

ligated to pay a late payment interest penalty (other than under construction contracts), that the Federal Government has accepted property or services by the 7th day after the date on which, in accordance with the terms and conditions of the contract, the property is delivered or final performance of the services is completed, unless the solicitation specifies a longer period which is determined by the contracting officer to be required to afford the agency a practicable opportunity to inspect and test the property furnished or evaluate the services performed.

“(4) The limitation that the Federal Government may take a discount offered by a contractor for early payment by the Federal Government only in accordance with the time limits specified by the contractor, determined in accordance with the second sentence of section 3904 of title 31, United States Code.

“(5) The requirements of section 3902(c) of title 31, United States Code.

“(6) The requirements of section 3903(a)(6) of title 31, United States Code.

“(7) The requirements of section 3905 of title 31, United States Code.

“(c) The regulations required by subsection (a) of this section shall be published as proposed regulations for public comment as provided in section 22 of the Office of Federal Procurement Policy Act ([former] 41 U.S.C. 418b) [now 41 U.S.C. 1707] within 120 days after the date of the enactment of this Act [Oct. 17, 1988].”

EDIBLE FRESH OR FROZEN POULTRY MEAT, PERISHABLE POULTRY MEAT FOOD PRODUCTS, FRESH EGGS, AND PERISHABLE EGG PRODUCTS

Pub. L. 98-181, title II, §2002, Nov. 30, 1983, 97 Stat. 1297, to the extent that it provided that the terms “meat” and “meat food products” as used in 31 U.S.C. 3903(2) also included edible fresh or frozen poultry meat, perishable poultry meat food products, fresh eggs and perishable egg products, was stricken by Pub. L. 100-496, §13(b), Oct. 17, 1988, 102 Stat. 2465, applicable to payments under contracts awarded, contracts renewed, and contract options exercised during or after the first fiscal quarter which begins more than 90 days after Oct. 17, 1988.

§ 3904. Limitations on discount payments

The head of an agency offered a discount by a business concern from an amount due under a contract for property or service in exchange for payment within a specified time may pay the discounted amount only if payment is made within the specified time. For the purpose of the preceding sentence, the specified time shall be determined from the date of the invoice. The head of the agency shall pay an interest penalty on an amount remaining unpaid in violation of this section. The penalty accrues as provided under sections 3902 and 3903 of this title, except that the required payment date for the unpaid amount is the last day specified in the contract that the discounted amount may be paid.

(Added Pub. L. 97-452, §1(18)(A), Jan. 12, 1983, 96 Stat. 2476; amended Pub. L. 100-496, §8, Oct. 17, 1988, 102 Stat. 2460.)

HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
3904	31 App.:1802.	May 21, 1982, Pub. L. 97-177, §3, 96 Stat. 86.

The word “otherwise” is omitted as surplus. The words “may pay the discounted amount” are substituted for “may make payment in an amount equal to the discounted price” to eliminate unnecessary words. The words “on such unpaid amount” and “the

regulations prescribed pursuant to” are omitted as surplus. The words “specified in the contract that the discounted amount may be paid” are substituted for “of the specified period of time described in subsection (a)” for clarity.

Editorial Notes

AMENDMENTS

1988—Pub. L. 100-496 inserted after first sentence “For the purpose of the preceding sentence, the specified time shall be determined from the date of the invoice.”

Statutory Notes and Related Subsidiaries

EFFECTIVE DATE OF 1988 AMENDMENT

Amendment by Pub. L. 100-496 applicable to payments under contracts awarded, contracts renewed, and contract options exercised during or after the first fiscal quarter which begins more than 90 days after Oct. 17, 1988, see section 14(a) of Pub. L. 100-496, set out as a note under section 3902 of this title.

§ 3905. Payment provisions relating to construction contracts

(a) In the event that a contractor, after making a certified payment request to an agency pursuant to section 3903(b) of this title, discovers that a portion or all of such payment request constitutes a payment for performance by such contractor that fails to conform to the specifications, terms, and conditions of its contract (hereafter in this subsection referred to as the “unearned amount”), then the contractor shall—

(1) notify the agency of such performance deficiency; and

(2) be obligated to pay the Government an amount equal to interest on the unearned amount (computed in the manner provided in section 3903(c) of this title), from the date of the contractor’s receipt of such unearned amount until—

(A) the date the contractor notifies the agency that the performance deficiency has been corrected; or

(B) the date the contractor reduces the amount of any subsequent certified application for payment to such agency by an amount equal to the unearned amount.

(b) Each construction contract awarded by an agency shall include a clause that requires the prime contractor to include in each subcontract for property or services entered into by the prime contractor and a subcontractor (including a material supplier) for the purpose of performing such construction contract—

(1) a payment clause which obligates the prime contractor to pay the subcontractor for satisfactory performance under its subcontract within 7 days out of such amounts as are paid to the prime contractor by the agency under such contract; and

(2) an interest penalty clause which obligates the prime contractor to pay to the subcontractor an interest penalty on amounts due in the case of each payment not made in accordance with the payment clause included in the subcontract pursuant to paragraph (1) of this subsection—

(A) for the period beginning on the day after the required payment date and ending

on the date on which payment of the amount due is made; and

(B) computed at the rate specified by section 3902(a) of this title.

