



Date: JAN 30 2020

Subject: Annual Prompt Payment Complaint Report

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.

### **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 assist in meeting these requirements, in November 2018 the FAA created an online reporting tool for airport sponsors to report covered complaints to the FAA. On February 11, 2019, the FAA Office of Civil Rights issued a letter notifying airport sponsors of the new requirements. Reminder notifications were sent to airports sponsors on March 13 and August 7, 2019. The FAA provided prompt payment training, including a review of reporting requirements and how to report, during ten conference trainings/webinars between March 10 and August 23, 2019. Additional reminder emails as well as a request for affirmation that all complaints for FY19 were reported and sent through October 2019.

### **Data Review**

A total of 17 complaints for FY19 were reported as of November 1, 2019. A review of the complaints received showed the following:

- Of the 17 reported complaints, 11 were “covered complaints” within the meaning of Section 157
- Two (2) of the 11 covered complaints were not resolved at the time they were reported

Note:

- Approximately 1,350 airports received grants in FY19, and a total of nine (9) airports reported covered prompt payment complaints, representing approximately 0.7% of all FY19 grant recipients, and an even smaller percentage of all contracts

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

- Subcontractors not advising airports of prompt payment complaints for fear of retaliation by prime contractors
- 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 is 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 150/5370-10G (now 150/5370-10H)
  - Of the nine (9) unique airports that reported receiving complaints, three (3) indicated that their contracts did not include prompt payment enforcement provisions
- ii. *whether and how airport sponsors are enforcing prompt payment requirements;*
  - Of the nine (9) unique airports that reported receiving complaints, three (3) indicated that their contracts did not include prompt payment enforcement provisions
  - Some responses 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
  - issuing joint checks to pay subcontractors directly
- iii. *the processes by which covered complaints are received and resolved by airport sponsors;*
  - Complaints were received through various means verbally, letters, e-mail, and 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 progress payment, issuing joint checks to pay subcontractors directly, and in one case the issue was resolved by the subcontractor itself before the airport intervened
- iv. *whether improvements need to be made to better track and resolve covered complaints;*
  - Because this is the first year complaint reporting was instituted, it may be premature to say if there are problems with tracking covered complaints. However, with additional resources, FAA could 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 FAA does not have direct oversight over prime contractors and subcontractors, with sufficient resources the 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.
- 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 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. This may be a matter for further evaluation and potential recommendations after gathering more data in future years.

- 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 first year the FAA has systematically gathered and analyzed information relating to prompt payment complaints at airports nationwide. The limited number of reported complaints received indicates no sufficient empirical basis exists to identify any broad trends or specific changes that would have a significant measurable impact.

However, the FAA can still take action based on what has been received to date and from anecdotal information the FAA obtained during past airport compliance reviews and FAA-led training sessions. The FAA has some general concerns as follows:

- Some airport sponsors are not proactively monitoring for prompt payment compliance
- Some airport sponsors are not fully aware and/or complying with the prompt payment complaint reporting requirements, including how to report complaints to 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

It is reasonable to anticipate an increase in reported complaints in the near future that may be partially attributable to the greater visibility and monitoring around the issue. Compiling a larger data set will be critical to the success of any future action the FAA will take to ensure that such actions are impactful.

The FAA's Office of Civil Rights will focus on the following proactive approaches during fiscal year 2020:

- Continue to educate airport sponsors on the requirement to report all prompt payment complaints to the FAA including how to report them through training and technical assistance
- 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 Airport Compliance Division 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.

- Explore resource options to streamline, standardize, and improve the manner in which airports report prompt payment complaints to the FAA pursuant to Section 157 as well as providing 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.

Respectfully Submitted,



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