

The final DFARS business system rule (henceforth: "BizSys Rule") hadn't been out for 24 hours before Apogee Consulting, Inc. began to hear from our small (yet clearly fanatical) group of readers asking for our take on the matter. Or—as could be fairly said—we were being asked for yet *another* of one our opinions on the final set of regulatory requirements. The last OpEd piece was [right here](#).

The final BizSys Rule's [language](#) didn't have much in the way of substantive changes from the interim rule, which was issued May 18, 2011. We found the DAR Council's promulgating comments to be of more interest. Here are some quotes we'd like to share with our readers—

Comment: A number of respondents stated that DCAA and DCMA are not properly staffed to address the new DFARS rule. Further, with regard to EVMS, the rule provides extensive authority to contracting officers and DCAA and DCMA auditors in evaluating implementation of the ANSI/EIA 748 standard, which was intentionally designed to be flexible. According to the respondents, the magnitude of programs and contractors requiring EVMS surveillance and assessment inherently results in less experienced personnel in positions with this authority. The respondents suggested that Government resources are not adequate in numbers or depth of skills to provide the required oversight.

Response: This rule does not add additional oversight responsibilities to DCAA and DCMA, but instead mitigates the Government's risk when contractors fail to maintain business systems, as is required by the terms and conditions of their contracts. Contracting personnel will continue to make appropriate determinations in accordance with this rule. DoD has been taking measures to align resources and ensure work is complementary. The increased cooperation and coordination between DCAA and DCMA will enable DoD to employ audit resources where they are needed.

Comment: A respondent expressed concern that DCAA has not updated its guidance to reflect the definition of significant deficiency. According to the respondent, DCAA has not issued audit guidance to align its definition of significant deficiency to that in the NDAA and interim rule. DCAA's latest guidance in its MRD 08-PAS-011(R) dated March 2, 2008, starts out defining a significant deficiency as a "potential unallowable cost that is not clearly immaterial." However, in MRD 08-PAS-043(R) dated December 19, 2008, DCAA clarified its guidance that "DCAA only performs audits of contractor systems that are material to Government contract costs" and that a contractor's "failure to accomplish any applicable control objective should be reported as a significant deficiency/material weakness." The respondent stated that DCAA's clarification changes the criteria from a "potential unallowable cost that is not clearly immaterial" to if any deficiency is found during an audit, it is reported and the system is rated as inadequate. The respondent expressed concern that DCAA's guidance is constantly changing with no oversight

body to regulate its audit policies.

Response: DCAA is in the process of updating its guidance and will report significant deficiencies in accordance with the definition of significant deficiency in this rule, as set forth in section 893 of the NDAA for FY 2011. Additionally, contracting officers will administer this rule according to the requirements in section 893 of the NDAA for FY 2011, as implemented in this rule.

Comment: With respect to the language relating to the finding of a significant deficiency by the contracting officer, the interim rule states: "The initial determination by the Government will describe the deficiency in sufficient detail to allow the contractor to understand the deficiency." A respondent suggested that this language be expanded to include a specific explanation as to how the deficiency identified was determined to be a significant deficiency and further, why information produced by the business system under review is considered not to be reliable in accordance with the requirements of the enabling legislation, the NDAA for FY 2011, which defines a significant deficiency as "A shortcoming in the system that materially affects the ability of DoD to rely upon information produced."

Response: "Significant deficiency" means a shortcoming in the system that materially affects the ability of officials of the Department of Defense to rely upon information produced by the system that is needed for management purposes. The contracting officer's significant deficiency determination will describe the significant deficiency in sufficient detail to allow the contractor to understand the deficiency. This rule incorporates criteria for each business system, which define the aspects of the system that materially affect the ability of DoD to rely on information produced. Determinations of significant deficiencies will be based on the contractor's failure to comply with the business system criteria.

