

Council of Defense and Space Industry Associations
4401 Wilson Blvd. Suite 1110
Arlington, Virginia 22203
codsia@codsia.org
www.codsia.org

CODSIA Case 2019-002

July 1, 2019

Defense Acquisition Regulations System
ATTN: Ms. Amy Williams
OUSD(A&S) DPC/DARS
3060 Defense Pentagon, Room 3B941
Washington, DC 20301-3060

RE: Defense Federal Acquisition Regulation Supplement (DFARS) Case 2019-D002,
“Performance-Based Payments”

Submitted via email: osd.dfars@mail.mil

Dear Ms. Williams:

On behalf of the undersigned members of the Council of Defense and Space Industry Associations (CODSIA),¹ we appreciate the opportunity to provide comments on the subject proposed rule. We recommend that the Department of Defense (DoD) revise the proposed rule to ensure that performance-based payments (PBPs) are the preferred method of contract financing for DoD, consistent with the Federal Acquisition Regulation (FAR), and as directed by Congress in Section 831 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017.

Background

The Senate Report for the FY17 NDAA explains that the Committee on Armed Services was “disappointed in the movement of [DoD] to a greater reliance on cost-type contracts, progress payments, and the need for incurred cost audits performed by the Defense Contract Audit Agency,” and remarked that DoD had “become even more focused on measuring cost as an output rather than focusing on measuring outcomes for the taxpayer and rewarding contractors for meeting those performance objectives.”

¹ CODSIA was formed in 1964 by industry associations with common interests in federal procurement policy issues at the suggestion of the Department of Defense. CODSIA consists of seven associations – Aerospace Industries Association (AIA), American Council of Engineering Companies (ACEC), Associated General Contractors (AGC), Information Technology Industry Council (ITI), National Defense Industrial Association (NDIA), Professional Services Council (PSC), and U.S. Chamber of Commerce. CODSIA’s member associations represent thousands of government contractors nationwide. The Council acts as an institutional focal point for coordination of its members’ positions regarding policies, regulations, directives, and procedures that affect them. A decision by any member association to abstain from participation in a particular case is not necessarily an indication of dissent.

Council of Defense and Space Industry Associations
4401 Wilson Blvd. Suite 1110
Arlington, Virginia 22203
codsia@codsia.org
www.codsia.org

CODSIA Case 2019-002

The Committee expressed “a desire to focus on achieving better outcomes for the taxpayer and reduce the unnecessary bureaucracy and compliance burden that Congress established in the Federal Acquisition Streamlining Act of 1994... the option of using a more commercial payment process known as performance-based payments.”

Thus, language was included in the bill that would become the FY17 NDAA re-establishing that “performance based payments as the preferred Government financing mechanism” while noting that “[p]erformance based payments **shall not** [emphasis added] be conditioned upon costs incurred in contract performance but on the achievement of milestone or events based on performance outcomes...” The conference report associated with the bill also reiterated that the purpose of the section was to “re-establish the policy objective laid out in Federal Acquisition Regulation 32.1001, which established performance-based payments as the preferred government financing mechanism.”

Comments

To fully effectuate Congress’s intent, DoD should remove DFARS 232.1004 (and the corresponding guidance in the PGI), requiring the negotiation of progress payments prior to allowing the contractor to request use of PBPs in exchange for additional consideration. Originally, PBPs had no associated requirement for consideration from passage of FASA until Better Buying Power (2010). Under Better Buying Power, then-USD(AT&L) Ashton Carter established policy that “As a matter of practice, on all fixed price type contracts, ***I expect that the basis of negotiations shall be the use of customary progress payments*** [emphasis added]. After agreement on price on the basis of customary progress payments, the contractor shall have flexibility to propose an alternate payment arrangement for the Government’s consideration.” In support of this effort, DoD developed a ‘cash flow model’ with the intent of “ensur[ing] that the improved cashflow opportunities provide benefit to both industry (at both prime and subcontractor level) and the taxpayer,” which became the basis for calculating additional consideration that contractors would have to offer to use PBPs.