(c) The construction contract awarded by the agency shall further require the prime contractor to include in each of its subcontracts (for the purpose of performance of such construction contract) a provision requiring the subcontractor to include a payment clause and an interest penalty clause conforming to the standards of subsection (b) of this section in each of its subcontracts and to require each of its subcontractors to include such clauses in their subcontracts with each lower-tier subcontractor or supplier.

(d) The clauses required by subsections (b) and (c) of this section shall not be construed to impair the right of a prime contractor or a subcontractor at any tier to negotiate, and to include in their subcontract, provisions which—

(1) permit the prime contractor or a subcontractor to retain (without cause) a specified percentage of each progress payment otherwise due to a subcontractor for satisfactory performance under the subcontract, without incurring any obligation to pay a late payment interest penalty, in accordance with terms and conditions agreed to by the parties to the subcontract, giving such recognition as the parties deem appropriate to the ability of a subcontractor to furnish a performance bond and a payment bond;

(2) permit the contractor or subcontractor to make a determination that part or all of the subcontractor's request for payment may be withheld in accordance with the subcontract agreement; and

(3) permit such withholding without incurring any obligation to pay a late payment penalty if—

(A) a notice conforming to the standards of subsection (g) of this section has been previously furnished to the subcontractor; and

(B) a copy of any notice issued by a prime contractor pursuant to subparagraph (A) of this paragraph has been furnished to the Government.

(e) If a prime contractor, after making application to an agency for payment under a contract but before making a payment to a subcontractor for the subcontractor's performance covered by such application, discovers that all or a portion of the payment otherwise due such subcontractor is subject to withholding from the subcontractor in accordance with the subcontract agreement, then the prime contractor shall—

(1) furnish to the subcontractor a notice conforming to the standards of subsection (g) of this section as soon as practicable upon ascertaining the cause giving rise to a withholding, but prior to the due date for subcontractor payment;

(2) furnish to the Government, as soon as practicable, a copy of the notice furnished to the subcontractor pursuant to paragraph (1) of this subsection;

(3) reduce the subcontractor's progress payment by an amount not to exceed the amount

specified in the notice of withholding furnished under paragraph (1) of this subsection;

(4) pay the subcontractor as soon as practicable after the correction of the identified subcontract performance deficiency, and—

(A) make such payment within—

(i) 7 days after correction of the identified subcontract performance deficiency (unless the funds therefor must be recovered from the Government because of a reduction under paragraph (5)(A)); or

(ii) 7 days after the contractor recovers such funds from the Government; or

(B) incur an obligation to pay a late payment interest penalty computed at the rate specified by section 3902(a) of this title;

(5) notify the Government, upon—

(A) reduction of the amount of any subsequent certified application for payment; or

(B) payment to the subcontractor of any withheld amounts of a progress payment, specifying—

(i) the amounts of the progress payments withheld under paragraph (1) of this subsection; and

(ii) the dates that such withholding began and ended; and

(6) be obligated to pay to the Government an amount equal to interest on the withheld payments (computed in the manner provided in section 3903(c) of this title), from the 8th day after receipt of the withheld amounts from the Government until—

(A) the day the identified subcontractor performance deficiency is corrected; or

(B) the date that any subsequent payment is reduced under paragraph (5)(A).

(f)(1) If a prime contractor, after making payment to a first-tier subcontractor, receives from a supplier or subcontractor of the first-tier subcontractor (hereafter referred to as a "second-tier subcontractor") a written notice in accordance with section 3133(b) of title 40, asserting a deficiency in such first-tier subcontractor's performance under the contract for which the prime contractor may be ultimately liable, and the prime contractor determines that all or a portion of future payments otherwise due such first-tier subcontractor is subject to withholding in accordance with the subcontract agreement, then the prime contractor may, without incurring an obligation to pay an interest penalty under subsection (e)(6) of this section—

(A) furnish to the first-tier subcontractor a notice conforming to the standards of subsection (g) of this section as soon as practicable upon making such determination; and

(B) withhold from the first-tier subcontractor's next available progress payment or payments an amount not to exceed the amount specified in the notice of withholding furnished under subparagraph (A) of this paragraph.

(2) As soon as practicable, but not later than 7 days after receipt of satisfactory written notification that the identified subcontract performance deficiency has been corrected, the prime contractor shall pay the amount withheld under

paragraph (1)(B) of this subsection to such first-tier subcontractor, or shall incur an obligation to pay a late payment interest penalty to such first-tier subcontractor computed at the rate specified by section 3902(a) of this title.

