

Proposed DFARS Rule on Contract Financing – UPDATE

Written by Nick Sanders
Monday, 24 September 2018 00:00

Quick update here on the proposed rule we told readers about in [this article](#) . It's DFARS Case 2017-D019. Remember that identifier, because you'll be seeing it again as the rule-making process progresses.

If you didn't read that article you really should. Go on, we'll wait.

You didn't read it, did you? *Sigh*.

For those who didn't click the link, suffice to say that any contractor other than small businesses should rightfully be upset at the proposed rule, which would peg contract financing payments at 50% of (adjusted) incurred costs—though the exact recovery amount would vary by contractor.

If a contractor has legal problems (as itemized in the proposed rule), then it would be allowed to recover only 25 percent of (adjusted) costs through contract financing payments. Otherwise, the standard recovery rate would be 50 percent. If a contractor meets performance criteria in five areas (on time or accelerated contract deliveries, contractor quality, contractor business systems, increasing contract opportunities for small businesses and for the blind and severely disables, and receipt of timely quality proposals), then it may recover up to 95% of (adjusted) costs.

According to the proposed rule:

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.

Based on the language above, Mr. Shay Assad himself will review each contractor submission

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and decide, *by himself with no opportunity for appeal*, the appropriate cost recovery rate for that contractor.

If that doesn't upset you, well. We don't know what would.

Okay, that's the baseline. What's new?

1.

On 10 September 2018, registration for the public hearing on the proposed rule was [extended](#) to 11 September. But don't worry about it. When you woke up the next morning to read the Federal Register—as you do every morning—it was already too late. The public hearing was held 14 September in Alexandria, VA. You can still submit comments, though. The deadline for comments is 23 October, 2018.

1.

On 21 September 2018, DoD [announced](#) *another* public meeting! We don't know why, but perhaps the need for a second meeting may be related to the lack of timely public notice for the first meeting. We don't really know; we're just saying. Anyway, the second public meeting will be held 10 October, in the same Alexandria, VA location. You must register by 4 October if you would like to attend.

Readers, rarely do we advocate for a particular position vis-à-vis a proposed rule. However, this is one of those times. The proposed rule is so obviously biased against contractors and it's potentially unworkable as written even if it weren't. When one adds in the fact that business system adequacy is already subject to what many call punitive payment withholds, this rule is simply a very bad idea.

This is the time you will want to work with your legal counsel to develop comments for submission. This is the time you will want to work with your industry associations to help shape their comments. This is the time you will want to get involved.

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Because if you don't, you will certainly regret the outcome.