



Date: March 8, 2022

Subject: FY 2021 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 (Attachment 1) notifying airport sponsors of the new requirements. Reminder notifications were sent to airports sponsors on March 13 and August 7, 2019 to reiterate the 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. During FY2021 the FAA replaced the original stand-alone online reporting tool with a new module for the online system airport sponsors already use for other FAA Civil Rights compliance and reporting needs. Airport sponsors were notified of the new reporting module in March 2021 via email, and the electronic user guide for the system was updated with instructions on how to report covered prompt payment complaints.

Emails were sent in November and December 2021 reminding airport sponsors to report covered complaints through the new module and requesting affirmation that all covered prompt payment complaints for FY2021 had been reported.

Data Review:

A total of 25 complaints for FY2021 were reported as of December 22, 2021. A review of the complaints received showed:

- Of the roughly 1,300 airport sponsors that received grants in FY2021, a total of five (5) airport sponsors representing six (6) unique airports reported covered prompt payment complaints, representing approximately 0.4% of all FY2021 grant recipients.
- Of the 25 reported complaints, six (6) were duplicate entries. This leaves a total of 19 individual complaints reported for FY2021.
- 16 of the 19 individual complaints (84.2%) were “covered complaints” within the meaning of Section 157.
- Two (2) of the 16 covered complaints were the result of an issue reportedly related to a prime contractor getting vendors entered into its payment system.
- Seven (7) of the 16 covered complaints related to retainage not promptly released to subcontractors.
- One (1) of the 16 covered complaints was the result of a prime failing to pay the balance due from a previous invoice when the subcontractor’s next invoice was paid.
- Two (2) of the 16 covered complaints reportedly resulted from a prime contractor’s paperwork management issues.
- Three (3) of the 16 covered complaints were the result of a prime contractor failing to timely pay its subcontractor.
- One (1) of the 16 covered complaints resulted from the prime contractor changing personnel and impacting the workflow to release payment.

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 airport sponsors that reported receiving complaints, three (3) indicated the complaints were resolved simply by reminding the prime contractor of the prompt payment requirements
 - One (1) airport sponsor withheld payment to the prime contractor until the subcontractor's past due payment was released
 - One (1) airport sponsor did not report taking enforcement action
- iii. *the processes by which covered complaints are received and resolved by airport sponsors;*
 - Complaints were received through various means, including e-mail, telephone, 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, and withholding payment to a prime contractor
- iv. *whether improvements need to be made to better track and resolve covered complaints;*
 - Despite significant efforts devoted to educating airport sponsors on the prompt payment complaint reporting requirements, since FY2019, total reported complaints remain very low in proportion to the number of active projects.
 - In FY2021, the FAA integrated a prompt payment complaint reporting feature into the existing airport-facing FAA Office of Civil Rights software platform in an effort to improve airports' compliance with complaint reporting requirements. Reported complaint numbers have still remained very small in comparison to the anecdotal concerns raised by stakeholders on a regular basis.
 - While the FAA does not have direct oversight over prime contractors and subcontractors, the FAA has provided and will continue to provide training and other resources to help airport sponsors understand their obligations and options for resolving and reporting 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 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 an improvement to the requirements for airport sponsors to timely pay prime contractor invoices may be of value. Furthermore, invoicing and paperwork requirements of prime contractors have been implicated in delays in payment to subcontractors while documentation disputes are resolved. 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.

- 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 third 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, and only a subset of these are covered complaints within the meaning of Section 157. Data received so far still lacks empirical sufficiency needed 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. Furthermore, considering the context of complaints reported to date, the FAA remains concerned that many airport sponsors may not be monitoring for prompt payment and/or not complying with the legislative requirement to report prompt payment complaints. The FAA also notes that 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, the greater visibility surrounding prompt payment requirements, the rollout of the new prompt payment complaint reporting module for airport sponsors, and the regular training the FAA provides on prompt payment and the complaint reporting requirements, an increase in reported complaints was anticipated but did not occur in FY2021. 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 2022:

- Make targeted efforts to verify whether airport sponsors are actively monitoring for prompt payment and reporting covered prompt payment complaints during compliance reviews.
- Encourage airport sponsors to require prime contractors clearly explain invoicing requirements before subcontractors begin work.

- Continue to educate airport sponsors on the benefits of proactively monitoring prompt payment and reporting all covered prompt payment complaints to the FAA.
- 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.
- Collaborate with the U.S. Department of Transportation Department Office of Civil Rights (DOCR), Federal Highway Administration (FHWA) and Federal Transit Administration (FTA), and any other relevant agencies to evaluate the need to expand or complement the prompt payment provisions contained within 49 CFR Part 26 to help address payment scenarios that may impact subcontractors even though they are not currently considered covered complaints.
- Explore additional 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
Assistant Administrator for Civil Rights