



March 16, 2010

Defense Acquisition Regulations System
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IMD 3D139
3062 Defense Pentagon
Washington, D.C. 20301-3062

Subject: DFARS 2009-D038 "Business Systems – Definition and Administration"

Dear Mr. Gomersall:

The Aerospace Industries Association (AIA) and the National Association of Manufacturers (NAM) are pleased to provide their comments on the proposed rule, "Business Systems -- Definition and Administration" (DFARS Case 2009-D038). The stated purpose of the proposed rule is to improve the effectiveness of Defense Contract Management Agency (DCMA) and Defense Contract Audit Agency (DCAA) oversight of contractor business systems. The rule proposes a business system clause requiring the administrative contracting officer (ACO) to withhold ten percent per system from payments owed to contractors whenever the ACO determines that one or more of a contractor's business systems contain "deficiencies" or "systems deficiencies."

In summary, we believe that the rule is unnecessary, is overbroad and ambiguous, creates significant mandatory remedies with no process for redress, is of questionable enforceability under existing government contract law, and will increase cost, with limited benefit, to the detriment of the warfighter. Sufficient remedies are already in place, fair, balanced in their approach and well tested.

The Proposed Rule Should be Reduced in Scope

In large part, this rule is drafted in response to the Commission on Wartime Contracting's Special Report 1,¹ which questioned the aggressiveness of the DCMA and DCAA in responding to deficiencies in contractor "business systems." The Commission found that the DCMA and DCAA are not working

¹ CWC SPECIAL REPORT 1, Commission on Wartime Contracting in Iraq and Afghanistan, (Sept. 21, 2009) (hereinafter cited as "Report").

together effectively to protect government interests. To that end, the Commission recommended several steps, including “aggressive compliance enforcement.”² In its Report, the Commission recommended that “DCAA and DCMA must work together to develop agreed-upon standards and processes that communicate the same message to both the individual contractor and the contracting community and help contractors achieve ‘adequate’ systems.”³

However, the Commission’s recommendations are based on its assessment that “[o]pinions rendered and actions taken on *contingency-contractor business systems* have not received the attention necessary to monitor the billions of dollars of costs that flow through these systems” (emphasis added).⁴ In reaching this conclusion, the Report relied on a single day’s testimony on the subject of contingency contracting in Iraq and Afghanistan. Notably, there was no testimony or evidence related to broader DoD contracting policy in a non-contingency setting. A proposed rule as broad in scope as this should be based on a wider set of data; alternatively, the rule should be limited to contingency contracting.

The Proposed Rule Should Include Objective Standards Linked to Materiality

The proposed rule fails to establish objective definitions against which to judge acceptable systems or deficiencies. Definitions of “acceptable” systems in the proposed rule are vague, could be interpreted subjectively, and allow for imposition of additional standards not set out in regulation. For example, the definitions include such catch-all phrases as, “but is not limited to” or “but not be limited to” and adjectives like “appropriate”, “sufficient”, “proper”, “timely”, “consistent”, “logical”, “adequate”, “reliable”, etc., all of which could be interpreted subjectively. The proposed rule should define objective measurements by which to judge a system as deficient and limit the criteria to a few well-defined metrics that cannot be embellished by subjective interpretation.

The definition of deficiency also is too broad. Federal Acquisition Regulation (FAR) Part 15.001 defines “deficiency” as “a **material** failure of a proposal to meet a Government requirement or a combination of significant weaknesses in a proposal that increases the **risk** of unsuccessful contract performance to an **unacceptable** level [emphasis added].” In contrast, the proposed rule states that “deficiency means a failure to maintain **any** [emphasis added] element of an acceptable ... system.”

The proposed rule is contrary to the guiding principles of FAR Part 1.102. The principles state “To achieve efficient operations, the System must shift its

² Report, at 9.

³ Report, at 16.

