Croggle—To astound, shock, or bewilder.

We found a new word recently that comes from Science Fiction fandom. (See above.) We think it appropriately captures our mood as we learned that the Department of Energy (DOE) **has adopted**, apparently on a completely voluntary basis, the DFARS Business System compliance regime.

We were *croggled*.

In a **prior article**, we reacted with a mixture of wonder, bewilderment, and shock to the notion that the Office of the Inspector General of the United States Postal Service would consider the DFARS Estimating System adequacy criteria to be a set of "best practices." Apparently, the USPS operating deficit wasn't large enough; the USPS OIG wanted to add to the deficit by requiring USPS contractors to embrace the same adequacy criteria used by DOD contractors—criteria that have been demonstrated to add a premium of 17 to 20 percent to contractors' pricing.

Similarly, we were croggled when we read that the DOE published an Acquisition Letter (AL) that implemented "compliance enforcement mechanisms in the form of business systems clause and related clauses that requires the contractor to have acceptable business systems that comply with system criteria."

And as is the case with DOD contractors, "When a contractor's business system contains identified significant deficiencies, the contracting officer will be able to withhold a percentage of payments in accordance with the applicable system clause."

The new compliance regime—which is the subject of a proposed rule to modify the Department of Energy Acquisition Regulations (DEAR)—will not apply to Management and Operating (M&O) contractors. As the notice stated, the rule applies to "applies to DOE and NNSA for non-M&O contracts in support of Capital Assets (as prescribed in DOE Order 413.3 B or latest version) or non-capital asset projects (other than M&O)." Moreover, the rule is to be

applied retroactively to existing contracts. The Acquisition Letter stated—

When the threshold and contract type are met, the contracting officer will negotiate bilaterally with the contractor who hold affected contract to incorporate the clauses of this AL into the affected contract within 90 days. The contracting officers will also incorporate the clauses of this AL into affected contracts before extending them or exercising options under them by negotiating bilaterally with the contractors.

Here's **a link** to the formal Acquisition Letter, containing all the details.

Readers will note that DOE is adopting only five of the six DOD business systems—MMAS will not be applicable to DOE contractors. We were also a bit croggled at the rationale for adopting the DOD business systems compliance regime. The AL stated—

Contractor business systems and its internal controls are the first line of defense against waste, fraud, and abuse. Weak control systems increase the risk of unallowable and unreasonable cost on Government contracts. … When the contractor has acceptable business systems that comply with the terms and conditions of the contract, this will improve contract performance.

Given the DOE's rationale, quoted above, it seems *puzzling* that the M&O contractors would be exempted from the new business systems compliance regime.
According to the DOE itself
, M&O contracts are "central to the DOE's business model." That same DOE document also stated, "DOE relies upon the M&O contractors for the performance of the substantial part of the agency's mission." So we are at a loss as to exactly why those contractors would be exempt from the new compliance requirements.

Perhaps additional rule-making, focused on M&O contractors, is planned for the future? We don't know. But we do know that the current additional compliance requirements focus on contractors that are less essential to the DOE mission, that handle less critical projects, and that spend the smaller fraction of the DOE budget.

If you are a DOE contractor, you had better review the AL and contract language, and be prepared to comply. Expect retroactive implementation on contracts already awarded—which of course will entitle you to an equitable adjustment.

Enjoy!