

DOE Contractors Must Comply with Business System Administration Regime

Written by Nick Sanders

Monday, 17 February 2014 00:00



Last August [we reported](#) that the Department of Energy had decided to implement the DFARS Business System administration regime for its contractors. We were interested to note that DOE Management and Operations (M&O) contractors were exempted from that decision. We also noted that DOE had decided to implement only five of the six DFARS business systems, leaving MMAS on the cutting room floor (so to speak).

On February 12, 2013, the DOE issued further implementation guidance via Acquisition Letters (ALs).

[Link to DOE Policy Flash 2014-17](#) which summarized the changes from the prior Business System ALs.

[Link to DOE AL](#) which describes how DOE will implement the Business Systems administration regime.

As is usually the case with DOE, policy makers provided background and context, as well as direction, to their acquisition teams. (We wish DOD would take a similar approach.) When perusing the AL we noted several points we would like to bring to readers' attention.

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DOE contractors that don't have approved accounting and purchasing systems are going to have a tough time being determined to be "responsible" contractors, as that term is defined

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at FAR 9.1. The AL states, “The contracting officer shall ensure that the offeror/contractor has an approved accounting system and purchasing system for use under the contract.” Contractors that have unassessed accounting systems will be evaluated via the SF 1408 Pre-award Survey. Contractors that have disapproved or inadequate systems are going to be in trouble.

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DOE contracting officers are directed to obtain business system information from contractors “not later than 60 days after contract award.” Contractors must submit “written documentation that each business system meets the system criteria required in each clause”.

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DOE provided guidance to its contracting officers addressing negotiation objectives when a contractor has a disapproved accounting system. Options include: (1) give the contractor time to correct identified deficiencies, (2) use another contract type, (3) reduce profit/fee, or (4) including a contractor “reopener” clause.

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Similar guidance was provided to address negotiation objectives when a contractor’s purchasing system has been disapproved.

Importantly, *DOE has different criteria than DOD regarding which contracts are subject to the Business Systems administration regime.* DOD implements the rules only on CAS-covered contracts. All other contracts are exempt from payment withholds arising from disapproved or inadequate business systems. DOD implements the rules on CAS-covered contracts plus “fixed-priced contracts awarded to large businesses on the basis of adequate price competition” regardless of whether cost or pricing data was submitted.

In summary, DOE has adopted a similar, yet subtly different, approach to contractor business system administration.

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Meanwhile, how's DOD doing with its approach to contractor business system administration?

At the end of January, [Bloomberg reported](#) that payment withholds were in place at several of the largest defense contractors, including Northrop Grumman (\$1.4 million), Boeing (\$5.2 million), and BAE Systems (\$19 million). In addition, Bloomberg reported that DCMA was planning to start withholding payments from Honeywell and General Atomics.

Readers will perhaps recall [our story](#) that DCMA had finally approved Lockheed Martin's EVMS business system at its Fort Worth facility, freeing up roughly \$222 million in previously withheld payments. The Bloomberg article reported that \$46.4 million in payment withholds (related to an unidentified deficient business system) had also been freed up at Lockheed's "space unit". Interestingly, DCMA is not letting Lockheed Martin recoup the payment withholds in one lump sum (as we would have guessed), but instead, "Lockheed has received some of the payments, and the rest will be released in future billings." Why? We have no idea.

So if you are a DOE contractor looking to assess risk associated with the new business system administration regime, you have only to look at those large DOD contractors. Based on their experiences, you may just want to take this whole thing seriously.

If you are a DOE contractor new to the business system administration regime, you will want to start by mapping your current practices to the official adequacy criteria. You will want to remediate any gaps. You will want to document the compliant state through policies, procedures and desk instructions. You will want to prepare boilerplate language for your future DOE proposals. You will want to develop walk-through presentations to support future business system audits/reviews. If you don't currently have assessed or approved accounting or purchasing systems, you will want to focus on those two systems first.

We would very much like to think the foregoing will inspire contractors to get serious about their business systems. Unfortunately, experience has taught us to be more cynical. Too many contractors are going to defer investing in their business systems until the very last minute—i.e., just before their covered proposal is due to be submitted. Trust us, at that point it's really too late. The DOE guidance makes it clear that deficient accounting or purchasing

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systems are going to put you at a competitive disadvantage, and may end up costing you the win.

Still other contractors are going to ignore the business systems clauses in their contracts. Those contractors will be surprised when the auditors and/or reviewers show up, and they'll be even more surprised when their system deficiencies lead to payment withholds. They will convene tiger teams and executive steering committees, and bring in platoons of expensive outside consultants, and they'll scramble in a "Chinese fire drill" until, sooner or later, the payment withholds will go away. And then they'll congratulate themselves and award bonuses to the same people who ignored the issue until it was too late.

Don't be those contractors.

If you have business system clauses in your existing contracts, or if you think you will be bidding on contracts subject to the business system administration regime, then *now* is the time to get started. Don't put it off for another day.