⁴ Report, at 8.

focus from 'risk avoidance' to one of 'risk management.' The cost to the taxpayer of attempting to eliminate all risk is prohibitive. The Executive Branch will accept and manage the risk associated with empowering local procurement officials to take independent action based on their professional judgment." The current assessment of business systems is essentially "pass or fail" – systems are either seen as adequate or inadequate. As the Wartime Commission notes in its Report:

"In December 2008, DCAA changed its policy, eliminating "inadequate-in-part" opinions and "suggested management improvements." Now, all deficiencies reported by DCAA will render the contractor's system "inadequate," resulting in many more adverse audit opinions. But this does not improve matters. Rather than giving system deficiencies more importance, it seems to have the opposite effect—undermining the significance of the audit findings and weakening their effectiveness. *Use of a binary system involving a pass/fail rating does not adequately depict relative degrees of impact.* Without any reasonable provision for more accurately describing systems that are less than perfect, contractors and contracting officers find the "adequate/inadequate" options too restrictive.⁵

Thus, even minor, administrative issues that have no material impact on the Government's rights could result in deficiencies and a system being determined to be "inadequate" with a resulting withhold. The proposed rule fails to give adequate consideration to the seriousness or effect of alleged deficiencies and whether the withholds bear any rational relationship to the materiality of the problem to be fixed.

Withholding is traditionally associated with redress for deliverable item/service nonconformance to requirements, and the specific dollar amount withheld is *proportional* to the specific impact caused to the Government. The arbitrarily mandated 10%-per-system-deficiency withhold both denies the ACO of the prerogative to assess a proportional (fair and equitable) response to the specific deficiency and its potential impact to the Government, and creates a severe and potentially fatally debilitating liability to defense contractors, particularly smaller, less capitalized businesses. For example, if a system deficiency has a potential to overstate one particular element of cost comprising a fraction of one percent of a contractor's business base, even a 10% withholding of all financing payments would be grossly out of proportion to the potential damage. There is no explanation as to why 10% is deemed to be a commensurate withhold necessary to protect the Government's interest and why it would not be found by courts to be arbitrary.

⁵ Report, at 4

The proposed rule contains no specified time when withholds are to be released. It also does not address the timeframe or process for reassessing corrected deficiencies. Nor does it address how withholds are to be applied company-wide, across multiple programs and sites, and which ACO would be responsible for making necessary determinations to establish, reduce, or withdraw withholds.

The Proposed Rule Creates Significant Mandatory Remedies with no Process for Redress

The proposed rule offers no opportunity for contractor “due process.” FAR Part 1.106(b) establishes a requirement that ACO’s are to “ensure that contractors received impartial, fair, and equitable treatment.” Unilateral determination by the ACO on subjective standards for one contract does not allow for response by the contractor or right of appeal of deficiencies to someone whose business experience and breadth of view allows that person to assess the industrial base ramifications of the decision. The ACO’s notification of deficiencies is supposed to describe the deficiency “in sufficient detail to allow the Contractor to understand what actions are necessary to correct the deficiencies,” yet there is no process for addressing situations when the Contractor does not understand what actions are necessary to correct the deficiencies based on the notice provided by the ACO.

FAR Part 1.102(b) states that “... rules, regulations, and policies should be promulgated only when their benefits clearly exceed the costs of the development, implementation, administration, and enforcement.” Imposition of the proposed rule’s withhold process, particularly a compound withhold against several systems or the most egregious withhold of 100% of cost reimbursements or financing payments, could put a contractor out of business, particularly in a weakened economy. Such withholds could likely affect a contractor’s entire DoD (and other Government Department and Agency) business base as the use of common systems for greater efficiency becomes more widespread.

The Proposed Rule Will Increase Cost with Limited Benefit

If the proposed rule is implemented, it would have many negative unintended consequences. For example, it would establish a major barrier to entry for new contractors. For existing contractors, it would harm cash flow and the ability to obtain financing necessary for continued performance of their contracts. Fear of failure on existing adequate systems will prompt unnecessary administrative cost and improvements to business systems, which will divert resources away from products. Small businesses that are growing their government business to the point that a business system would be required, would hesitate to take such a step knowing that payment withholds will quickly follow as they struggle to get their business system(s) up and approved. All these unintended consequences could directly result in loss of jobs for many

Americans. More importantly, this would be contrary to supporting our warfighters and our national security, both of which depend on a *healthy* industrial base.

