

# **DFARS Case 2019 – D002**

## **Performance-Based Payments**

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**12866 Meeting**  
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DFARS Case 2019-D002

# **INDUSTRY CONCERNS**

- **This Rule Should...**

- Preserve congressional intent to create a preference for performance-based payments
- Seek to unify DFARS practices with the FAR
- Eliminate the system of negotiating for progress payments then performance-based payments
- Affirm that performance-based payment shall not be conditioned on cost incurred

# Keep with Congressional Intent

- A preference for performance-based payments has been clearly expressed.
- Sec. 831 of 2017 NDAA
  - Section 2307(b) of title 10
    - “Whenever practicable, payments... shall be made using performance-based payments...”
- Any proposed rule should carry out this preference and not create additional constraints or restrictions on PBPs.

- FAR 52.232-32 Provides adequate guidance for the use of PBPs.
- DoD should adopt these standards to ease the burden on contractors doing government-wide work.
- Eliminate DFARS Unique PBP Clauses:
  - DFARS 252.232-7012 “Performance-Based Payment-Whole Contract Basis”
  - DFARS 252.232-7013 “Performance-Based Payment-Deliverable Item Basis”

# Eliminate DFARS 232.1004 “Procedures”

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- Current DFARS standards require the contracting officer to negotiate progress payments prior to settling for performance based payments.
- The requirement for additional consideration when moving from progress payments to PBPs is also burdensome.
- This system creates unnecessary administrative costs on both the contractor and DoD and prolongs contract lead time.
- DFARS 232.1004 should be modified or eliminated to reform this practice.

# Do Not Condition PBPs on Cost Incurred



- DFARS 232.1001 should be rewritten to not condition PBPs on cost incurred.
- Limiting payments to cost incurred reduces or eliminates the incentive to use PBPs, treating the contract more like a cost-type arrangement.
- DFARS 232.1001 is in direct contention with 10 USC 2307 (b) (2):
  - "Performance-based payments shall not be conditioned upon costs incurred in contract performance but on the achievement of performance outcomes listed in paragraph (1)."

# Recommendations

- **Preserve congressional intent but ensuring that the rule provides a real preference for PBPs.**
- **Unify DFARS standards with the FAR to ease the administration of contracts across government and industry.**
- **Eliminate DFARS 232.1004 requiring a progress payment negotiation prior to using PBPs.**
- **Do not condition PBPs on cost incurred in violation of the law.**



# Thank You

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