



Date: January 25, 2021

Subject: 2020 Assessment of Prompt Payment Complaints

The Federal Aviation Administration (FAA) Reauthorization Act of 2018 (Public Law No: 115-254), signed into law on October 5, 2018, requires the FAA to analyze and assess prompt payment complaints reported by airport sponsors, and to create a report describing the results including a plan to respond to such results. The following comprises the report described by the Act.

Background:

Section 157 of the 2018 FAA reauthorization requires airport sponsors to track and report the number of complaints received from subcontractors regarding alleged non-compliance with the prompt payment requirements, including the timely return of retainage by prime contractors to the FAA.

Section 157 also requires the FAA to assess and improve airport sponsor compliance with prompt payment requirements, including:

- i. whether requirements relating to the inclusion of prompt payment language in contracts are being satisfied;
- ii. whether and how airport sponsors are enforcing prompt payment requirements;
- iii. the processes by which covered complaints are received and resolved by airport sponsors;
- iv. whether improvements need to be made to better track and resolve covered complaints;
- v. whether changes to prime contractor specifications need to be made to ensure prompt payments to subcontractors; and,
- vi. whether changes to prime contractor specifications need to be made to ensure prompt payment of retainage to subcontractors.

To meet these requirements, the FAA created an online reporting tool for airport sponsors to report covered complaints to the FAA during November 2018. On February 11, 2019, the FAA Office of Civil Rights issued a letter notifying airport sponsors of the new requirements. The FAA provided prompt payment training, including a review of reporting requirements and how to report, during four conference trainings/webinars between December 2019 and August 2020. Additional reminder emails as well as a request for affirmation that all complaints for FY2020 were reported were sent in November and December 2020.

Data Review:

A total of 17 complaints for FY2020 were reported as of December 16, 2020. A review of the complaints received showed:

- Of the roughly 1,300 airport sponsors that received grants in FY2020, a total of four (4) airport sponsors representing five (5) unique airports reported covered prompt payment complaints, representing approximately 0.3% of all FY2020 grant recipients.

- Of the 17 reported complaints, 14 of them (82.4%) were “covered complaints” within the meaning of Section 157.
- Seven (7) of the 14 covered complaints were the result of a single incident reportedly related to a prime contractor’s payment system error.
- Two (2) of the 14 covered complaints were not resolved at the time they were reported.
- One (1) of the 17 total reported complaints appears to have been entered in the reporting system by the complainant itself rather than the airport. This entry cannot be considered in this report, but the FAA is following up with the airport where the complainant claims the incident occurred.

While the actual number of covered complaints reported is comparatively low, anecdotal reports regularly communicated to the FAA suggest that several factors could be at work that may depress the number of covered complaints. These factors may include:

- Airports may not be properly reporting covered complaints to the FAA
- Subcontractors not advising airports of prompt payment complaints for fear of retaliation by prime contractors or airports themselves
- Scenarios where payments are delayed but the delay is not a violation of the prompt payment requirements; these cases are not considered covered complaints. Examples include:
 - Subcontractors are several tiers down and each prior tier needs to receive payment first
 - Prime contractors do not include subcontractor work on an invoice and therefore have not been paid for the work yet
 - Airports take extended periods of time to pay prime contractors, which delays the prime contractor’s payment to subcontractors
 - Prime contractors fail to invoice the airports timely and measures to require and enforce timely invoicing are either unavailable or not implemented

Analysis and Assessment:

Although the total complaint number remains very low, it is still possible to map the responses received into the areas of analysis identified in Section 157 of the Act:

- i. *whether requirements relating to the inclusion of prompt payment language in contracts are being satisfied;*
 - All respondents stated that their contracts included prompt payment and retainage return language from FAA Advisory Circular 150/5370-10H
- ii. *whether and how airport sponsors are enforcing prompt payment requirements;*
 - Of the five (5) unique airports that reported receiving complaints, four (4) did not specify how the requirements are included in contract documents, and two (2) did not indicate whether their contracts included prompt payment enforcement provisions
 - One (1) response suggested that the airport may not have been actively monitoring to ensure prompt payment
 - Enforcement measures airports reported included
 - withholding part or all of a prime contractor’s progress payment
 - seeking to pay subcontractors directly