(g) A written notice of any withholding shall be issued to a subcontractor (with a copy to the Government of any such notice issued by a prime contractor), specifying—

- (1) the amount to be withheld;
- (2) the specific causes for the withholding under the terms of the subcontract; and
- (3) the remedial actions to be taken by the subcontractor in order to receive payment of the amounts withheld.

(h) A prime contractor may not request payment from the agency of any amount withheld or retained in accordance with subsection (d) of this section until such time as the prime contractor has determined and certified to the agency that the subcontractor is entitled to the payment of such amount.

(i) A dispute between a contractor and subcontractor relating to the amount or entitlement of a subcontractor to a payment or a late payment interest penalty under a clause included in the subcontract pursuant to subsection (b) or (c) of this section does not constitute a dispute to which the United States is a party. The United States may not be interpleaded in any judicial or administrative proceeding involving such a dispute.

(j) Except as provided in subsection (i) of this section, this section shall not limit or impair any contractual, administrative, or judicial remedies otherwise available to a contractor or a subcontractor in the event of a dispute involving late payment or nonpayment by a prime contractor or deficient subcontract performance or nonperformance by a subcontractor.

(k) A contractor's obligation to pay an interest penalty to a subcontractor pursuant to the clauses included in a subcontract under subsection (b) or (c) of this section may not be construed to be an obligation of the United States for such interest penalty. A contract modification may not be made for the purpose of providing reimbursement of such interest penalty. A cost reimbursement claim may not include any amount for reimbursement of such interest penalty.

(Added Pub. L. 100-496, §9(a)(2), Oct. 17, 1988, 102 Stat. 2460; amended Pub. L. 107-217, §3(h)(7), Aug. 21, 2002, 116 Stat. 1300.)

Editorial Notes

PRIOR PROVISIONS

A prior section 3905 was renumbered section 3906 of this title.

AMENDMENTS

2002—Subsec. (f)(1). Pub. L. 107-217 substituted “section 3133(b) of title 40” for “section 2 of the Act of August 24, 1935 (40 U.S.C. 270b)”.

Statutory Notes and Related Subsidiaries

EFFECTIVE DATE

Section applicable to payments under contracts awarded, contracts renewed, and contract options exer-

cised during or after the first fiscal quarter which begins more than 90 days after Oct. 17, 1988, see section 14(a) of Pub. L. 100-496, set out as an Effective Date of 1988 Amendment note under section 3902 of this title.

[§ 3906. Repealed. Pub. L. 105-362, title XIII, § 1301(c)(1), Nov. 10, 1998, 112 Stat. 3293]

Section, added Pub. L. 97-452, §1(18)(A), Jan. 12, 1983, 96 Stat. 2476, §3905; renumbered §3906 and amended Pub. L. 100-496, §§9(a)(1), 10, Oct. 17, 1988, 102 Stat. 2460, 2463, required submission of reports to Director of the Office of Management and Budget by 60th day after end of fiscal year by head of each agency concerning agency's payment practices during that fiscal year.

A prior section 3906 was renumbered section 3907 of this title.

§ 3907. Relationship to other laws

(a) A claim for an interest penalty not paid under this chapter may be filed under section 7103 of title 41.

(b)(1) An interest penalty under this chapter does not continue to accrue—

- (A) after a claim for a penalty is filed under chapter 71 of title 41; or
- (B) for more than one year.

(2) Paragraph (1) of this subsection does not prevent an interest penalty from accruing under section 7109(a)(1) and (b) of title 41 after a penalty stops accruing under this chapter. A penalty accruing under section 7109(a)(1) and (b) may accrue on an unpaid contract payment and on the unpaid penalty under this chapter.

(c) Except as provided in section 3904 of this title, this chapter does not require an interest penalty on a payment that is not made because of a dispute between the head of an agency and a business concern over the amount of payment or compliance with the contract. A claim related to the dispute, and interest payable for the period during which the dispute is being resolved, is subject to chapter 71 of title 41.

(Added Pub. L. 97-452, §1(18)(A), Jan. 12, 1983, 96 Stat. 2477, §3906; renumbered §3907, Pub. L. 100-496, §9(a)(1), Oct. 17, 1988, 102 Stat. 2460; amended Pub. L. 111-350, §5(h)(8), Jan. 4, 2011, 124 Stat. 3849.)

HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
3906(a)	31 App.:1803(a)(1).	May 21, 1982, Pub. L. 97-177, §4, 96 Stat. 87.
3906(b)	31 App.:1803(a)(2), (3).	
3906(c)	31 App.:1803(b).	

In the section, the words “be construed to” are omitted as surplus.

In subsection (a), the words “not paid under this chapter” are substituted for “which a Federal agency has failed to pay in accordance with the requirements of section 2 or 3 of this chapter” to eliminate unnecessary words.

In subsection (b)(2), the word “accruing” is added for clarity. The word “both” is omitted as surplus.

In subsection (c), the words “with respect to disputes concerning discounts”, “by the required payment date”, and “other allegations concerning” are omitted as surplus.