



Date: January 31, 2023

Subject: 2023 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. 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 October and November 2022 reminding airport sponsors to report covered complaints through the new module and requesting affirmation that all covered prompt payment complaints for FY2022 had been reported.

Data Review:

A total of five (5) complaints for FY2022 were reported as of December 21, 2022. A review of the complaints received showed:

- There was a total of five (5) individual complaints reported for FY2022.
- Of the roughly 1,230 airport sponsors that received grants in FY2022, a total of three (3) unique airports reported covered prompt payment complaints, representing approximately 0.2% of all FY2022 grant recipients.
- All five (5) of the complaints reported were “covered complaints” within the meaning of Section 157.
- Three (3) of the five (5) covered complaints were attributable to the same project with the same prime contractor. One (1) of these complaints was resolved when airport sponsor informed the prime contractor that progress payments would be withheld until the subcontractor was paid. The other two (2) complaints were not resolved until the prime contractor’s bond company stepped in and appointed a third-party company that received payments directly from the airport sponsor and then distributed funds to the prime and subcontractors on an independent basis.
- One (1) of the five (5) covered complaints was self-reported to the airport sponsor by the prime contractor. The late payment was attributed to employee illness that delayed processing of the payment to the subcontractor.
- One (1) of the five (5) covered complaints was resolved between the prime and the subcontractor before the airport sponsor had been notified of the delayed payment. The prime contractor was reminded of its obligation to report payment information timely, in addition to the basic requirement to promptly pay subcontractors.

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:

- Airport sponsors 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 airport sponsors 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:
 - Airports take extended periods of time to pay prime contractors, which delays the prime contractor’s payment to subcontractors
 - 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
 - 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 three (3) unique airport sponsors that reported receiving complaints, two (2) indicated the complaints were resolved without any actions by the airport sponsor.
 - One (1) airport sponsor withheld payment to the prime contractor until the subcontractor's past due payment was released. This same airport sponsor is the location where the prime contractor's bonding company brought in a third-party funds control firm to ensure payments were made to subcontractors.
- iii. *the processes by which covered complaints are received and resolved by airport sponsors;*
 - Complaints were received through various means, including e-mail, formal letter, 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 payment to a prime contractor, and a third-party funds control company receiving payments from the sponsor and making direct, independent payment to prime and subcontractors
- 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 extremely 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.*
 - o 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 fourth 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 is not of sufficient quantity to properly evaluate broad trends or suggest specific policy changes that would have a significant measurable impact. However, with four years of reported complaint data the FAA has identified some positive tendencies. In the first year of reporting, three (3) airport sponsors indicated that they did not have correct prompt payment and return of retainage clauses in their contracts. Since that first year, no airport sponsors have indicated the prompt payment language was missing. Airport sponsors have also been increasingly accurate in reporting only covered complaints. FY2022 is the first year where all reported complaints were covered complaints. There were fewer complaints in FY2022 compared to all previous years, and fewer complaints as a percentage of all grant recipients.

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. The possibility remains that airport sponsors may not be monitoring for prompt payment and/or not complying with the legislative requirement to report prompt payment complaints. However, since reporting requirements went into effect the FAA has provided numerous training sessions on prompt payment monitoring and reporting. These sessions were attended and viewed by hundreds of airport sponsors, and there has been no appreciable increase the number of prompt payment complaint reports. The FAA also notes that anecdotal concerns often involve issues related to billing and invoicing, where the prime contractor has not been paid and therefore is 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 FY2022. In fact, reports decreased compared to FY2021, whereas an increase had been anticipated for that year, as well. 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.

The Infrastructure Investment and Jobs Act, also known as the Bipartisan Infrastructure Law, created additional opportunities for airport sponsors to obtain federal funding for projects that would be subject to federal requirements, including the prompt payment monitoring and reporting requirement. Presently there is no expectation that a major shift will take place in the prevalence of reported complaints as a percentage of total grant recipients, but if total project volume increases then an attendant increase in the number of reported prompt payment complaints is anticipated. We have identified the following areas of emphasis where we may be able to positively impact prompt payment compliance and complaint reporting through continued proactive approaches.

The FAA's Office of Civil Rights will take the following actions during fiscal year 2023:

- 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 incorporate prompt payment requirements in training provided to airport sponsors, and provide updated training specifically focused on prompt payment, including reporting requirements
- Continue to collaborate with other FAA Lines of Business and Staff Offices 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 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

John P. Benison

Assistant Administrator for Civil Rights