

CLIENT ALERT

Take Two: DoD Issues Another Proposed Rule on Performance-Based Payments

May.23.2019

On April 30, 2019, the Department of Defense (DoD) issued a proposed rule to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to address the use of performance-based payments. The proposed rule, which purports to implement section 831 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017, would:

- Remove the restrictions at DFARS 232.1001(a), 252.232-7012(b)(i), and 252.232-7013(b)(i) that previously limited performance-based payments to amounts not greater than costs incurred up to the time of payment (though contractors would still be required to report costs incurred when requesting performance-based payments).
- Revise DFARS 232.1001 to explain that nontraditional defense contractors and other private sector companies are eligible to receive performance-based payments consistent with best commercial practices.
- Update DFARS 232.1003-70, 252.232-7012, and 252.232-7013 to require contractors be in compliance with Generally Accepted Accounting Principles (GAAP) to receive performance-based payments (though Government-unique accounting systems or practices would not be a prerequisite).
- Require offerors responding to a solicitation, which may result in a contract providing performance-based payments, to represent that the output of the offeror's accounting system is in compliance with GAAP, as evidenced by audited financial statements.

This proposed rule, which would not apply to contracts at or below the simplified acquisition threshold or for the acquisition of commercial items, replaces a previous (and controversial) DoD proposed rule that also attempted to implement section 831, but was withdrawn in October 2018. Comments are due on July 1, 2019.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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