- iii. *the processes by which covered complaints are received and resolved by airport sponsors;*
- Complaints were received through various means, including verbal, written letters, e-mail, and by responses entered in automated prompt payment tracking systems
 - Complaint resolutions were effected by various means, including consultations with prime contractors to remind them of contractual payment obligations, withholding part or all of a prime contractor's final payment, and referring affected subcontractors to the payment bond
- iv. *whether improvements need to be made to better track and resolve covered complaints;*
- FAA plans to leverage existing software platforms to streamline, standardize, and improve the manner in which airports report prompt payment complaints to the FAA pursuant to Section 157. While the FAA does not have direct oversight over prime contractors and subcontractors, FAA can provide additional training and other supportive services to help airports understand their obligations and options for reporting and resolving prompt payment complaints in a timely manner. The FAA anticipates that integrating a prompt payment complaint reporting feature into the existing airport-facing FAA Civil Rights Connect software platform will improve airports' compliance with complaint reporting requirements as compared with the current standalone reporting method.
- v. *whether changes to prime contractor specifications need to be made to ensure prompt payments to subcontractors;*
- The sufficiency of contractor specifications regarding prompt payment and return of retainage was not a common theme in regard to the reported complaints. Anecdotal reports the FAA receives outside the context of the present analysis suggest that improvements to requirements and enforcement measures for prime contractors to invoice timely and accurately as well as the improvement to the requirements for airport sponsors to timely pay prime contractor invoices may be of value. However, because delays in subcontractor payments stemming from invoicing procedures are not currently violations of the prompt payment requirements of 49 CFR Part 26.29, any complaints arising from these issues are not covered complaints within the meaning of Section 157. Therefore, there is currently no standard method to track or analyze the timeliness with which prime contractors invoice airports, the timeliness with which airports pay prime contractors, or the myriad ways in which invoicing practices may impact subcontractors.
 - One (1) reported complaint that was not a covered complaint within the meaning of Section 157 was related to what the airport sponsor called a contract dispute. 49 CFR Part 26.29 encourages, but does not require, the use of alternative dispute resolution (ADR) mechanisms to aid with timely resolution of such disputes.
- vi. *whether changes to prime contractor specifications need to be made to ensure prompt payment of retainage to subcontractors.*

- As noted in regard to the previous item, the sufficiency of contractor specifications regarding prompt payment and return of retainage was not a common theme in regard to the reported complaints.

Results and Plan:

This is the second year the FAA has systematically gathered and analyzed information relating to prompt payment complaints at airports nationwide. The FAA continues to receive only a very limited number of reported complaints. As a result, there remains a very limited empirical basis on which to attempt to evaluate any broad trends or suggest specific changes that would have a significant measurable impact.

The lack of overwhelming quantitative data does not mean that the FAA cannot take action based on what has been received to date and from anecdotal information the FAA obtained during airport compliance reviews and FAA-led training sessions. Certainly, the data received to date combined with the anecdotes the FAA hears on a regular basis has led to some general concerns that can be readily articulated as follows:

- Some airport sponsors are not proactively monitoring for prompt payment compliance
- Some airport sponsors are not fully aware of and/or complying with the prompt payment complaint reporting requirements, including how to report complaints to the FAA
- Contracting documents contain the required prompt payment language provisions, but some may not have enforcement provisions
- Anecdotal concerns often involve issues related to billing and invoicing, where the prime contractor has not been paid and is therefore not in violation of prompt payment requirements

Given the anecdotal information the FAA receives on a regular basis and the reported complaints that continue to suggest some airports may not be proactively monitoring prompt payment compliance, an increase in reported complaints was anticipated in response to the greater visibility and monitoring around the issue of prompt payment. However, the expected increase did not materialize in FY2020. Compiling a larger data set will be critical to the success of any future action the FAA might take or propose regarding prompt payment requirements, because the actions could then be properly targeted to have the most useful impact. We have identified the following areas of emphasis where we may be able to positively impact prompt payment through continued proactive approaches.

The FAA's Office of Civil Rights will take the following actions during fiscal year 2020:

- Explore development of a module for the FAA Civil Right Connect airport-facing software program that will help streamline, standardize, and improve the manner in which airports report prompt payment complaints to the FAA pursuant to Section 157
- Continue to educate airport sponsors on the requirements to proactively monitor prompt payment and the timely return of retainage and to report all prompt payment complaints to the FAA, including how to report these complaints
- Continue to focus on prompt payment compliance during all onsite and online compliance assessments including ensuring that contracting documents contain the

required language and enforcement provisions and the airport sponsors are proactively monitoring for prompt payment and the timely return of retainage

- Continue to collaborate with FAA's Office of Airport Compliance to ensure that prime contractor specifications address prompt payment of subcontractors including the timely return of retainage as well as the inclusion of contractual enforcement mechanisms
- Collaborate with the U.S. Department of Transportation Department Office of Civil Rights (DOCR), Federal Highway Administration (FHWA) and Federal Transit Administration (FTA) to evaluate the need to expand the prompt payment provisions contained within 49 CFR Part 26 to include additional payment scenarios that may impact subcontractors that are not currently considered a covered complaint
- Explore additional resource options to further streamline, standardize, and improve the manner in which airports report prompt payment complaints to the FAA pursuant to Section 157 as well as to provide other supportive services to help airports understand their obligations and options for reporting and resolving prompt payment complaints in a timely manner

The FAA continues to support full and effective implementation and monitoring of all DBE program requirements, including prompt payment, at airports nationwide. We look forward to implementing the above actions to ensure that contractors working on FAA funded projects are paid timely including the timely release of retainage.

Sincerely,

John P. Benison

John P. Benison
Assistant Administrator for Civil Rights