



January 10, 2011

Defense Acquisition Regulations System
Attn: Mr. Mark Gomersall
OUSD (AT&L), DPAP (DARS)
Room 3B855
3060 Defense Pentagon
Washington, D.C. 20301-3060

Via email: dfars@osd.mil

Re: DFARS Case 2009–D038, “Business Systems – Definitions and Administration”

Dear Mr. Gomersall;

The Aerospace Industries Association (AIA) appreciates your consideration of our previously submitted (November 16, 2010) concerns arising from the first version of the proposed rule, “Business Systems – Definitions and Administration,” regarding, among other things, the amounts of withholds, the impact on small business, and the criteria definition for each business system. In general, we do not believe that this rule is necessary. However, as we continue to focus on the proposed rule, there remain several outstanding issues that we feel must be considered and addressed before the final rule is promulgated.

- We believe that the question of scope remains an unresolved issue. The second iteration of the proposed rule continues to apply to all contracts. If the intent of the rule is to address risk in payments resulting from poor internal controls, fixed price and performance based contracts should be exempt as payments are based on contract terms, not on the basis of costs incurred.
- Cost type contracts are “best efforts” contracts and withholding is not appropriate. The Government does not withhold for performance or schedule issues and must not withhold for business systems issues either.
- The proposed rule requires the Contracting Officer to disapprove a supplier’s Earned Value Management System (EVMS) when the initial validation is not complete within a 16-month period from contract award (252.234-7002 paragraph (j)(1), System Disapproval). However, the DCMA Earned Value Management Center, which is responsible for EVMS validation has not successfully demonstrated the ability to complete a system validation within this timeframe since refocusing its efforts beginning in October 2006.

- On the subject of applicability to commercial contracts, while the background to the rule talks about exempting commercial contracts, this needs to be stated explicitly in the rule itself.

Another applicability-related concern centers on the lack of precision in describing which contracts will be subject to withhold. The rule should only apply to contracts which fall under the business system found to be deficient and only to contracts administered by the ACO making the deficiency determination. Because ACOs may render different determinations, it is unclear how differences in determinations will be adjudicated.

- Regarding the definition of deficiency, the revised rule attempts to resolve the issue of how to define deficiency by instituting the requirement that any deficiency could result in a withhold. We strongly believe that deficiencies should be characterized as significant and material before a withhold is deemed appropriate. The Government has already defined the terms “deficiency”, “significant deficiency” “material weakness” by the Public Company Accounting Oversight Board (PCAOB), which applies to publicly traded corporations.

http://pcaobus.org/Standards/Auditing/Pages/Auditing_Standard_5_Appendix_A.aspx#a1.

OMB has also has adopted these terms in - OMB Circular A-123, Management’s Responsibility for Internal Control. As per the OMB approach, identified control deficiencies are not a reportable condition and are to be addressed by internal management. The proposed rule is out of step with the approach of the PCAOB as well as OMB. In both PCAOB and OMB approaches, not all deficiencies are material or significant. Redefining common financial terms within an audit context is wrong and is harmful to the Government, the public, and the contractor as there will be constant confusion as to the significance of reported deficiencies. Non-significant and non-material deficiencies that have little likelihood of occurring or have little impact should they occur should not trigger this level of onerous actions. We recommend that an unambiguous and clear-cut standard of materiality and risk be adopted. Further, we recommend that all Government identified deficiencies in a contractor’s business system must include a reasonable estimate of the net probable undue or material harm to the Government to show the deficiency is material.

- Finally, we continue to be acutely concerned about the Government’s refusal to address and include the fundamental principles of due process in the proposed rule. As with the first iteration, the proposed rule denies a contractor due process and notification of alleged non-compliance by allowing the contracting officer to issue “initial determinations” prior to receiving all the facts. It also shortens the time in which the contractor is given to respond from “60 days or other mutually agreeable date” to the proposed 30 days, with no allowance for an alternative mutually agreeable date. This lack of due process seriously disadvantages contractors who will thus be unable to demonstrate that a DCAA or DCMA determination of deficiency is either not a deficiency or that it has been corrected. Additionally, due to the lack of recourse, it will require contractors to make corrections of all deficiencies without consideration of the attendant costs or benefits – a notion that flies in the face of Secretary Gate’s Efficiency Initiative. Lastly, the proposed rule both

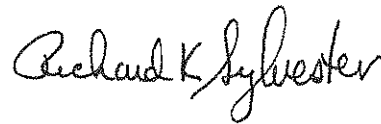
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conflicts with and duplicates existing FAR guidance related to processing non-compliances or deficiencies found in FAR 30.605. These inconsistencies/duplications should be resolved in any subsequent rule.

While DoD's leadership has asked contractors to eliminate overhead costs, a substantial portion of what is being proposed in this rule will ultimately result in non-value added direct or indirect costs. Our members are aggressively trying to minimize overhead while managing the skill sets necessary to manage or improve business systems. We believe that better solutions exist whose benefits will accrue to all of the interested parties – Government, industry, and the American taxpayer.

On behalf of its member companies, AIA thanks you for the opportunity to provide these comments and welcomes an ongoing dialogue to discuss them further. If you have any questions or need any additional information, please contact me at 703-358-1045 or richard.sylvester@aia-aerospace.org.

Sincerely,

A handwritten signature in black ink that reads "Richard K. Sylvester". The signature is written in a cursive, flowing style.

Richard K. Sylvester
Vice President, Acquisition Policy