Remedies Already Exist to Address Deficiencies

The government already has a number of enforcement mechanisms to ensure that material deficiencies in contractor systems do not result in unchecked fraud, waste or abuse in government contracting and provide contractors with appropriate incentives to quickly address any deficiencies. If system deficiencies substantively increase the likelihood of improper payments or otherwise materially affect the government's contractual rights, it is appropriate for the government to exercise those enforcement tools, and the contracting officer can ensure that the response to a deficiency is fair and reasonable and in proportion to the risk created. Among the remedies already in place are:

- Purchasing system disapprovals and the associated significant increase in oversight of the contractor's purchasing system (e.g., consent to subcontract);
- Accounting system disapproval and associated reduction or suspension of progress payments or cost reimbursements, the withdrawal of direct billing authority, etc.;
- Estimating system disapprovals and the associated negative impacts on proposal analysis, negotiation, and contract award;
- Identifications of material management and accounting systems (MMAS) deficiencies and the associated impacts on proposal analysis, negotiation and contract award as well as reductions in progress payments or disallowance of costs on vouchers;
- Withdrawal of property system approval and the resultant impact on contractor responsibility for loss, damage and destruction of property, government self-insurance, etc.;
- Performance of pre-award responsibility determinations;
- Adverse pre-award competitive evaluations of contractors;
- Negative past-performance evaluations;
- Suspension or reduction of payments through the DCAA Form 1 process; or
- Suspension and debarment.

Although the above list is not all inclusive, it represents a significant repertoire of enforcement mechanisms that can be applied, where appropriate, to protect the government's interests. The decision to exercise these remedies is left to the reasoned judgment of the contracting officer. Thus, they can be applied only when necessary and it is incumbent upon the contracting officer to ensure that they are not imposed indiscriminately or disproportionately. The remedies proposed in the business systems rule are additive to these already significant remedies and do not provide for application of reasoned judgment in application, creating an environment that removes due process, and arbitrarily

mandates minimum financial penalties for system deficiencies, regardless of their true impact on the government.

Need for a Public Hearing

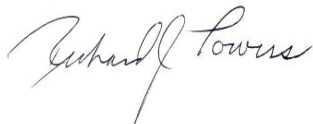
Industry supports the public policy goal of reducing fraud, waste, and abuse and strengthening control systems. However, we do not believe this proposed rule will accomplish that purpose. We also believe that there are existing remedies that can be used to address system deficiencies and protect the public interest. If the government believes the existing remedies are not sufficient, additional discussion could suggest modifications to the current mechanisms. We strongly recommend a public hearing to fully address all concerns, and if a rule is still required, DoD should re-issue a re-written proposed rule.

Need for a Formal Review of Regulatory Impacts

Industry strongly believes this rule is subject to review and requirements under Section 6(b) of Executive Order 12866, Regulatory Planning and Review.” A preliminary estimate of the financial impact from this proposed rule is estimated in the hundreds of million dollars.

Detailed and specific comments on the proposed rule are attached. The AIA point of contact for this proposed rule is Mr. Dick Powers who may be reached at 703-358-1042 or by e-mail at dick.powers@aia-aereospace.org

Sincerely,



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AIA



Marc-Anthony Signorino
Director, Technology Policy
NAM

Additional Comments

Contract Enforceability Concerns.

The failure of the U.S. Government to pay for goods and services provided could be a material breach of contract that would permit the contractor to stop work. The requirement to compensate contractors for providing goods and services flows from the Constitution itself in the Fifth Amendment and viewing failure to pay as a breach of contract has been recognized by the courts.

- After award it is inappropriate for the DoD to withhold up to 100% of contract performance payments, as required in the proposed DFARS 252.242-7XXX. In cases where the DoD believes deficiencies are “highly likely” to lead to improper contract payments or represent an unacceptable risk of loss (neither concept being defined in the proposed rule), the likelihood is that the contract is ripe for termination. Absent that, withholding payments while expecting continued contractor performance is a material breach of contract. See, e.g., Northern Helex Co. v. U.S., 197 Ct. Cl. 118 (1972) (“Perhaps mere delay in payment, for a while, would not be a material breach but there is a clear distinction between delay of that kind and a total failure to pay over many months. Our jurisprudence strongly suggests that the latter sort of breach by the Government is material, just as it would be in the case of a private party”)(citations omitted). Northern Helex, at 124.
- In Priebe & Sons, Inc. v. United States, 332 U.S. 407 (1947), the Supreme Court stated that liquidated damages provisions “serve a particularly useful function when damages are uncertain in nature or amount or are unmeasurable, as is the case in many government contracts.” A liquidated damages provision will not, however, be enforced if it is a penalty. Priebe, at 411-412. FAR 11.501 states the general policy that liquidated damages clauses should be used only when: (a)(1) The time of delivery or timely performance is so important that the Government may reasonably expect to suffer damage if the delivery or performance is delinquent; and (2) The extent or amount of such damage would be difficult or impossible to estimate accurately or prove. The FAR’s two-part test resembles the common law rule that such a clause is enforceable only if: (1) the fixed amount is a reasonable forecast of just compensation for the harm that is caused by the breach; and (2) the harm that is caused by the breach is incapable of accurate estimation. See Mega Constr. Co. v. U.S., 29 Fed. Cl. 396, at 502.

