

On January 15, 2010 the DOD published a proposed rule in the Federal Register that announced several significant changes to the way it intends to exercise oversight over contractor “business systems.” Readers of this site will likely experience some feelings of *déjà vu* as they scan the proposed DFARS rule changes.

The linkage of the proposed rule to the activities of the Commission on Wartime Contracting in Iraq and Afghanistan is obvious. We’ve posted several articles on the CWC, notably [here](#) and [here](#)

. It was the CWC that used the phrase “contractor business system” instead of the term of art “contractor internal control system.” Apparently, the DAR Council has decided to adopt that phrase.

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Written by Administrator

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Moreover, the first sentences of the background of the proposed rule come directly, word for word, from the CWC's first Special Report, which can be found [here](#)

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“Contractor business systems and internal controls are the first line of defense against waste, fraud, and abuse. Weak control systems increase the risk of unallowable and unreasonable costs on Government contracts.

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Obviously, the proposed rule needs to be understood in the context of the past months' drama that has played out in that forum.

There are some positive aspects of the proposed rule.

- Reduces the number of “business systems” subject to oversight by the DOD, from ten to six. The six business systems are: (1) Accounting, (2) Earned Value

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Management, (3) Estimating, (4) Material Management and Accounting (MMAS), (5) Property Control, and (6) Purchasing.

- Establishes in the regulatory framework system adequacy standards, thus moving control of system adequacy determinations from DCAA to DCMA contracting officers.
- Requires DCAA to issue audit reports to the DCMA contracting officers “in sufficient detail to allow the contracting officer to understand what the contractor would need to correct to comply with the applicable standard or system requirement, and the potential magnitude of the risk to the Government posed by the deficiency. ”

There are some less-than-positive aspects of the proposed rule.

- The rule notes the cooperation necessary between DCAA auditor and DCMA contracting officer, yet it provides essentially no details regarding how that cooperation is to work. For example, the proposed rule says “The ACO, in consultation with the auditor, shall (1) approve the [estimating] system ...” but does not describe how that consultation is to work in actual practice.

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- The rule provides for payment withholds for system deficiencies, up to 50 percent of the contract value—which we would consider to be punitive in nature. Moreover, if the ACO determines “that there are one or more system deficiencies that are highly likely to lead to improper contract payments being made,” then “the ACO will withhold up to one-hundred percent of payments....”
- Payment withholds can be made against performance-based payments. PBPs are, by Congressional intent and DOD implementation, not supposed to be tied to business system adequacy.

The proposed rule affects numerous parts of the DFARS and implements several new contract clauses. Readers are encouraged to review the proposed rule in detail. It can be found [here](#).

DOD is seeking comments on this proposed rule. In addition, DOD is seeking comments on the information collection requirements associated with it. The promulgating comments state—

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DoD invites comments on the following aspects of the proposed rule: (a) Whether the collection of information is necessary for the proper performance of the functions of DoD, including whether the information will have practical utility; (b) the accuracy of the estimate of the burden of the information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including the use of automated collection techniques or other forms of information technology.

Comments must be submitted before March 16, 2010. Comments may be submitted via email or USPS; details are found in the proposed rule.

This rule, if implemented as written, will likely have a significant impact on how contractors approach compliance and how they implement governance and control systems. Because of this potential impact, we encourage all Federal contractors to submit comments to the DAR Council.

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