

## Another Version of DFARS Business Systems Rule Out for Comment

Written by Nick Sanders  
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On December 3, 2010, another version of the proposed DFARS Business Systems rule (DFARS Case No. 2009-D038) was published for public comment. Here is [a link](#) to the Federal Register notice—all 28 pages of it.

You and your company should review the proposed rule and provide comments back to the DAR Council at the address provided in the Federal Register notice. The previous version received “370 comments from 25 respondents,” according to the new version. Apogee Consulting, Inc. [was one](#) of those 25 respondents.

You might think that a mere 25 responses would not be sufficient to sway the rule-makers, but you would be wrong. The language in the new version indicates that some—perhaps many—of the 370 comments were considered. If your company does business with the Department of Defense, you would be quite foolish indeed to ignore the potential impact the rule will have on your business (and cash flow) if implemented as currently drafted.

In addition to our official comments, we had some choice words for the initial version of the proposed rule. Here’s a link to our [original blog article](#). So what do we think of the new version of the proposed rule?

We think it’s a significant improvement. The mandatory withhold amounts have been reduced. As currently drafted, the rule would impose a five percent payment withhold for each business system that the Administrative Contracting Officer (ACO) determines to have significant deficiencies—although small businesses would be only subject to a two percent withhold. The cumulative amount of payments that can be withheld has been reduced from 100 percent to 20 percent (10 percent for small businesses).

The revised draft permits the ACO to reduce payment withholds upon receipt of an adequate corrective action plan from the contractor, and to eliminate the withholds when it is believed that the corrective actions have been successfully implemented—even though a formal DCAA audit report to that effect has not yet been received by the ACO.

However, the revised rule is far from perfect. In fact, one commenter already said that the rule

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“has gone from terrible to just bad.” The rule-makers still insist that withholds must be mandatory when necessary “to mitigate the Government’s risk when contractors fail to comply with the terms and conditions of their contracts by failing to maintain adequate business systems necessitates this rule.”

The proposed rule permits the ACO to impose withholds even when the Government is not reasonably at risk of financial harm. For example, deficiencies in an Earned Value Management system (EVMS) can lead to withholds. Moreover, the withholds are to be implemented on *all* payments, including contract financing payments on Firm Fixed-Price contract types—as well as on Performance-Based Payments (PBPs).

There is more to say, but we’ll save it for our comment letter. In the meantime, why don’t you get on the stick and see what you think about the proposed rule. This may be your last opportunity to affect it, before it is implemented and you see your cash flow take a hit.

One thing you might want to do is to compare the criteria for “adequate business systems” against your current practices to see how you stack up. If you don’t like the result, you might want to consider beefing-up your policies, procedures, and practices.

This rule, when finalized, is going to be significant. Don’t say you weren’t warned.