These two cases alone demonstrate that withholding an arbitrary percentage (10 -100%) of payments owed is a material breach of contract and that any withhold must be proportional and material.

Applicability to All Contract Types Concerns.

The rule proposes withholding against *all* reimbursements and payments and *all* systems.

- Performance-Based Payments (PBPs) should be removed from the proposed rule. PBPs are not based on incurred cost and are unaffected by deficiencies in certain systems. This is why DFARS clause 252.242-7004 “Material Management and Accounting System” is not to be incorporated in contracts utilizing PBPs as the financing mechanism.
- Negotiated Firm Fixed Price contracts should be exempt from the proposed rule. System deficiencies in business systems covered by the proposed rule would not result in actual or potential harm to the Government under this contract type because the total Government liability is fixed.
- Cost-type contracts, which are “best efforts” by definition, should be wholly or mostly exempt from the proposed rule. DoD does not withhold where the contractor does not meet product specifications. It certainly ought not withhold up to 100% for deficiencies in business systems, unless the deficiency is in an accounting system or is some other way directly impacts billings.
- Government Property Systems should not be subject to this proposed rule. FAR Part 45 has been revised and replaced the requirement for an approved property system with compliance with voluntary consensus standards. The definition of an acceptable property system identified in the proposed rule is not in conformance with the new FAR Part 45 requirements since they are not a voluntary consensus standard.
- Contracts for Commercial off-the-shelf (COTS) and Commercial Items should be exempt from this proposed rule. COTS and Commercial item contracts do not include the business systems requirements defined under this proposed rule (i.e., they are not required for FAR Part 12 contracts) and requiring such systems would not reflect customary commercial practices.
- It should be made clear in the implementing guidance that the new clauses are only applicable to prime contractors and are not to be flowed down to subcontractors.

Impact on Small Businesses Concerns.

Some small businesses may not have the financial resources to support the business systems, nor the expertise to administer those business systems. That cost will probably flow to the contractor in the form of increased procurement costs. In addition, a potential payment withhold will have an impact of the small business “cash flow,” along with an increase in the number of supplier claims.

Unanticipated Consequences.

If the proposed rule is implemented, it will require a number of significant and expensive changes in current laws, regulations, and policies. It will also have a huge impact on the Government’s already thinly-stretched and under-trained workforce.

- Implementation of this proposed rule will require additional resources at DFAS and modifications of the MOCAS system because all payments for contracts with withholds must be processed manually.
- If the proposed rule is adopted in its current form industry strongly believes the Government must also revise both the Prompt Payment Act (PPA) (5 CFR Part 1315) and Contract Disputes Act (41 U.S.C. 601-613) to provide contractors with interest for withholds taken in excess of the value of actual harm or risk avoided. Industry estimates, based on the current DCAA Audit Goals (a minimum of 45% of audit reports must include findings)⁶, that the unpaid withholds balance at any given point during the year will range between \$5 and \$10 billion which will increase contractors non-recoverable financing costs. Currently the PPA exempts contract financing from interest penalties. The PPA should be revised to provide interest to contractors on financing invoices for withholds taken in excess of the actual demonstrated harm or risk. The Contract Disputes Act should also be revised to specifically address consideration when withholds of any nature are taken and subsequently determined to be in excess of the amounts deemed necessary based on actual harm to the Government.
- If the rule is implemented in its current form, it will destabilize contractor cash management by, for example, changing terms and conditions for borrowing from lending institutions, cash reserves, and the cost of borrowing.

⁶ GAO-09-1009T, Government Accountability Office Testimony, “DCAA Audits: Widespread Problems with Audit Quality Require Significant Reform,” September 23, 2009, p. 12.