Comment: A respondent expressed serious reservations as to the need for the rule, and identified potential harms to contractors if the rule is administered in an inconsistent or arbitrary fashion. According to the respondent, because the determination of a system deficiency is dependent upon the subjective interpretation of critical system criteria, application of the rule could well lead to inconsistent treatment by individual contracting officers and their DCAA advisers.

Response: This rule incorporates criteria for each business system, which define the aspects of the system that materially affect the ability of DoD to rely on information produced.

Business Systems Rule Continues to Shock and Awe

Written by Nick Sanders

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Determinations of significant deficiencies will be based on the contractor's failure to comply with the business system criteria. Each significant deficiency must be determined on its own set of facts and ultimately decided by the contracting officer.

Comment: A respondent stated that the term "material" requires better amplification in the final rule to reduce variability in interpretation. The respondent suggested that the final rule should specify that when determining materiality, a contracting officer or auditor should rely on established Government standards such as CAS and Federal Accounting Standards Advisory Board statements.

*Response: The rule requires that an acceptable business system comply with the system criteria set forth under each of the six business system clauses. The criteria for each business system defines the aspects of the system that materially affect the ability of DoD to rely on information produced. Determinations of significant deficiencies will be based on the contractor's failure to comply with the business system criteria. For example, the system criteria under the clause at DFARS 252.242-7006, Accounting System Administration, requires that the contractor's accounting system "shall provide for *** Accounting practices in accordance with standards promulgated by the Cost Accounting Standards Board, if applicable, otherwise, Generally Accepted Accounting Principles." Each significant deficiency must be determined on its own set of facts regarding compliance with the system criteria.*

Comment: A respondent suggested standardization of two contractor requirements across all business systems to (1) monitor and periodically review the business system to ensure compliance with established policies and procedures and (2) upon request, present results of those internal reviews to the administrative contracting officer (along the lines of DFARS 252.242-7004(c)(2) and (d)(10)). Currently, both requirements are included in the interim rule, but not for all business systems.

Response: While the system criteria language is not standardized across all business systems clauses, each business system clause contains system-specific requirements for contractor monitoring and disclosure. For example, under the property system criteria, the contractor is required to "establish and maintain procedures necessary to assess its property management system effectiveness, and shall perform periodic internal reviews and audits. Significant findings and/or results of such reviews and audits pertaining to Government property shall be made available to the Property Administrator." Furthermore, the contractor "shall periodically perform, record, and disclose physical inventory results."

Let's be clear here: we are sharing with you only a small snippet of the promulgating comments. There are 51 comment categories in the final rule, with multiple comments appearing in each category. The above quotes are the ones we think need some management

focus; but, of course, you should read them all.

In a [previous blog article](#) , we shared the travails of Huntington Ingalls Industries, who became the first contractor reported to have payment withholds imposed under the new BizSys Rule. Reports have recently emerged about the second contractor to see payment withholds—Lockheed Martin’s Fort Worth-based Aeronautics Division—prime contractor for the F-35 Lightning II JSF program. The news was first reported by Bloomberg [here](#)

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The payment withholds were imposed because of significant deficiencies in the operating unit’s Earned Value Management System (EVMS). According to the article, “the withholding will start in March with billings made under a new production contract of about \$4 billion for as many as 30 F-35 fighters.” Because LockMart had submitted a Corrective Action Plan, the payment withholds will be set at two percent instead of five percent.

Fort Worth’s EVMS has been “decertified” since 2010, when the DCMA identified noncompliances with “about half” of the 32 system criteria and also found a failure to make progress on corrective actions, according to this [October 2010 story](#) at AW&ST. Our “friends” at POGO obtained, and publicly posted, the 2010 DCMA report [here](#)

. But it was not until LockMart was awarded the latest F-35 production contract, which contained the complete set of May 2011 BizSys Rule clauses that the payment withholds could be implemented.

Huntington Ingalls. Lockheed Martin. We wonder who will be next in the DOD payment withhold sweepstakes?