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VIA REGULATORY PORTAL, ELECTRONIC MAIL, AND U.S. MAIL

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Re: Defense Federal Acquisition Regulation Supplement; Business Systems – Definition and Administration, DFARS Case 2009-D038

Dear Mr. Gomersall:

On behalf of the Section of Public Contract Law of the American Bar Association (“the Section”), I am submitting comments on the above rulemaking Defense Federal Acquisition Regulation Supplement; Business Systems – Definition and Administration. The Section consists of attorneys and associated professionals in private practice, industry, and Government service. The Section’s governing Council and substantive committees have members representing these three segments, to ensure that all points of view are considered. By presenting their consensus view, the Section seeks to improve the process of public contracting for needed supplies, services, and public works.

The Section is authorized to submit comments on acquisition regulations under special authority granted by the Association’s Board of Governors. The views expressed herein have not been approved by the House of Delegates or the

1 The Honorable Thomas C. Wheeler, a member of the Section’s Council, did not participate in the Section’s consideration of these comments and abstained from the voting to approve and send this letter.
Board of Governors of the American Bar Association and, therefore, should not be construed as representing the policy of the American Bar Association.²

I. **INTRODUCTION**

Over the past two years, contractor business systems have come under increased scrutiny from the Department of Defense ("DoD"), the Senate Homeland Security and Governmental Affairs Committee, and the Commission on Wartime Contracting. Recently, there has been heightened concern over the effectiveness of various DoD components in addressing contractor business system deficiencies and the proper means to compel contractor compliance. The Section understands DoD’s stated purposes underlying this rule, which are to clarify the process for review of business systems and to protect the Government from the risk of unallowable and unreasonable costs resulting from defects in such systems. Nevertheless, for the reasons discussed below, the Section believes the proposed rule is not tailored to address these purposes. As written, the proposed rule is open to legal challenge and is likely to lead to increased litigation and compliance costs. Accordingly, the Section offers these comments to assist DoD with better addressing the purposes of the proposed rule.

II. **BACKGROUND**

On January 15, 2010, DoD issued a proposed rule to amend the Defense Federal Acquisition Regulation Supplement ("DFARS") with request for comments regarding contractor business systems.³ The proposed rule defines contractor business systems as accounting systems, estimating systems, purchasing systems, earned value management systems ("EVMS"), material management and accounting systems ("MMAS"), and property management systems. The proposed rule also would require Administrative Contracting Officers ("ACOs") to implement payment withholding when contractors’ business systems contain deficiencies. DoD categorized the action as not being a significant regulatory action.

For each of the covered business systems, the proposed rule would add or amend a DFARS contract clause that lists the attributes of an acceptable system. The rule would not change the existing requirements for an estimating system, EVMS, or MMAS. Nevertheless, the rule would create new DFARS contract

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² This letter is available in pdf format at: http://www.abanet.org/contract/regscomm/home.html under the topic “Cost Allowability and Cost Accounting.”

clauses prescribing requirements for an accounting system and purchasing system. The rule would require a contractor to “establish and maintain acceptable business systems in accordance with the terms and conditions of the contract.” If the Defense Contract Audit Agency (“DCAA”) or other cognizant functional specialist identified system deficiencies, then the auditor would report the deficiencies to the ACO. The ACO would then notify the contractor of the alleged deficiencies and request a response from the contractor. If, after reviewing the contractor’s response, the ACO determines a business system deficiency exists, the ACO would implement a 10 percent withhold on the contractor’s payments. The ACO must implement such a withhold for each system deficiency. Although the proposed rule generally caps the withhold at 50 percent, the proposed rule specifically provides that the ACO may withhold 100 percent of the contractor’s payments under certain circumstances. The ACO would remove the withholds only after the contractor successfully implements a corrective action plan and has “substantially corrected” the system deficiencies.

III. COMMENTS

A. The Proposed Rule Goes Beyond Protecting the Government’s Interest and Imposes a Punitve Withholding System

The stated purpose of the proposed rule is to “clarify the definition and administration of contractor business systems.” DoD states that “internal controls are the first line of defense against waste, fraud and abuse” and that “[w]eak controls increase the risk of unallowable and unreasonable costs on Government contracts.” The Section agrees with these statements, and we believe the entire procurement community would as well. The Section notes, nevertheless, that the word “risk” in its commonly accepted meaning connotes “a possibility” that a hazard may occur. By the same token, a “first line of defense” against a risk assumes that there are second, and perhaps more, lines of defense against the risk.

