

DOD Increases Progress Payment Rates in Response to COVID-19 Crisis

Written by Nick Sanders

Wednesday, 25 March 2020 00:00

There was a time, not so long ago, when the DOD was [contemplating](#) lowering customary progress payment rates to 50 percent for large businesses, with an opportunity to earn higher rates based on meeting certain performance criteria. To be sure, that proposed rule was formally withdrawn, but DOD never withdrew from its initiative to reform contract financing payments and link those payments to “performance incentives” that would be established by DOD bureaucrats.

Public meetings on the topic were [scheduled](#) for early 2019. We never heard any feedback from those meetings; and since that time we’ve not seen any formal Federal Register publications on the topic. But we suspect the initiative has not gone away.

In any case, DOD recently issued a Class Deviation to *increase* customary progress payment rates. Class Deviation [2020-O 0010](#),

entitled “Class Deviation—Progress Payment Rates” provides contracting officers with alternate contract clauses that increase customary progress payment rates “to 90 percent for large business concerns and 95 percent for small business concerns,” effective immediately.

Which is a good thing!

Only ... we wonder how effective it will be.

Our point is: the Class Deviation does not seem to apply to current, active, contracts. Instead, it seems to apply to new contract awards. Thus, if you are a defense contractor trying to address production concerns with your existing contracts, this Class Deviation does not seem to help you.

We can envision an scenario where a contractor in need approaches a contracting officer to modify an existing contract to incorporate the alternate clauses. According to contract theory, that would only happen if the contractor offered some form of consideration. For example, reduced profit. Then the parties negotiate and maybe—just maybe—the contract gets modified. But by then the crisis may be over, so what’s the point?

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No, the alternate clauses with the increased progress payment rate seems focused on new contract awards, which are likely to be related to COVID-19 responses. Companies that would seem to be the beneficiaries will be those that produce masks, or ventilators, or other medical equipment. They are going to see the benefits of the increased progress payment rates, not the traditional defense contractors that produce more mundane products such as fighter jets and tanks.

And perhaps that's appropriate, given the nation's priorities at the moment.

EDITOR'S NOTE: It appears that Senior DOD Leadership has committed the agency to modify existing contracts, without consideration and potentially via "block change," even though nothing of that sort was mentioned in the Class Deviation. You had to read the DOD press release and then confirm via other sources. Still, all's well that ends well.

But remember, customary progress payments are based on costs incurred. Companies that don't have any employees (because they are all at home) won't have a lot of payroll costs to cover. Further, supply chain costs may be minimal, because the suppliers don't have workers either. Companies that produce necessary medical supplies and equipment may be exempt from state or local "lock-downs"—we don't know if that's the case, but it would certainly make sense. If so, then strike this paragraph and skip to the next one.

Further, use of progress payments requires the contractors to have an adequate accounting system. Therefore, this Class Deviation is aimed at existing defense contractors, not at any non-traditional defense contractors that may start producing medical products in response to the invocation of the Defense Production Act. Would those non-traditional defense contractors even make use of progress payments based on costs? Remember, such contractors (and products) likely qualify for treatment as commercial items, based on FAR and DFARS definitions, already. If so, they probably don't need progress payments based on costs and, instead, would like payment in full, in accordance with commercial terms.

Okay, so there's a lot we don't know; and this article contains a lot of speculation and "what-ifs" that may be completely unwarranted. What do you expect from me, sitting here in my home office? Obviously, somebody in the Pentagon thinks this is a good idea—and it may very well be a good idea! Certainly, it doesn't hurt anything.

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As they say: *Primum non nocere*.