Another update here on the proposed rule we told readers about in **this article** . It's DFARS Case 2017-D019.

In our article (link in 1st sentence), we didn't have many nice things to say about the proposed rule. Subsequently, we **updated** readers with another article, in which we had even fewer nice things to say about it. In that second article, we wrote—

Readers, rarely do we advocate for a particular position vis-à-vis a proposed rule. However, this is one of those times. The proposed rule is so obviously biased against contractors and it's potentially unworkable as written even if it weren't. When one adds in the fact that business system adequacy is already subject to what many call punitive payment withholds, this rule is simply a very bad idea.

So what's changed since then?

Well, what's changed is that the Department of Defense got the message and withdrew the proposed rule.

On October 4, 2018, a **notice** was published in the Federal Register announcing that "DoD is withdrawing the proposed rule on performance-based payments and progress payments that published on August 24, 2018, and is cancelling the public meeting previously scheduled to be held on October 10, 2018."

Simple. Clear. To the point.

But it didn't tell the whole story.

The rather banal official notice didn't mention the Washington Post **story** , written by Aaron

Gregg, that stated—

A Defense Department plan to save taxpayer dollars by paying defense contractors less money upfront on major weapons deals has drawn the ire of influential Republican lawmakers, who say the scheme will hurt the technological prowess of the U.S. military. In a Sept. 24 letter addressed to Deputy Secretary of Defense Patrick M. Shanahan, House Armed Services Committee Chairman Mac Thornberry (R-Tex.) and Senate Armed Services Committee Chairman James M. Inhofe (R-Okla.) asked the Defense Department to walk back a proposed policy that would cut the amount of financing support that defense contractors get in the early phases of a contract. They called the plan "fundamentally flawed" and asked for it to be rescinded, saying that it would cause the department to fall behind on its national security strategy, which prioritizes competing with Russia and China for technological dominance.

The WaPo story also noted that "Defense contractors and their lobbyists reacted sharply to the proposal, with the three major defense industry associations unanimously opposing the rule in a Sept. 14 meeting."

The official notice didn't mention exactly *how* the rule was withdrawn. In a DefenseNews.com story, authors Aaron Mehta and Joe Gould wrote: "In a statement released at the unusual time of 7:19 PM, Deputy Secretary of Defense Patrick Shanahan said the decision to withdraw the proposed acquisition changes stemmed from a lack of 'coordination' inside the department." Whereas we had assumed the initiator of the proposed rule was Mr. Shay Assad, their article stated that it had originated from the desk of Ellen Lord (USD, Acquisition & Sustainment). The article quoted her as saying in a September 5 interview, "I believe the lifeblood of most industry is cash flow, so what we will do is regulate the percentage of payments or the amount of profit that can be achieved through what type of performance they demonstrate by the numbers."

The official notice didn't mention that Mr. Shanahan said the rule was being withdrawn because it had been released "prematurely." The DefenseNews.com article quoted him as saying in his official statement that the proposed rule was "prematurely released, absent full coordination" within the DoD. Interestingly, we didn't think that was supposed to happen. We had thought that proposed rules were supposed to be well-coordinated with all stakeholders.

Guess we were wrong.

So all that is good news if you are a defense contractor; though of course perhaps not so good news if you are Ellen Lord, Shay Assad, or a member of the DAR Council who failed to get stakeholder agreement before prematurely releasing the rule for public comment.

But if you think this is over, you are wrong about that.

The Federal Register notice contained the following language—

This proposed rule is withdrawn in order for DoD to conduct additional outreach with industry regarding contract financing methods. Implementation in the Defense Federal Acquisition Regulation Supplement (DFARS) of section 831 of the National Defense Authorization Act for Fiscal Year 2017 will be addressed in a proposed rule to be published under DFARS Case 2019-D002. Any other changes to contract financing policy will be addressed under DFARS Case 2019-D001.

So: Note DFARS Case 2019-D001, now opened to address “contract financing policy.” Ms. Lord has provided notice to defense contractors that she believes they have been overpaid in the past few years (a time of low interest rates where borrowing was cheap) and, now that interest rates are increasing (and borrowing is becoming more expensive), it’s now time to lower contract financing amounts. Ms. Lord is an accomplished business person, so perhaps she’ll explain that logic to the business people who will now need to borrow more money, at higher interest rates, in order to finance their contract performance obligations.

Also note DFARS Case 2019-002, now opened to implement Section 831 of the 2017 NDAA. As a reminder, Section 831 reinforced the regulatory preference for performance-based payments and expressly stated “Performance-based payments shall not be conditioned upon costs incurred in contract performance but on the achievement of performance outcomes …” and “In order to receive performance-based payments, a contractor’s accounting system shall be in compliance with [GAAP], and there shall be no requirement for a contractor to develop Government-unique accounting systems or practices as a prerequisite for agreeing to receive performance-based payments.” We are excited to see the DAR Council swiftly implement those clear statutory requirements.

To wrap this up, the contractors have won the first skirmish. But the fight is not yet over and we

expect more battles to come.