

Written by Nick Sanders

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Performance-Based Payments (PBPs): a topic many people, on both the government and contractor sides of the table, are not comfortable with—because use of PBPs involves extra effort. Never mind that (from the contractor’s side) use of PBPs leads to enhanced cash flow and reduced audit support efforts. Never mind that (from the government’s side) use of PBPs leads to reduced oversight requirements and increases depth of competition. Nope. PBPs are not well-understood and they are hard to plan, and so the contracting parties have learned to avoid them in favor of the traditional cost-based progress payments that offer reduced cash flow, increased audit oversight, and keep non-traditional companies from entering the defense marketplace.

The bias against PBPs has been exacerbated by recent DOD policies and DFARS rules that have made it harder to use them. In my view, the DFARS rules and associated DOD policies have been illegal since they contradicted the FAR direction that PBPs are the “preferred” form of contract finance payments—and no agency supplement is permitted to contradict FAR language. And it’s not just me: Congress has expressed its frustration with DOD policy and DFARS language in the past few NDAA’s (National Defense Authorization Acts).

The DAR Council finally got around to doing something about the situation. (Interestingly, the most progress in addressing Congress’ comments has been made since Shay Assad departed DOD. Just a coincidence, I’m sure.)

I have been interested in PBPs since the late 1990’s, when [Jacques Gansler’s](#) DOD focused on “partnerships” with defense contractors and creating more opportunities for private industry to join the marketplace. It was under his watch that the DOD published its first (and best) User’s Guide to PBPs. Since then, I watched the DOD retreat from the bold policies and guidelines he had established—to the point that, until recently, there was no reason to actually avail oneself of the “preferred” contract financing payment method.

However, recently there has been movement. As we [reported](#) to readers, at the end of April the DAR Council issued a proposed rule that would, if implemented as drafted, lead to some significant improvements in the administration of PBPs. However, as we told readers (and as we [told](#) the DAR Council in the letter we submitted to them), the proposed rule still had one fatal flaw: it required contractors using PBPs to maintain a job cost accounting system, and thus imposed a requirement unique to government contractors—which violated both the letter and intent of the NDAA language.

We’re not sure what the DAR Council will make of our input, which was but one public comment out of eleven submitted. (We noted that several other commenters made some of the same

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points we had made.) But whatever the DAR Council does in moving the proposed rule to a final rule, the DOD isn't waiting around for the final language to be published. As if growing impatient with a DAR Council that is seemingly "taking its sweet time" to follow Congressional direction (in the words of one WIFCON poster), DOD recently issued a [Class Deviation](#) that tells its contracting officers how to deal with PBPs—and that Class Deviation seems to address every concern we had with the proposed rule.

Class Deviation 2019-O0011 provides a solicitation provision and contract clause that are to be used ("effective immediately") to deviate from the current (problematic) DFARS regulatory language. Notably, the clause language contains strong language that supersedes both the current and proposed regulatory language.

For example:

Incurred cost is determined by the Contractor's accounting books and records, to which the Contractor shall provide access upon request of the Contracting Officer for administration of the clause. An acceptable job order cost accounting system (per DFARS 252.242-7006) is not required for reporting of incurred costs under this clause. If the Contractor's accounting system is not capable of tracking costs on a job order basis, the contractor shall provide a realistic approximation of the allocation of incurred costs attributable to this contract in accordance with [GAAP] and the Contractor's accounting system.

Or:

If the Contractor's accounting system is not capable of identifying and tracking through the build cycle the property that is allocable and properly chargeable to the contract, the Contracting Officer may consider acceptance of one or a combination of the following forms of security ... and so specify in the contract. [Five alternate forms of security are listed.]

In summary, the use of the Class Deviation solicitation provision and contract clause addresses our fundamental problems with recent DOD administration of PBPs. As such, we welcome their use.

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As we noted at the beginning of this article, many acquisition professionals are uncomfortable with planning and/or negotiating PBP plans. We here at Apogee Consulting, Inc. are available to assist you. Why not give us a call?

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