other required documentation from the small business subcontractor [if a specific payment date is not established by contract.

(2) The Contractor agrees to make such payments to its small business subcontractors without any further consideration from or fees charged to the 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)

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52.244-6 Subcontracts for Commercial Items.

As prescribed in 44.403, insert the following clause:

SUBCONTRACTS FOR COMMERCIAL ITEMS (AUG 2019) [(DEVIATION APR 2020)]

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(c) (1) * * *

(xix) 52.232-40, Providing Accelerated Payments to Small Business Subcontractors (DEC 2013) [(DEVIATION APR 2020)], if flow down is required in accordance with paragraph (c) of FAR

clause 52.232-40.

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