

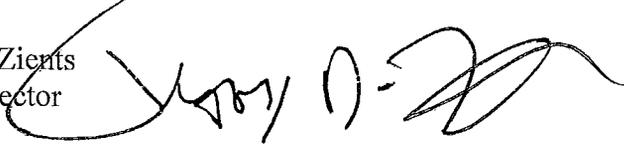


EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

July 11, 2012

M-12-16

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: Jeffrey D. Zients
Acting Director 

SUBJECT: Providing Prompt Payment to Small Business Subcontractors

The Administration is strongly committed to supporting small business growth and prosperity, as an engine to drive economic activity and job creation throughout the country. As part of this commitment, the Administration has taken steps to enhance small businesses' opportunities to contract with the Federal Government, as well as to ensure that the government promptly and efficiently pays small businesses when they contract to provide goods and services to the government.

On September 14, 2011, the Office of Management and Budget (OMB) issued Memorandum 11-32, "Accelerating Payments to Small Business for Goods and Services." That memorandum established "the Executive Branch policy that, to the full extent permitted by law, agencies shall make their payments to small business contractors as soon as practicable, with the goal of making payments within 15 days" of receipt of relevant documents.¹ Such acceleration helps to improve cash flow for small businesses, increases liquidity, unlocks capital for the purposes of investment and growth, and increases small business participation in Federal contracting.

In furtherance of this policy, and to further preserve and increase small business participation in all levels of Federal contracting by improving cash flow, this memorandum establishes the Executive Branch policy that, to the full extent permitted by law, agencies shall take these steps outlined in this memorandum to ensure that prime contractors are able to pay their small business subcontractors in a prompt fashion.² In particular, agencies should, to the full extent permitted by law, temporarily accelerate payments to all prime contractors, in order to allow them to provide prompt payments to small business subcontractors. Of note, this memorandum does not affect the application of the Prompt Payment Act's (PPA) late-payment interest penalty provisions.

¹ Pursuant to the implementing regulations for the Prompt Payment Act (PPA), relevant documents include a proper invoice for the amount due and confirmation that the goods and services have been received and accepted by the Federal Government.

² As defined at 48 C.F.R. Part 3.502-1, a prime contractor "means a person who has entered into a prime contract with the United States," and a subcontractor "(1) means any person, other than the prime contractor, who offers to furnish or furnishes any supplies, materials, equipment, or services of any kind under a prime contract or a subcontract entered into in connection with such prime contract; and (2) includes any person who offers to furnish or furnishes general supplies to the prime contractor or a higher tier subcontractor."

BACKGROUND

Under the Prompt Payment Act (PPA) and OMB's implementing regulations,³ and as outlined in OMB Memorandum 11-32, a Federal agency is generally required to make payments within 30 days from when the agency receives proper documentation. If an agency does not pay a vendor the amount due by the "required payment date" prescribed by the PPA, the agency must pay the vendor a late-payment interest penalty.

In accordance with the PPA, agencies generally pay prime contractors no earlier than seven days in advance of this 30-day deadline. However, the PPA and OMB's implementing regulations authorize agencies to make accelerated payments when the agency determines that doing so is "necessary." In addition, OMB's regulations specifically support agencies in making accelerated payments to small businesses, stating that "[a]gencies may pay a small business as quickly as possible, when all proper documentation, including acceptance, is received in the payment office and before the payment due date."⁴

Pursuant to the policy established in Memorandum 11-32, Federal agencies have already taken steps to accelerate payments to small business prime contractors. In consultation with OMB and Treasury, Federal agencies have accelerated of payments to small business prime contractors while protecting the good stewardship inherent in effective cash management practices, as required by the PPA. These actions have been taken during a period in which the cost of capital for the Federal Government has been low, and therefore the government is able to remit payments along an accelerated timeline without jeopardizing prudent cash management practices.

ACCELERATING PAYMENTS TO SMALL BUSINESS SUBCONTRACTORS

To further this policy, with respect to small businesses that are subcontractors, agencies shall take steps, as outlined below and to the full extent permitted by law, to ensure that prime contractors disburse the funds that they receive from the Federal Government to their small business subcontractors in a prompt manner.

