September 14, 2018 DoD Public Meeting on

Performance-Based Payments and Progress Payments

DFARS Case 2017-D019 (published 8/24/18)

Presentation by

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On behalf of the Professional Services Council (PSC), I am pleased to submit this statement in opposition to the proposed rule titled "Performance-Based Payments and Progress Payments (DFARS Case 2017-D019) published in the *Federal Register* on August 24, 2018.[1] We appreciate the department holding a public meeting on this significant change to these payment provisions

The Professional Services Council is the leading national trade association of the professional and technology services industry doing business with the Federal Government. PSC's almost 400-member companies provide the department with a wide range of services and span the spectrum of the size of companies competing for DoD work.

As it relates to the application to professional and technology services, progress payments are an important component of bidding and performance and the significant proposed reduction in the standard rate will have an adverse impact on our members and our industry. In short, we do not believe the rules changes will improve contractor performance or distinguish and meaningfully recognize high performance segments of companies or entire companies. The proposed rule creates inconsistencies with Section 831 of the fiscal year 2017 National Defense Authorization Act that establishes a preference for the use of performance-based payments. The criteria identified in the proposed rule to potentially increase the percentage introduces huge variables for both government and industry, introduce components that are unrelated to contractor performance, and include subjective criteria for government decision-making over which a contractor has little control. There are also several inconsistencies between the templates and the text of the rule.

While we support meaningful efforts to relieve the administrative burden on contractors and DoD acquisition officials by deleting or modifying current regulations, we do not believe the replacement provisions in this proposed rule offset the benefits from the current regulations in DFARS 232.10 or the requirement to negotiate consideration for providing contractors with improved cash flow.

Statutory Preference for Performance-based Payments

Section 831 of the fiscal year 2017 National Defense Authorization Act establishes a preference for the use of performance-based payments where applicable. This proposed rule seeks to implement this statutory requirement by adding a new provision (S-70) titled "eligibility for performance-based payment," providing in part that eligibility is predicted on compliance with Generally Accepted Accounting Principles (GAAP). But elsewhere in the proposed rule for performance-based payments (see proposed 252.232-70YY), one element for an additional ten-percentage point increase over the new 50 percent starting rate is that all contractor business systems are acceptable, without significant deficiencies. Only in the proposed revision of the first sentence of DFARS 242.7000 is there a reference to the contractor business system requirements – and no clarification of what would constitute a "significant deficiency" for purposes of this rule. And reliance on the detailed requirements of the DFARS rule for the elements of an acceptable accounting or other covered business systems could conflict with the standards in GAAP.

[1] https://www.gpo.gov/fdsys/pkg/FR-2018-08-24/pdf/2018-18238.pdf.

Coverage in CBAR

Most professional and technology companies are not included in the DCMA Contract Business Analysis Repository (CBAR). The rule does not address whether every one of those contractors who seeks customary progress, or performance-based, payments will still have their rate reduced to 50 percent, and then must be covered in CBAR before being eligible for a different (higher) rate.

Criteria for Additional Percentages

For other than small businesses, the rule provides six criteria – and associated percentage values – by which a contractor could increase the progress payment rate or the performance-based payment rate. From a professional and technology industry perspective, we have concerns with several of them. To the extent that small businesses are held accountable to the first three criteria (albeit with lower additional percentages), the comments below are equally applicable.

Contract Delivery Dates

The first element, worth a ten-percentage point increase in the payment rates, requires 95 percent compliance with contract delivery dates for "contract end items and contract data requirements lists or performance milestone schedule." It is unclear whether there is a conjunctive test "end items and data requirements" requiring compliance with both elements but these two are not applicable if there is a performance milestone schedule. Furthermore, for most contracts for and with technology and professional services, there are rarely contractual requirements for "end items" to be delivered. Does this apply to all contracts the contractor is performing, regardless of whether progress or performance-based payments are requested? What is the objective source of this compliance standard? Thus, without any clarification, we are concerned that technology and professional services firms will be ineligible for this increase. Further, this criterion could be read to provide that if there is any single point in time during a government fiscal year when the 95 percent requirement is not met, the contractor is ineligible for the increase for the entire following year, notwithstanding that corrective action was taken by the contractor. Finally, we note that the text of the templates is different from the text of this criteria in the tables and clauses.

CARS

The second criterion, also worth a ten-percentage point increase, requires no "open level III or Level IV corrective action requests" (CARS). While the proposed addition of DFARS 242.302 purports to address the absence of any coverage of CARS, it fails to do so. The only definitive element is included in the first sentence of proposed DFARS 242.302(a) that states "when contractual noncompliance is independently identified." But that is not a definition of a CAR or the levels III or IV provided for in the rule. We read the second sentence as informational – that DCMA had (sic) identified four levels of corrective actions – because the proposed rule does not adopt them as the standard. These CARS are typically applied to manufacturing contracts; most technology and professional services firms do not have the contractual requirements that lend themselves to such CARS. As such, will technology and professional services firms be eligible for this increase?

