

UPDATE: Contract Financing and Performance Incentives

Written by Nick Sanders

Wednesday, 19 December 2018 00:00

Hey! Remember that proposed DFARS rule on contract financing payments? You know, the one we wrote about [here](#) and then again [right here](#) ? (Actually we wrote a quick update in between those other two articles, but let's skip that one.) You know, the one that—according to watercooler gossip and rumor—cost a DoD Director a senior leadership position.

Yeah, that's the one. Not a great rule and, if gossip and rumor is to be believed, not a great public relations result at the public meetings held to solicit “public input” on the proposed language. (Hey, that's a lot of “public” used in a sentence to describe a rule that, based on language and discussion points, really didn't benefit the public to any great extent.)

Anyway, it's back.

What? No, *really*. It's back. And we've all got to deal with it.

The Federal Register [noticed](#) a new series of three public meetings to be held “to obtain views of experts and interested parties in Government and the private sector regarding revising policies and procedures for contract financing, performance incentives, and associated regulations for DoD contracts.” Yeah, for real.

The public meetings will be held in the Mark Center Auditorium, 4800 Mark Center Drive, Alexandria, Virginia, on the dates of January 10, January 22, and February 19. Note that participants (or onlookers) must register ahead of time.

Hey, let's all hope these new public meetings go better than the last couple on the same topic, right?

What might participants wish to discuss at said meetings?

Well, if you recall, the earlier (now defunct) proposed rule sought to link the value of contract financing payments to certain performance criteria, including:

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Conviction or civil judgment related to fraud

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Criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State, or local) contract or subcontract

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Violation of Federal or State antitrust statutes relating to the submission of offers

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Commission of embezzlement, theft, forgery, or bribery

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Falsification or destruction of records

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Making false statements

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Tax evasion or violations of Federal criminal tax laws

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Receiving stolen property

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Any open level III or level IV corrective action requests (CARs) related to contractor business systems

Were we to present to the members of the DAR Council, we would note that the performance criteria specified in the (now defunct) rule had very little to do with enhancing performance in the “five domains” identified by the rule—i.e., On Time or Accelerated Contract Deliveries, Contractor Quality, Contractor Business Systems, Increasing Contract Opportunities for Small Business and for the Blind and Severely Disabled, and Receipt of Timely Quality Proposals. Really, at best only one of the detailed contractor performance criteria had any relation to any of the five domains; the rest were completely unrelated.

Moreover, every single one of the detailed performance criteria already had both legal and administrative remedies available to the government. Or did somebody on the DAR Council think that all those laws such as the False Claims Act, the False Statements Act, or the Federal Bribery Statute (to name but a few) were just there for window-dressing? And did the DAR Council think that the suspension or debarment rules were for show? And what about the Mandatory Disclosure rule? And what about the Contractor Business System Administration rule? And what about ... we could go on, but let's not.

The point is, there was *no point* to the (now defunct) proposed rule. It was redundant at best and double jeopardy at worst. It appeared to set up one single bureaucrat as the sole arbiter of how much a contractor might receive in contracting financing payments (to include performance-based payments) and, while authoritarianism seems to be in vogue these days, there is no reason to encourage it, especially when it puts thousands of jobs on the line and might end up hurting the warfighter.

DoD needs to declare what it cares about. If what the Pentagon cares about is accelerated contract deliveries and contractor quality, then it needs to award incentive contracts where the incentive is tied to on-spec, on-time deliveries. It's that simple. If the Pentagon cares about contract opportunities for small business and for the blind and severely disabled, then it needs to incentivize prime contractor awards to such entities—though it may have to pay for those entities to become approved subcontractors.

And contractor business systems? Yeah, well *that's* working out, isn't it? Neither DCMA nor DCAA are resourced to effectively administer the oversight regime envisioned by the DAR Council in 2011, and we're all awaiting a forthcoming GAO report that may shed some light on what's working and what's not working there. Our position is that the DAR Council broke it, and

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we need some new folks to come and fix it. Until then, keep the DAR Council the hell away from the topic.

So that's what we might tell the DAR Council, were we to present at one of the three upcoming public meetings. But as we are not going to be in attendance, this blog article will have to suffice as a public record of our sentiments.