- The ultimate impact of this rule on contractors is highly dependent on current and future DCAA/DCMA policies that are not subject to the public comment process. For example, the December 19, 2008 DCAA memorandum, “Audit Guidance on Significant Deficiencies/Material Weaknesses and Audit Opinions on Internal Control Systems,” provides guidance to auditors on evaluating contractor’s internal control systems and no longer permits a determination that a system is “inadequate in part.” The internal DCAA policy magnifies the adverse impacts and consequences of the proposed rule to government contractors. If DCMA and DCAA policies can have such a significant cost or administrative impact on contractors, then a strong argument can be made that such policies are not just internal agency policies, but policies that must be published for public comment pursuant to the requirements of the OFPP Act.
- DCAA’s role under the proposed rule means that timely action and follow-up by DCAA will be even more important. DCAA now lacks the resources to timely and adequately perform its existing functions. This is exactly the wrong time to require DCAA to do more, particularly when slow DCAA follow-up will impede performance.

Regulatory Flexibility Concerns

In the Background portion of the proposed rule notice, DoD has asserted that the proposed regulation is not a significant regulatory action per Section 6(b) of Executive Order 12866. The language of the Executive Order in section 3(f) defines a significant regulatory action as one that is *likely to result* in a regulation that may:

- (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities;
- (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- (3) Materially alter the budgetary impact of entitlements, grants, user fees or loan programs or the rights and obligations of recipients thereof; or
- (4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities or the principles set forth in this Executive Order.

It is reasonable to conclude that the proposed rule will *likely* have an annual effect on the economy of \$100 million dollars or more considering that contractor business systems will have to be brought into complete compliance and accounting for the potential withholding of payments to contractors is *likely* to materially affect the defense industrial base, contract competition, and jobs. The

rule will also result in inconsistency between the FAR and the DFARS where business system administration and oversight overlap or coexist. Since this rulemaking is so clearly a significant regulatory action, the DAR Council should comply with all the process requirements of EO 12866 before proceeding to any final rulemaking.

The proposed rule notice asserts that DOD has performed an initial Regulatory Flexibility Analysis consistent with 5 U.S.C. 603, but did not include the analysis and cannot estimate how the rule will impact small businesses. Instead, the Federal Register notice invites comment by industry to backfill that regulatory requirement or requests that prospective commenters specifically request the analysis before DoD will provide it. The statute cited above requires:

- (1) An identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap or conflict with the proposed rule.;
- (2) A description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities; and
- (3) Consistent with the stated objectives of applicable statutes, a discussion of significant alternatives such as the establishment of differing compliance or reporting requirements or timetables.

There is no firm evidence that the proper analysis of alternatives was ever performed or, if performed, seriously contemplated as impacting small defense contractors who would be subject to this proposed rule. If DoD has performed these analysis as required, the rulemaking notice should be amended to include the appropriate work product or the analysis of alternatives provided to demonstrate compliance with the requirements of 5 U.S.C. 603.

Additional Thoughts on Existing Remedies.

The Government has existing remedies to address system deficiencies and protect the Government's interest. Examples include suspension or reduction of progress payments, disapproval of government property systems, disapproval of purchasing systems, defective pricing remedies for estimating system errors, and pre-award responsibility determinations to assess grave financial system inadequacies.

- DCAA/DCMA have existing authorities to address the concerns that are underpinning the need for this rule -- i.e., the Form 1 process. The benefit of the Form1 process is that the suspension of payment is tied to actual disputed costs that have already been reimbursed or those that will be on future invoices. Another benefit of the Form1 process is that it is both tested and well defined, and it provides contractors with the opportunity to

challenge the rationale for the withhold to the Armed Services Board of Contract Appeals.