In fact, this is precisely the case with respect to contractor business systems. Every government contractor confronts a comprehensive and controlling array of administrative, civil, and criminal penalties, certification requirements, and other compliance mechanisms. There are literally dozens of “lines of defense” that cause prudent contractors to treat unallowable and unreasonable costs properly. These

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4 Id. at 2457.

5 Id.

6 Whether a cost is “reasonable,” of course, is an issue of subjective judgment. Similarly, with the exception of expressly unallowable costs, parties may disagree on the allowability of a given cost.
existing lines of defense, and their daily results, do not appear to have been considered fully in the proposed rule. Instead, the proposed rule assumes that any deficiency in a business system will immediately and irrevocably cause the Government to be overcharged, thereby justifying the withholding of payments to protect the Government from such overcharging.

The Section believes that the proposed rule would be improved by focusing on the stated goals of the rulemaking and methods more precisely crafted to achieve those goals. The Section also believes that the proper purpose of the proposed rule should be to protect the Government against the risk of unallowable and unreasonable costs, without mandating that ACOs impose punitive withholds.  

Furthermore, there is significant doubt that the proposed withholding scheme would survive legal challenge. The longstanding rule applied by the boards of contract appeals has been that Government withholding must be reasonably related to the Government’s potential harm. Moreover, the boards recognize that it is inappropriate to withhold costs as a “club to insure [sic] compliance with demands unrelated to the costs suspended.” For a Government-imposed withhold to bear a reasonable relationship to the Government’s potential risk, therefore, the ACO must make a determination of the potential scope of the Government’s risk.

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7 Removing discretion from ACOs regarding the extent of the withhold may also encourage ACOs to disagree with DCAA audit findings regarding real but insignificant system deficiencies. This could hamper the Government’s ability to require correction of minor deficiencies. At the same time, it puts ACOs in a difficult position of potentially imposing a grossly unfair withhold or facing potential referral to the DoD Inspector General for ignoring DCAA’s recommendations. See Defense Contract Management Agency Actions on Audits of Cost Accounting Standards and Internal Control Systems at DoD Contractors Involved in Iraq Reconstruction Activities, Department of Defense Inspector General (Apr. 8, 2009).

8 See Norair Eng’g Corp., GSBCA No. 3539, 75-1 BCA ¶ 11,062 (1975) (“The amount withheld must be justified by reasonable proof of the costs involved” and even if a precise estimate of future costs is not possible, the amount withheld must be a reasonable measure of the contractor’s actual obligations); Columbia Eng’g Corp., IBCA No. 2352, 88-2 BCA ¶ 20,595 (1988) (Board holds that it was arbitrary and capricious for Government to withhold $50,000 when less than $6,000 was owed in Davis-Bacon Act compliance matter; $50,000 withhold was excessive and unsupported by any reliable evidence of the amount actually owed by the contractor).

9 Martin Marietta Corp., ASBCA No. 31248, 87-2 BCA ¶ 19,875 (1987) (Board rules that it was “unnecessary, therefore arbitrary and capricious” for Government to withhold from billings the entire cost of contractor’s internal audit department during disagreement over whether contractor was obligated to provide certain records under the audit clause of its contract).
The proposed rule, however, treats all alleged business system deficiencies the same, except for deficiencies which “are highly likely to lead to improper contract payments being made, or represent an unacceptable risk of loss to the Government.” The rule fails to recognize that every business system deficiency is unique in terms of the potential risk to the Government. Because, under the proposed rule, the Government withhold is not reasonably related to the Government’s potential harm, the rule likely would not survive legal challenge.

Moreover, there seems little doubt that the proposed rule is punitive. Under the proposed rule, as much as 100 percent of a contractor’s billings may be withheld. It is impossible to conceive of a situation in which the work performed by a contractor could have no value, or that all of the costs charged would be unallowable or unreasonable, or that the risk to the Government from system deficiencies could amount to the total contract price. Thus, there is a significant likelihood that, if challenged, the proposed rule would not pass muster under longstanding board of contract appeals jurisprudence.

