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Proposed Rule May Delay Payments

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The Defense Department proposed a rule change Aug. 2, governing its payment obligations, that could result in contractors waiting longer for payment under certain cost-reimbursement contracts.

DOD requires interim payments on cost-reimbursement services contracts to be made within 14 days after the contractor's request. DOD intends to extend the payment due date to 30 days. Readers can find the proposed rule at 72 Fed. Reg. 42366.

The proposed rule apparently reflects the DOD Inspector General's success in an internal policy dispute. The IG is seeking to save millions of dollars in interest paid annually under the Prompt Payment Act.

Service contractors receive more favorable payment terms from DOD than from civilian agencies under cost-reimbursement contracts. Most government contracts require payment within 30 days of request. DOD has a more liberal policy for vouchers for interim payments under cost-reimbursement service contracts. For those payments, DOD agrees to make payment within 14 days. DOD also agrees to pay Prompt Payment Act interest automatically if those payments are not made within 14 days.

The Prompt Payment Act, enacted in 1982, is designed to treat contractors fairly by having the government pay on time and, when payment is late, compensate them with interest. Accordingly, contractors should know which of their contract payments are subject to the act, and they should understand how to enforce their payment rights.

Under the basic rules of the Prompt Payment Act, payment is due no later than the 30th day after the submission of a proper invoice or the government's acceptance of the supplies or services. If the government does not pay on time, it must pay interest — referred to as an "interest penalty" — automatically, without a request from the contractor. If the interest penalty is not paid within 10 days after the invoice amount is paid, the contractor has the right to an additional penalty payment if a written demand to the government is made within 40 days.

The act covers all types of contracts, but not necessarily all types of payments under every contract. The general rule is the act applies to payments for services that have been completed and accepted or for supplies that have been delivered and accepted, though it does not apply to financing payments for work in progress. Financing payments include advances, progress payments and certain interim payments.

Interim payments are typically made under cost-reimbursement services contracts. Contractors may request interim payments every two weeks as work progresses and then final payment after the job is done. The Prompt Payment Act applies to both types of payments under cost-reimbursement service contracts. It is the timing of those interim payments — from 14 to 30 days — that is the subject of the proposed DOD rule change.

It's unclear whether small business might receive some relief from the new rule. It will state that it is DOD policy to pay small businesses within 14 days under services cost-reimbursement contracts, and a corresponding new Defense Federal Acquisition Regulation Supplement clause would state that "accelerated payments may be made within 14 days." For purposes of Prompt Payment Act interest, however, the due date would be 30 days after receipt of the payment request, for small and large businesses. Thus, despite what DOD suggests, small businesses may also be waiting longer for payments under cost-reimbursement contracts.

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