Acceptable Business Systems

The third criterion, also worth a ten-percentage point increase, requires that all applicable contractor business systems are "acceptable, without significant deficiency." Not all of the six business systems are equal regarding payments; the rule should be more specific of the applicable systems. In addition, as noted above, this provision is inconsistent with the statutory change providing a preference for performance-based payments.

Meeting Due Date for TINA Submission

The fourth criterion, worth a 7.5-percentage point increase, is available if the contractor, at least 95 percent of the time during the past fiscal year, has complied with the due date for submission of certified cost or pricing data (so-called "TINA certification") and complied with the proposal adequacy checklist. We are troubled that the department appears to be using progress and performance-payment payment rates as an additional enforcement mechanism for TINA compliance and/or compliance with the proposal adequacy checklist. Neither of these factors has any bearing on the need for or appropriate use of progress and performance-based payments, or in furthering contractor performance or "to increase (contractor) effectiveness and efficiency."

Achieving Small Business Subcontracting Goals

The fifth criterion, worth a 5-percentage point increase, requires the other-than-small business contractor to have met its small business subcontracting goals during the preceding fiscal year. While we acknowledge the relationship between achieving subcontracting goals and contractor performance, we do not believe that a binary decision is appropriate. For example, government actions (such as a full or partial termination of a contract for convenience, or a failure to exercise an option) could have a significant impact on a contractor's ability to fulfill its subcontract goals. If this criterion is retained, it must provide flexibility and address only those matters that are under the contractor's control.

Subcontracting to Ability One

The final criterion, worth a 2.5 percentage point increase, requires that a contractor has provided subcontracting opportunities for the blind and severely disabled, with no further details provided in the proposed rule. Notwithstanding the merits of finding increased business opportunities for firms owned and controlled by the blind and severely disabled, we do not support the department using the progress and performance-based payment rate as an incentive to make awards to one specific category of businesses – and certainly not to condone a sole-source award to one vendor – Ability One.

We note that the criterion listed under the "Procedures" for establishing performance-based payments in proposed DFARS 232.1004(b) references only subcontracting with the blind and severely disabled, but the templates and the table in 232.501-1(a)(i)(A) refers specifically to "Ability One."

Inaccurate Representation

The proposed rule provides that the progress or performance-based payment rate "may be adjusted" by the Director of Defense Pricing and Contracting if he subsequently determines that the representation by the contractor was not accurate. While we support providing authority for action to be taken in the event of an "inaccurate representation," we have several questions and concerns. First, it appears that the decision is discretionary, but there are no objective standards when the rate "may" or "may not" be

adjusted. There are no standards for the adjustment amount – including whether the Director could rescind eligibility for such financing in its entirety. It is unclear if the bar is "reset" for the next cycle. These are important areas for clarification to eliminate the risk of DoD taking an arbitrary action or imposing a penalty.

25 Percent Payment Rate Standard

The rule provides that if a contractor (or any of its principals) have within the preceding government fiscal year committed certain offenses, the progress payment rate will be set at 25 percent and the contractor will be ineligible for any of the incentives. While we do not condone behaviors that result in criminal or civil judgments relating to the federal contracting process, we are concerned that the department is trying to resurrect the congressionally nullified "Fair Pay and Safe Workplaces ('Blacklisting')" rules by adding coverage of certain state and local government actions. Further, the rule fails to account for any corrective or remedial action or mitigating factors that may have been involved subsequent to (or part of) any judgment – deficiencies that we highlighted in our detailed comments on the "Blacklisting" rules, as well. Rather than address these elements through the payment clauses, these matters are more appropriately address as part of the contracting officer's responsibility determination of the contractor.

Conclusion

For these reasons, PSC is opposed to the rule in its current form. In short, we do not believe the rules changes will improve contractor performance or will distinguish and meaningfully recognize high performance segments of companies or entire companies. The proposed rule creates inconsistencies with Section 831 of the fiscal year 2017 National Defense Authorization Act that establishes a preference for the use of performance-based payments. The criteria identified in the proposed rule to potentially increase the percentage introduces huge variables for both government and industry, introduce components that are unrelated to contractor performance, and include subjective criterion for government decision-making over which a contractor has little control. There are also several inconsistencies between the templates and the text of the rule.

Thank you for the opportunity to provide this statement. If you have any questions or need any additional information, please do not hesitate to let me know. I can be reached at (703) 875-8148 or at chvotkin@pscouncil.org.

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