

The Federal Acquisition Regulation (FAR), at [Part 32.9](#) , implements the Prompt Payment Act of 1982 ( [Public Law 97-177](#) ), which was enacted to "require Federal agencies to pay their bills on a timely basis, to pay interest penalties when payments are made late, and to take discounts only when payments are made by the discount date." The purpose of the Act, and its implementing regulations in the FAR, was to protect contractors from a government bureaucracy that was notoriously slow to pay, and from the cash flow hardships caused by such slow payments. These contractors, who generally must follow all direction given to them by authorized government representatives, and who generally must continue to perform their government contracts regardless of any losses they may be incurring, had little if any recourse available to them for such contract breaches, short of litigation. But under the Prompt Payment Act, contractors could typically expect to receive payment for properly prepared invoices within 30 days (often sooner), or else receive an additional interest payment automatically--i.e., without making another request. Such robust protection is one reason that interest on financing, as well as bad debt expense, are considered "unallowable costs" under government regulations. Contractors shouldn't need to incur such expenses because the Federal government is such a good customer with respect to making on-time payments, so they can't claim the costs on proposals, invoices, or claims.

### **But no longer.**

On August 19, 2009 the Director of Defense Procurement and Acquisition Policy (Mr. Shay Assad) promulgated a memorandum to all military services that implemented a "class deviation" from the requirements of FAR Part 32.9 with respect to contractors involved in "emergencies ... military contingency operations ... and the release or threatened release of hazardous substances. ..." In that memo, which can be found [here](#) , Mr. Assad stated that the Department of Defense would no longer be bound by the promise to pay a contractor within 30 days of receipt of a proper invoice, or to automatically add an interest payment when due dates were inadvertently missed, for any payment that is "either certified for payment in an operational area, or ... contingent upon receipt of necessary supporting documentation (i.e., contract, invoice, receiving report) emanating from an operational area." His rationale for exempting these actions from the requirements of the Prompt Payment Act is that "It is clear that ... the operational area can be so fluid and dynamic that carrying out normal business practices can be extremely challenging [and] this deviation will provide the [Defense] Department with needed flexibility in limited circumstances."

### **What a shame.**

Mr. Assad is discussing the very contractors deployed on the battlefields of Southwest Asia and elsewhere, the contractors supporting recovery operations in New Orleans and elsewhere, and the contractors who respond to terrorist attacks and accidental spills of hazardous substances. He is saying that the companies of these brave and dedicated individuals, who often risk their lives along with the military servicemen and women they support, cannot be assured of timely payment from the U.S. Government. Although those companies still need to make their payroll each pay period, and fly personnel to and from operations, and purchase supplies and equipment (and pay their suppliers on time), they should not expect timely payment from their Government customers.

The Commission on Wartime Contracting has [blasted](#) LOGCAP IV contractors and their business systems. It seems patently unfair for the DOD to forgive itself its inadequate business

## **DOD to Contractors in the Battlefield: You'll Be Paid When We Get Around to It**

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systems while pointing the finger at the contractors' business systems. Moreover, if you wanted to disincentivize contractors from supporting contingency and emergency operations, if you wanted to severely limit competition to the few biggest companies who might have the resources to take this cash flow hit, while keeping smaller (more agile and potentially more responsive) companies out of the bid process ... well, this would seem to be an outstanding way of doing so.