- Approval of billing rates by the DCAA and the ACO (DCAM 6-705) is another tool available to the Government when costs lack adequate support or risks are. In comparison to directing and taking withholds on every contract financing invoice, the process of establishing billing rates at a level that removes questioned costs or actual risk represents a much simpler approach to address DCAA or DCMA concerns. The use of billing rates provides risk or harm mitigation coverage on all cost type contracts and all fixed price contracts receiving progress payment financing. Similar to the Form1 process utilized on cost type contracts, the ACO already has the authority to suspend or reduce contractor progress payment billings when system deficiencies or improper controls exist (FAR 32.503-6). In both cases the current regulations are well crafted and clearly state that withholds should be fair and in relation to the potential risk. The benefit of using billing rates, Form1, and progress payment adjustments is that the DFAS automated payment process would not be adversely impacted. It is estimated that the withhold process directed under the proposed rule, which would result in manual invoice processing by the DFAS payment center, would increase the cost allocated to the services by \$5 million a year. The administrative expense of taking withholds using the current processes authorized by regulation would be nominal if any.
- FAR also already protects the Government's interest for deficiencies in a property management system by specifically addressing remediation for individual pieces of lost, damaged, destroyed, or stolen Government Property. Consequently any withholding against all of a contractor's financing payments would certainly be grossly out of proportion with the damage.
- The proposed rule assumes that system deficiencies cannot be addressed through manual interventions and other alternatives to protect against incorrect invoices or overpayments. Recognition of multiple ways to prevent deficiencies would reduce the need for a withhold and the impacts that a withhold will cause.
- The rule fails to give any regard to the billions of dollars that the U.S. defense industry has invested under Sarbanes Oxley (SOX) regulations to improve the control environment. The proposed rule duplicates mitigation that SOX was designed and implemented to address.

Technical Changes.

For each business system, the DFARS must make absolutely clear the criteria are for an "acceptable system." That can be done in the appropriate

DFARS subpart or in the DFARS clause, but should not be done in both places to avoid confusion and possible conflicts. The same comment applies to the discussion of “systems deficiencies” and “correction of deficiencies.”

- 215.405-5-70, Disclosure, maintenance, and review requirements
 - (a)(4) defines a “deficiency” as failure to maintain an element of an acceptable estimating system,” but leaves unanswered where the elements of an acceptable estimating system are. Recommend the definition reference the DFARS clause 252.215-7002 which describes an “acceptable system.”
 - (d)(1) describes the “characteristics of an acceptable estimating system,” yet paragraph (2) references DFARS clause 252.215-7002 which contains a more detailed description of an acceptable estimating system. Recommend the criteria for an acceptable system be described only in one place (the DFARS clause).
 - (f) states, “The ACO, in consultation with the auditor, shall...” It is unclear what “in consultation” means, especially since paragraph (h) says, “The ACO shall approve the estimating system....” The DFARS must be absolutely clear with regard to the roles and authority of the ACO and the auditor. The use of the term “in consultation” makes the responsibilities unclear.
 - Each of the subparagraphs has a title except for paragraph (h). Recommend paragraph (h) be titled “Withdrawal of Findings of System Deficiencies.”

- 234.201 [EVMS] Policy
 - The DFARS does not provide a clear description of the criteria for an “acceptable system” against which compliance can be measured and deficiencies identified.

- 242.70x1, Business system deficiencies
 - (b)(2) states, “The ACO, in consultation with the auditor....” It is unclear what “in consultation” means, especially since paragraph (3) is entitled “Notification of ACO final determination.” The DFARS must be absolutely clear with regard to the roles and authority of the ACO and the auditor. The language of 242.70x1(b)(2) is inconsistent with similar language at 215.407-5-70 (d)(2) by including a “consultation” requirement.
 - (b)(3)(i), (b)(3)(i)(B)(3), and (d)(3) state that the ACO shall withdraw the initial notification if the contractor has corrected **all** deficiencies....” [emphasis added], yet the language associated with the estimating system, EVMS, MMAS, accounting system and purchasing system state that the system may be approved when the contractor has **substantially** corrected the system deficiencies ... [emphasis added].” This inconsistency should be corrected to allow the system to be approved and withholdings to be reinstated

based on substantial correction of deficiencies. It is unrealistic to expect in the enormously complex business systems that are required that “all deficiencies” can be corrected at a given time. This inconsistency also illustrates the danger in duplicating the discussion of policies in several places in the proposed rule.