B. DoD Already Has Numerous Other Contractual Tools Available to Protect Itself From Any Actual Loss Associated With Business System Deficiencies

The Government already has many contractual tools available to it to address unallowable or unreasonable costs charged by contractors as a result of business system deficiencies. The proposed rule offers no guidance on how the proposed withholding will be used in conjunction with these other existing remedies.

For example, the Allowable Cost and Payment Clause, FAR 52.216-7, states that the contractor may be paid only for amounts “determined to be allowable by the Contracting Officer.” If the Government requires an audit of an interim payment to determine compliance with the contract (which would include the obligation under FAR 52.216-7 to charge only “allowable” costs), the Government is not required to make payment on the questioned invoice until that audit is complete. Thus, the Government already has mechanisms under cost-type contracts to withhold the precise amounts by which any billings may include unallowable costs that could result from a business system deficiency.

Similar tools exist with respect to both interim and final indirect rates. Under FAR 42.704, when establishing interim rates, the Government must already

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10 75 Fed. Reg. at 2462 (DFARS 252.242-7XXX(d)(4)).
adjust for any unallowable costs, thereby preventing any risk of the sort envisioned by the proposed rule.\footnote{See FAR 42.704(b) ("In establishing billing rates, the contracting officer (or cognizant Federal agency official) or auditor should ensure that the billing rates are as close as possible to the final indirect cost rates anticipated for the contractor’s fiscal period, as adjusted for any unallowable costs.").}

Even more tools exist in the case of final indirect rates. Under FAR 52.242-4, the contractor must certify that all of the costs in its final indirect rate proposal are allowable. Under FAR 52.242-3, the contractor agrees to the imposition of penalties if costs in its final indirect rate proposal are expressly unallowable. These penalties are in addition to disallowance of the underlying cost itself. It is important to note that the penalty scheme already contains a significant inducement for contractors to have adequate business systems because FAR 42.709-5(c)(1) mandates that the contracting officer waive the penalty, \textit{inter alia}, if the contractor demonstrates to the satisfaction of the contracting officer that “[i]t has established policies and personnel training and an internal control and review system that provide assurance that unallowable costs subject to penalties are precluded from being included in the contractor’s final indirect cost rate proposals . . .”

In the case of an estimating system, a deficiency will impact the negotiation of the original price. If the defects were known at the time of the negotiation, then they could have and should have been dealt with in the negotiation. If they were not known, then the Government already has a likely remedy to address its actual harm under the Truth in Negotiations Act, which would allow it to recover the amount by which the negotiated price was overstated due to the deficiency.\footnote{Beyond the Truth in Negotiations Act, the DFARS currently gives the Government tools to address estimating systems deficiencies. DFARS 215.407-5-70 provides, in pertinent part:}

\begin{enumerate}
\item[(g)] \textbf{Impact of estimating system deficiencies on specific proposals.}
\begin{itemize}
\item[(1)] Field pricing teams will discuss identified estimating system deficiencies and their impact in all reports on contractor proposals until the deficiencies are resolved.
\item[(2)] The contracting officer responsible for negotiation of a proposal generated by an estimating system with an identified deficiency shall evaluate whether the deficiency impacts the negotiations. If it does not, the contracting officer should proceed with negotiations. If it does, the contracting officer should consider other alternatives, e.g.---
\begin{enumerate}
\item [(i)] Allowing the contractor additional time to correct the estimating system deficiency and submit a corrected proposal;
\item [(ii)] Considering another type of contract, e.g., FPIF instead of FFP;
\end{enumerate}
\end{itemize}
\end{enumerate}
these alternatives do not provide sufficient solutions, then the Government should consider modifying or strengthening the current remedies instead of introducing new remedies.

The withholding authority in the proposed rule overlaps with many of these other clauses, and the proposed rule does not consider how these rules will interact. Notably, the proposed rule provides no guidance to ACOs on whether they should impose a 10 percent withhold in addition to taking the same steps they currently are authorized to take to protect the Government’s interests. Because the proposed rule gives ACOs no discretion regarding the withhold, it must be assumed that ACOs will take both actions. This could be especially problematic in situations where the discovery of a business system deficiency leads to the immediate discovery of a contract overcharge. In such a situation, the Government customers will almost certainly demand immediate repayment of the overcharges. Yet, the proposed rule would require the Government to continue imposing a withhold even though the overpayments have already been returned. In such cases, the withhold would serve only punitive purposes.

