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### DoD scales back plan to restrict payments to some contractors

By SEAN REILLY | Last Updated: December 15, 2010

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Under a barrage of contractor criticism, the Defense Department has softened a plan to hold back contract payments as a way to prod companies to fix problems in their accounting and other business systems.

In a proposed rule released in January, DoD had sought authority to withhold 10 percent of payments if a particular business system was found to be deficient. Under a new proposal published this month in the Federal Register, that amount is cut to 5 percent and for small businesses would be limited to 2 percent. If a deficiency is considered high risk, the maximum that could withheld would be capped at 20 percent, down from 100 percent in the original proposal. And in response to complaints that the original draft was overly subjective, officials spell out compliance criteria more clearly.

In general, the revised proposal does a "much better job of laying out the attributes of each of these business systems" and then linking enforcement to compliance with those attributes, said Alan Chvotkin, executive vice president and counsel at the Professional Services Council, a contractor trade group. While not ready to give the revision a passing grade without more study, "I liked what I saw," Chvotkin said.

But Scott Amey, general counsel at the Project on Government Oversight, viewed the new proposal as "a giant step backward" for contractor accountability. And because DoD is issuing a second proposed rule, another year may pass before contracting officers get the authority to withhold payments, said Amey, who had wanted the Pentagon to make its original draft more stringent.

The comment period for the new proposal ends Jan 10. "We are looking for more input and will make a determination of how to proceed with changes" after that point, Pentagon spokeswoman Cheryl Irwin said via e-mail.

Already, more than a year has passed since the Commission on Wartime Contracting in Iraq and Afghanistan warned that contractors' flawed business systems were hampering the government's ability to detect cost errors and material misstatements. Shaky data from those systems generated billions of dollars in contingency contract costs that auditors were often unable to verify, the commission found in its September 2009 report. Not helping was a fractured relationship between the Defense Contract Audit Agency and the Defense Contract Management Agency, which share oversight responsibilities.

For the Defense Department, business system functions — which also include estimating, purchasing, earned value management and property management — rank as the "first line of defense against waste fraud and abuse," the revised draft rule states. Withholding payments would not be a penalty, it says, but a way of mitigating the government's risks.

But the Pentagon's first stab at addressing the issue produced 370 comments from 25 parties, many of them critical.

Withholding payments "could lessen competition, force small business contractors out of business and endanger national security," wrote Michael Thorne, chief financial officer for DynCorp International, headquartered in Falls Church, Va., one of the firms found by DCAA to have faulty business systems. "Employees do not work for free and vendors do not provide goods and services for nothing."

Other caveats were more technical. In a lengthy list of concerns, for example, the Professional Services Council had asked for changes to the elements that comprise accounting and purchasing systems. The Pentagon made



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adjustments in those areas, but declined to add a new mechanism for resolving disputes with contracting officers, as the PSC had wanted.

Underlying some objections to the original proposal were doubts about the ability of DCMA and DCAA to do their jobs. In its response to the first round of comments, the Defense Department noted that some respondents expressed concerns that DCAA lacked the resources to carry out required audits adequately and on time. DCAA "has committed to making follow-up business system audits a priority" and is also seeking to address staffing challenges, the department said, adding that coordination with DCMA is being improved.

Amey, however, saw a connection between what he called a watered-down proposal and a recent decision by DCAA officials to limit oversight of fixed-price and cost-type contracts to those above certain dollar thresholds.

"Unfortunately, the contractors and their lobbyists have been effective at crying foul," Amey said, "and creating the false impression that they're overly burdened."

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