Under this construct, PBPs are not the ‘preferred method of contract finance.’ The two-step negotiation process increases the workload and the administrative burden of both parties. In addition, contracting officers are neither incentivized nor have the time to open a second set of negotiations on a definitized contract. DoD previously acknowledged this burden in a proposed rule to repeal this requirement. DFARS Case 2017-D019, published on August 24, 2018, and later withdrawn, stated, “[T]his rule proposes ***to relieve the administrative burden on contractors*** [emphasis added]” by deleting the current regulations relating to performance-based payments at DFARS subpart 232.10 and the associated clauses at DFARS 252.232-7012, Performance-Based Payments—Whole Contract Basis, and 252.232-7013, Performance-Based Payments—Deliverable Item Basis.

Council of Defense and Space Industry Associations
4401 Wilson Blvd. Suite 1110
Arlington, Virginia 22203
codsia@codsia.org
www.codsia.org

CODSIA Case 2019-002

There should not be any requirement for contractors to put forth additional consideration to use PBPs. While the stated purpose of contract financing is to provide financial assistance to contractors undertaking capital-intensive projects, requiring additional consideration for the use of PBPs ‘tips the scales’ against the contractors, thereby discouraging use of PBPs. This two-step negotiation process is unjustifiably unique to DoD and is counter to the system outlined for the Federal Government in FAR 32.005(a). The FAR clearly states that, when contract financing is included from the start of negotiations, there are no consideration requirements from the contractor; instead, the negotiated price will be used to offset the financing benefits.

Performance-based payments are a program management tool, whereas progress payments simply reimburse contractors for costs incurred. Thus, comparing the payment schedule of one to the other is not an ‘apples-to-apples’ comparison. Performance goals required by PBPs serve as additional requirements placed on the contractor that offset the payment schedule difference offered by PBPs compared to progress payments. Requiring additional consideration erodes the potential benefits of PBPs relative to the increased risk accepted by contractors and undermines the policy objective, directed by Congress in Section 831, to incentivize performance through PBPs rather than simply reimbursing contractors for incurred costs under progress payments.

CODSIA supports the removal of the requirement to limit PBP financing to costs incurred. Accordingly, the language of DFARS 232.1001(a) should be preserved in the final rule. However, the proposed rule should also be revised to clearly state that the maximum PBP rate for DOD is 90% of price, consistent with the FAR. This will ensure that the acquisition workforce is knowledgeable about the administration of PBPs.

The proposed rule should also be revised to eliminate requirements for contractors to track and report costs incurred when requesting performance-based payments on future contracts. Section 831 clearly states that PBPs shall not be conditioned upon costs incurred and that there shall be no requirement for contractors to develop government-unique accounting systems or practices to receive PBPs. However, contractors cannot report such costs without government-unique job cost order accounting systems. Regardless, PBPs should be based on stated performance milestones or events consistent with the contract’s performance objectives. Incurred costs are irrelevant to whether a contractor achieved those performance milestones or events and are not an appropriate or relevant basis on which DoD should measure outcomes for the taxpayer.






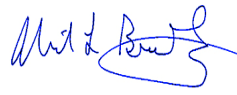
We encourage DoD to adopt the recommendations discussed above in the final rule under DFARS Case 2019-D002 to ensure that PBPs are truly the ‘preferred method of contract finance.’

Council of Defense and Space Industry Associations
4401 Wilson Blvd. Suite 1110
Arlington, Virginia 22203
codsia@codsia.org
www.codsia.org

CODSIA Case 2019-002

Thank you for your attention to and consideration of these comments. Should you have any questions, please contact Wes Hallman, who serves as our project officer for this case. He can be reached at WHallman@NDIA.org or (703) 247-2595.

Sincerely,

	
John Luddy Vice President National Security Aerospace Industries Association	Steve Hall Vice President, Government Affairs American Council of Engineering Companies
	
Eminence N. Griffin Senior Director, Government Affairs and Counsel Information Technology Industry Council	Wesley P. Hallman Senior Vice President for Policy National Defense Industrial Association
	
Alan Chvotkin Executive Vice President and Counsel Professional Services Council	Neil L. Bradley Senior Vice President & Chief Policy Officer U.S. Chamber of Commerce

CC: Kim Herrington
Acting Principal Director
Office of Defense Pricing and Contracting
3060 Defense Pentagon
Room 3B938
Washington, DC 20301-3060