(iii) Using additional cost analysis techniques to determine the reasonableness of the cost elements affected by the system’s deficiency;

(iv) Segregating the questionable areas as a cost reimbursable line item;

(v) Reducing the negotiation objective for profit or fee; or

(vi) Including a contract (reopener) clause that provides for adjustment of the contract amount after award.

(3) The contracting officer who incorporates a reopener clause into the contract is responsible for negotiating price adjustments required by the clause. Any reopener clause necessitated by an estimating deficiency should—

(i) Clearly identify the amounts and items that are in question at the time of negotiation;

(ii) Indicate a specific time or subsequent event by which the contractor will submit a supplemental proposal, including cost or pricing data, identifying the cost impact adjustment necessitated by the deficient estimating system;

(iii) Provide for the contracting officer to unilaterally adjust the contract price if the contractor fails to submit the supplemental proposal; and

(iv) Provide that failure of the Government and the contractor to agree to the price adjustment shall be a dispute under the Disputes clause.
C. **The Proposed Rule Includes Incomplete Definitions of Acceptable Business Systems**

For each of the covered business systems, the proposed rule either defines the elements of an acceptable system or applies the new withholding rule to the existing definitions. The proposed rule lists requirements of a compliant system, but the list of requirements is not exhaustive. For example, the accounting system clause states that the contractor’s accounting system “shall be in compliance with applicable laws and ensure the proper recording, accumulating, and billing of costs on Government contracts, including but not limited to providing, as applicable,” 17 enumerated accounting system elements. 13 By defining “deficiency” merely as a failure to maintain an adequate system, and listing only certain elements of adequate systems, the proposed rule invites controversy over what constitutes a deficient system. 14 If the proposed rule, as applied, requires ACOs to impose a 10 percent withhold for a minor deficiency in a sub-element of a listed requirement, the Government could soon be withholding funds from most contractors. At a minimum, the lack of clarity will likely result in disputes and litigation over what a contractor must do to avoid a withhold.

D. **The Proposed Rule Provides Inadequate Contractor Processes for ACO 100 Percent Withholds Based on Elevated Government Risk and Inadequate Guidance for ACO’s to Make 100 Percent Withhold Determinations**

As discussed above in Section II, the proposed rule includes various procedures the ACO must follow before implementing a 10 percent withhold. Under the proposed rule, these same procedures do not apply to ACO decisions to withhold 100 percent of payments based on ACO determinations that business system deficiencies “are highly likely to lead to improper contract payments being made, or represent an unacceptable risk of loss to the Government.” Rather, ACOs may make 100 percent withhold determinations without any contractor comment. Although the Section understands that in these situations alleged system deficiencies present elevated risk to the Government, the Section still recommends that DoD amend the proposed rule to provide some procedures, even if expedited,

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13 75 Fed. Reg. at 2462.

14 When defining the “deficiency” necessary for withholds under the proposed rule, drafters should consider that DCAA auditors will be applying the proposed rule in the context of DCAA’s definition of “Significant Deficiencies” contained in DCAA Memorandum 08-PAS-043(R) (Dec. 19, 2008), Subject: Audit Guidance on Significant Deficiencies/Material Weaknesses and Audit Opinions on Internal Control Systems.
that would allow contractors to respond to alleged system deficiencies before
withholds are implemented. The Section believes that this contractor input will
assist ACOs in making appropriate withhold determinations.

Compounding this concern, the proposed rule contains no guidance on
when business system deficiencies “are highly likely to lead to improper contract
payments” or “represent an unacceptable risk of loss.” Thus, the proposed rule
provides ACOs insufficient standards to make 100 percent withhold determinations
that will significantly impact contractor cash flow. The Section, therefore,
recommends that DoD amend the proposed rule to include more guidance on when
business system deficiencies “are highly likely to lead to improper contract
payments” or “represent an unacceptable risk of loss.”

E. The Proposed Rule Provides Incomplete Guidance for ACOs to
Approve Systems When Deficiencies Previously Have Been
Identified

The proposed rule provides incomplete guidance for when ACOs should
approve a system for which deficiencies previously have been identified. The
proposed rule states that ACOs shall approve such a system when they find that
“the contractor has substantially corrected the system deficiencies.”15
Nevertheless, the proposed rule provides no guidance for ACOs to determine when
deficiencies have been “substantially corrected.” The Section suggests that
deficiencies will have been “substantially corrected” when the risk to the
Government of unreasonable and unallowable costs, due to such deficiencies, has
been sufficiently mitigated.

