

Proposed DFARS Rule on Contract Financing Payments

Written by Nick Sanders
Thursday, 30 August 2018 00:00

Lots of regulatory actions recently. We told readers about rules going bye-bye, rules being sunsetted, and rules being added. This article focuses on DFARS Case [2017-D019](#), a proposed rule that impacts contract financing payments.

Remember, this is a *proposed* rule, not a final rule. Public comments are being solicited and it's possible (though unlikely) that they could affect the language of the final rule. So if you don't like what you're reading, we urge you to submit a comment to the rule-makers. Instructions for how to submit comments are in the text of the rule (link in the second sentence above). There will also be a public meeting on the topic, and you can offer comments in that forum, if you have a mind to do so. The point is: the rule is likely to be controversial and the rule-makers know it.

So what does this proposed rule propose to do?

Well, quite a bit, actually.

First, the rule purportedly implements [Section 831](#) of the 2017 National Defense Authorization Act (NDAA). That piece of legislation pointedly reminded DoD that it was not following the requirements of FAR 32.1001, "which established performance-based payments as the preferred Government financing mechanism." As we've [noted](#) in this blog from time to time, DoD has decided that it doesn't like performance-based payments (PBPs) and has tried to disincentivize their use, despite statutory and regulatory language to the contrary. Section 831 was Congress' way of telling DoD to stop it.

Did it work? You be the judge. The following are exact quotes from the comments in the proposed rule.

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DoD proposes to amend DFARS 232.1004 to remove the procedures for analysis of proposed performance-based payments using the performance-based payments analysis tool, and also removes the requirement that the contractor provide consideration to the Government, if the performance-based payments payment schedule will be more favorable to the contractor than

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customary progress payments. The current solicitation provisions at DFARS 252.232-7012 and 252.232-7013 are no longer required and will be removed, thus reducing burden on contractors.

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For maximum performance-based payments, DoD proposes rates and procedures comparable to those for determining the customary progress payment rate. The same representation will be used to determine both the customary progress payment rate and the maximum performance-based payment rate.

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... the contracting officer will not withhold progress or performance-based payments from a contract that includes the clause 252.232-7004 or the provision 252.232-70YY, unless the contractor is receiving progress payments or performance-based payments under the contract at a rate specified in CBAR that includes the 10 percent incentive based on having acceptable business systems without significant deficiencies.

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DoD proposes a customary progress payment rate of 50 percent for other than small businesses and retains the 90 percent rate for small businesses, but provides criteria by which contractors can achieve a customary progress payment rate of up to 95 percent. However, if a contractor or any of its principals has within the preceding Government fiscal year been convicted of or had a civil judgment rendered against the contractor or any of its principals for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State, or local) contract or subcontract; violation of Federal or State antitrust statutes relating to the submission of offers; or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating Federal criminal tax laws, or receiving stolen property, then the contractor will not be eligible for any incentives and the customary progress payment rate will be 25 percent for that contractor.

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On December 1 of each year, a contractor, or higher-level owner of a contractor, may submit a representation as to which criteria it meets and request a higher customary progress payment rate. Based on the representation received, the Director of Defense Pricing and Contracting will determine the appropriate customary progress payment rate for the following calendar year, and that data will be entered into the Contract Business Analysis Repository (CBAR) by December 31.

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If a contractor fails to submit by the December 1 deadline, then the rate for that contractor in CBAR will be 50 percent if the offeror is other than a small business and 90 percent if the offeror is a small business, unless the rate is 25 percent as provided in DFARS 232.501-1(a)(ii). If the offeror subsequently submits a representation after the December 1 deadline, any increase in rates will not be effective in CBAR until 30 days after submission.

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The rate may be adjusted at any time during the year if it is subsequently determined that the representation provided by a contractor was not accurate.

So how did the rule-makers do?

Our reading of the proposed rule is that they did not do very well. The customary progress payment rate for large businesses would fall to 50 percent of incurred costs; even though a contractor could earn a higher payment rate, our experience tells us that doing so would be difficult. The PBP valuations would be pegged to the same analysis used for progress payments based on costs—i.e., starting at 50 percent of contract value. In our view, this defeats the intent of PBPs, which is to divorce financial payments from cost incurrence and, instead, tie them to programmatic progress.

If you are a large business that currently receives customary progress payments based on costs incurred, you really should dig into the proposed language and see what it does to your cash flow. Our prediction: nothing good.

On the other hand, the DoD will be rescinding its nonsense about PBPs, which is nice. Too bad the rule-makers had to tie those actions to somethings that were less nice.