- Once the contractor has addressed the identified deficiencies, the government must review and provide a response on those corrective actions in a timely manner. The proposed rule does not provide the government and contractor with any guidelines associated with how and when corrective actions will be dispositioned, exposing the contractor to considerable risk associated with reinstatement of payments and cash flow necessary to pay employees and suppliers.
- 242.7501, [Contractor Accounting Systems] Policy
 - (a) This paragraph should make it clear that “incentive type” contracts are those with a “cost” incentives, not contracts with other non-cost related incentives (performance incentives, schedule incentives, etc).
 - (a) The proposed rule adds “time and material, or labor hour contracts” to the list of contract types that would requirement the new accounting system administration clause. We believe this would be inappropriate where the contractor was providing a commercial service on a time and material basis, or where the value of the time and material or labor hour contract was small (for example, less than \$650,000). The new clause describes an accounting system requirement that is unlikely to be in place for small businesses, or companies with limited government business. This will limit competition for time and material or labor hour contracts to only those contractors that routinely do business with the government and already have this extensive accounting infrastructure in place.
 - 242.7503 (a) makes the accounting administration clause applicable to time and material and labor hour contracts. We believe this requirement is extraordinarily burdensome, especially for businesses that do not otherwise already have such an extensive system in place.
 - Similar changes should be made to 252.242-7xxx (d)(5).
- 244.305-70, Granting, withholding, or withdrawing approval
 - This part states, “The ACO, in consultation with the purchasing system analyst (PSA) or auditor, shall...grant, withhold or withdraw system approval....” This introduces confusion with regard to roles and authorities, especially in light of the language at 244.305-70(b)(3) which states, “The ACO shall approve the purchasing

system....” It must be absolutely clear that the ACO has the authority and responsibility to make such determinations.

- 252.215-7002, Cost estimating system requirements
 - (a), definition of an “acceptable estimating system” states an acceptable system is one that “complies with, but is not limited to, the system requirements in paragraph (d) of this clause....” We believe it is unreasonable to establish the authority to withhold payment and pursue other remedies using a set of criteria that is defined in paragraph (d), but “not limited” to those criteria. Similar language is used in (d)(4). This language is a clear invitation to disputes with regard to the basis upon which deficiencies are identified and payment withholdings established. For each business system, the criteria must be absolutely clear, audits must follow those same criteria, and any deficiencies must be tied back to the applicable criteria.
 - (d)(4)(xiii) requires that the estimating system “...include the comparison of projected results to actual results and an analysis of any differences.” The intent of this requirement is unclear. Considerable time often elapses between when an estimate is prepared for the government and when the actual work is done to produce the item or perform the service. It is unreasonable to expect that contractors would discretely track and analyze **any** differences between a given proposal and the actual performance of the proposed work, often at a much later date.

- 252.242-7xxx, Business systems
 - The proposed Business System clause includes requirements associated with “systems deficiencies” and “correction of deficiencies”. In this regard, we note that each of the clauses associated with the individual business systems also addresses the same topics. In order to avoid the inevitable conflicts between the clause requirements, we recommended that each system clause define only the criteria for an acceptable system, and leave the discussion of how “system deficiencies” and “corrective actions” will be handled to the business system clause. Addressing the same issue in multiple clauses is certain to lead to conflicts and disputes.
 - (d)(5) defines the types of contracts that are covered by the term “payments.” This list of payment types is inconsistent with the language of 242.7503.
 - (d)(7) states that “payments on any basis” are covered. This is inconsistent with (d)(5) which defines the type of contract payments that are covered.

- 252-242-7yyy, Accounting system administration.

- (c) states, “The contractors accounting system shall be in compliance with applicable laws....” This is an open-ended requirement that is unreasonable to serve as a measurement against which deficiencies will be measured. Which laws does DoD consider “applicable?”
- 252.244-7xxx, Contractor purchasing system administration
 - The clause makes distinctions between “purchasing and subcontracting,” “purchase orders and subcontracts,” and “subcontractor and supplier.” Please clarify the distinction.
 - (a)(3) establishes a criteria for a purchasing system that procures materials “...at the most economical cost....” This term is unclear. Is DoD establishing a requirement that contractors must procurement items from the lowest cost suppliers?
 - (c) defines as a system requirement that purchase orders and subcontracts contain “...all flow downs, including terms and conditions and any other clauses needed to carry out the requirements of the prime contract.” The scope of DoD purchasing system requirement should be limited to verification that FAR/DFARS required flow downs from the prime or higher tier contract have been include in the purchase order or subcontract. All other terms and conditions are within the scope of the contractor to determine and should not be subject to purchasing system review.
 - (c)(11) requires the contractor to prepare a Price Negotiation Memorandum in accordance with FAR 15.406-3. This is a requirement that is appropriate for the contracting officer and should not be imposed on the contractor, especially without establishing a dollar threshold or other criteria. We recommend the contract be requirement only to document price negotiations following the guidelines of 15.406-3 when the subcontract exceeds the Truth in Negotiation Act threshold.