F. The Proposed Rule Should Clarify an Appeals Process

As discussed above, the proposed rule provides for an across-the-board
withhold of 10 to 100 percent of a contractor’s payments. For any contractor, such
a withhold would quickly add up to significant sums. For small businesses, the
withholding could be catastrophic. Because the proposed rule requires withhold
without regard to Government risk, much of the withheld money would eventually
be returned to the contractor. Yet, the rule states that no Prompt Payment Act
interest is due on withheld funds.16

15 75 Fed. Reg. at 2458 (DFARS 215.407-5-70(h)).

16 Id. at 2462.
It is likely that contractors will contest whether their business system is deficient. In the past, such issues were normally addressed through negotiation to an eventual resolution. The proposed rule leaves no room for that process. Under the proposed rule, if confronted by a contracting officer’s final determination and the potential of a withhold, prudent contractors likely would immediately appeal the withhold pursuant to the Contract Disputes Act. Although the proposed rule states that Prompt Payment Act interest does not accrue on the withhold, interest would accrue on the claim under the Contract Disputes Act if the Government’s position is not sustained. Consequently, the proposed rule would likely lead to the replacement of the existing process of negotiation with immediate litigation, significantly increasing the number of contract disputes that proceed to litigation.

G. Any Rule Should Allow For ACO Discretion To Apply or Not Apply A Withhold

If DoD finds that withholding authority is necessary, the Section believes that the more appropriate approach would be to require the ACO first to make a finding of the potential harm to the Government and then impose a withhold proportionate to that risk. This would be similar to the current contracting officer discretion under FAR Part 42 to waive imposition of the penalties for inclusion of unallowable costs in final indirect proposals if certain mitigating factors exist. This would recognize, for example, that some minor deficiencies will not carry any risk of the contractor charging unallowable costs or will only apply to a small portion of the contractor’s business. This would correct the proposed rule’s overly simplistic answer for the many different potential systems deficiencies – a 10 percent, across the board, withhold – with an appropriately measured response.

Allowing ACOs to exercise discretion is essential for another reason. The proposed rule’s “one size fits all” approach could actually increase the risk to the Government. In some cases, a 10 percent withhold could grossly overestimate the Government’s potential harm. In other cases, 10 percent might not be enough to protect the Government’s interest. Accordingly, the Section recommends that DoD revise the proposed rule to allow ACOs to exercise discretion in determining risk when making withhold determinations.

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17 Recent DCAA guidance has eliminated DCAA’s prior “inadequate in part” findings. It can be assumed that DCAA will now report all deficiencies, regardless of scope, as system deficiencies under this rule. This will likely lead to ACOs imposing withholds wholly out of line with the sometimes non-existent risk of unallowable costs.
H. The Rule Imposes Potentially Burdensome Requirements on Small and Mid-Sized Contractors

The requirements for business systems contained in the proposed rule, except for EVMS and estimating system requirements, apply to all contractors and contracts, regardless of size. Further, all requirements apply to a variety of types of contracts. Thus, under the proposed rule, small and mid-sized contractors performing a variety of contracts would be required to implement and maintain the same business systems as those systems implemented and maintained by the largest contractors.

For example, under the proposed rule on accounting systems, contractors must maintain "[a] timekeeping system that identifies employees’ labor by intermediate or final cost objectives."18 This requirement may be potentially burdensome on small and mid-sized contractors entering the federal government marketplace and not having sophisticated systems in place. The Section, therefore, recommends that the proposed rule impose reasonable limitations on the applicability of the requirements for contractor business systems based on the size of the contractor or contract. Such limitations would ensure that the proposed rule does not unduly deter small and mid-sized contractors from participating in federal procurements.

IV. CONCLUSION

The Section appreciates that contractor business systems have come under increased scrutiny from Congress and DoD in the past years. These comments seek to identify several areas where the Section believes the proposed rule could benefit from further analysis and clarification. The Section respectfully requests that DoD consider the issues identified in these comments in developing a revised DFARS rule that better matches the rule’s stated goals while ensuring fair payment to contractors.

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18 75 Fed. Reg. at 2462 (DFARS 252.242-7YYY(c)(9)).
The Section is available to provide additional information or assistance as you may require.

Respectfully submitted,

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Chair, Section of Public Contract Law

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