To assist in expediting contractor payments to small business subcontractors, agencies shall, to the full extent permitted by law, temporarily establish an earlier, accelerated date for making agency payments to all prime contractors. Consistent with the policy for small business prime contractors established in Memorandum 11-32, agencies are encouraged to make payments to all prime contractors as soon as practicable, with a goal of paying all prime contractors within 15 days of receiving proper documentation. In accordance with the above, agencies should begin accelerating payments to all prime contractors as soon as practicable.

While this temporary policy is in effect, agencies shall encourage prime contractors to –

- accelerate payments to their small business subcontractors;
- consider modifying their existing contracts with small business subcontractors without consideration or fees to include a clause providing that the prime contractor

³ The PPA is at 31 U.S.C. Chapter 39. OMB's implementing regulations are at 5 C.F.R. Part 1315.

⁴ 5 C.F.R. § 1315.5(b). The provision also explains that earlier payments to small businesses "are not subject to payment restrictions stated elsewhere" in OMB's PPA regulations. These restrictions include the instruction to agencies that their PPA authority to make an earlier payment "must be used cautiously." 5 C.F.R. § 1315.4(j).

will pay the small business subcontractor along an accelerated timetable to the maximum extent practicable; and

- insert a similar clause in their future contracts with small businesses subcontractors;

To assist in this effort, OMB is requesting that the Federal Acquisition Regulatory Council (FAR Council) develop standard wording for a clause that would be included in the agency's contract with the prime contractor, pursuant to a deviation, providing for prompt payment from the prime contractor to its small business subcontractors. OMB is encouraging the FAR Council to consider as an example the provision in the PPA that, for the purposes of construction contracts awarded by an agency, flows down an accelerated payment schedule to subcontractors for satisfactory contract performance.⁵ OMB is further requesting that the FAR Council undertake a rulemaking, in consultation with the Small Business Administration, to develop a standard clause that may be incorporated into future prime contracts and subcontracts (for activities other than construction) to address prompt payments to small business subcontractors.

The acceleration of payments to all prime contractors is a one year, temporary, transitional policy that provides for immediate assistance to small businesses, while affording agencies and prime contractors time to insert contract clauses as described above, or take other appropriate steps, to ensure that prime contractors provide prompt payment to their small business subcontractors. On a date one year after the date of this memorandum, the policy of automatically accelerating all payments to prime contractors shall terminate. At that time, agencies shall cease making accelerated payments to all prime contractors pursuant to the temporary, transitional policy. OMB will then provide further guidance on the appropriate steps that agencies should consider to ensure that small business subcontractors continue to be paid promptly by their prime contractors. Such steps may include continuing to provide accelerated payment to prime contractors that have inserted contract clauses as described above, exercising flexibility that is being considered as part of the implementing regulations of the Small Business Jobs Act that enables agency contracting officers to consider a prime contractor's commitment to paying small business subcontractors in a prompt manner as part of a contract award determination, or other measures as OMB deems appropriate.

This further guidance will be informed in part by an evaluation of the progress agencies have made, and information they have collected, in ensuring prompt payment to small business subcontractors, as well as analysis of the economic conditions facing small businesses at that time. Accordingly, within six months, and again within one year, of the date of this memorandum, each agency shall report to OMB on –

1. the agency's progress in making accelerated payments to all prime contractors, to the full extent permitted by law, pursuant to the temporary, transitional policy established by this memorandum and designed to expedite contractor payments to small business subcontractors;

⁵ This PPA provision is implemented in the Federal Acquisition Regulation (FAR) at 48 C.F.R. Part 52.232-27.

2. the progress of the agency's twenty-five largest prime contractors in incorporating prompt payment clauses in their subcontracts with small businesses; and
3. the progress of any other steps that the agency has undertaken to ensure that small business subcontractors are paid in a prompt manner.

In the immediate term, agencies should encourage small business prime contractors to accelerate payments to their small business subcontractors. However, the issuance of this memorandum and its implementation do not change the application of Memorandum 11-32, which remains in effect unless and until OMB issues further superseding guidance.

This memorandum does not affect the application of the PPA's late-payment interest penalty provisions. Under the PPA and OMB's implementing regulations, the interest penalty is triggered when an agency does not pay the contractor the amount due by "the required payment date." This memorandum and its implementation do not modify the "required payment date" and do not otherwise modify the operation of the interest penalty.

If you have any questions regarding this memorandum, please contact Mathew Blum (mblum@omb.eop.gov), Associate Administrator of the Office of Federal Procurement Policy, or Norman Dong (ndong@omb.eop.gov), Deputy Controller of the Office of Federal Financial Management.