

Statement of  
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At the DoD Public Meeting  
Progress and Performance-Based Payments

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On behalf of the Professional Services Council (PSC),<sup>1</sup> thank you for the opportunity to make an additional statement on the important issue of how the Department of Defense addresses contract financing issues, particularly with respect to progress and performance-based payments.

We compliment the Department for withdrawing the August 24, 2018 proposed rule and holding public meetings and other engagements with industry regarding this issue. Two new DFARS cases have been opened to separately consider components of that August rule.

#### Performance-Based Payments

The first case, DFARS 2019-D002, is notionally targeted at the implementation of Section 831 of the Fiscal Year 2017 National Defense Authorization Act (NDAA) that provides direction to DoD for the treatment of performance-based payments. The statute has a straightforward provision and we believe DoD can move expeditiously to implement that statute, particularly now that the partial shutdown of federal agencies might allow a return to “regular order” on rulemaking. But given the history of these contract financing matters, I encourage the Department to discuss with industry the planned implementation of even this apparently straightforward provision and to proceed with a proposed rule and allow adequate time for public comment before any final rulemaking. While Section 831(b) of the FY17 NDAA mandated that DoD revise the DFARS within 120 days after the December 23, 2016 date of enactment of the NDAA, that deadline has so long since passed that the delay of a few more weeks does not justify or require the publication of an interim rule.

#### Progress Payments

The second case, DFARS 2019-D001, is notionally targeted at the coverage of progress payments. There is no statute that requires DoD to adopt a change in the current coverage and we urge the Department to proceed carefully, if at all, on changing the current coverage. That is not to say that nothing should be done; in fact, I will make some suggestions for action that should be taken before any adjustment to the customary progress payment rate is considered.

However, I want to reiterate a statement I made at the September 2018 public meeting on the August proposed rule.<sup>2</sup> Whatever change is being considered, be sure that it addresses only the key elements of contract financing and does not stray into using progress payments or other contract financing techniques as incentives or disincentives for other contracting policies unrelated to financing – even if some of those unrelated policies have merit.

In the supplemental information accompanying the August proposed rule, and even since its withdrawal, there has been commentary about whether and how the financial environment has

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<sup>1</sup> PSC is the voice of the government technology and professional services industry, representing the full range and diversity of the government services sector. As a trusted industry leader on legislative and regulatory issues related to government acquisition, business and technology, PSC helps build consensus between government and industry. Our nearly 400 member companies represent small, medium, and large businesses that provide federal agencies with services of all kinds, including information technology, engineering, logistics, facilities management, operations and maintenance, consulting, international development, scientific, social, environmental services, and more. Together, the trade association’s members employ hundreds of thousands of Americans in all 50 states.

<sup>2</sup> PSC 9/14/18 statement available at:

[https://www.pscouncil.org/a/Resources/2018/Progress\\_Payments\\_Public\\_Meeting\\_Statement.aspx](https://www.pscouncil.org/a/Resources/2018/Progress_Payments_Public_Meeting_Statement.aspx)

changed since the 1985 Defense Financial and Investment Review (DFAIR) study was published and what changes DoD should undertake to make the information current. Frankly, this is not a useful endeavor.

First, that DFAIR study was criticized for the data collected and the analysis performed, including by the then named “General Accounting Office” (now the Government Accountability Office).<sup>3</sup> Second, all that will result from that significant data collection and analysis effort is a picture of where the Department’s policies WERE as of the date of the data collection; more importantly, it will provide no useful information about what data would be helpful in assessing what the defense marketplace WILL BE over the next five years when any policy changes made will be applied. And we know – and you know – that WHAT the department will acquire and HOW it will acquire it will be different in the next five to ten years than it is even today. As Assistant Secretary for Defense Acquisition Kevin Fahey has noted, almost every weapons system will be software intensive, and he views the so-called DoD 5000 series acquisition directive as not providing the foundation for these future acquisitions. Mr. Fahey commented that it is important that DoD move from a requirement-heavy procurement process to addressing how the technology will be purchased and maintained. In addition, since over 70 percent of the department’s spend on major systems is for the lifecycle sustainment costs of that system – not its original acquisition cost – it is essential that the Department’s future contract financing policies align with these future buying activities.

While services will probably not dominate the Department’s spend on the purchase of goods and services over the next five years as it has in the past, in part because of the large investment in shipbuilding and the transition from R&D to production of other large platforms, the Department’s purchases of information technology and cybersecurity capabilities are growing. And the current progress and performance-based contract financing policies are ill-suited to simply applying past paradigms to future acquisitions. It is essential that the Department’s future contract financing policies align with these future buying activities.

In addition to these changes to WHAT the Department will be acquiring in the next five years will come a change in HOW the department will acquire those goods and services. There is already a significant growth in acquisition through an “as a service” consumption model where the government pays for the operating expense of a service and the vendor is obligated to incur the capital expense necessary to have the services available at the time and in the amount required. In addition, both the Congress and the Section 809 Panel have emphasized the importance of buying both more commercial items and using commercial buying practices. It is essential that the Department’s future contract financing policies align with these future buying techniques.

And, of course, there will be a difference in WHO the Department contracts with. There is a push to expand the number of non-traditional companies and commercial vendors in the defense marketplace. The growth in the Department’s use of Other Transaction Authority (OTAs) and the exposure from the DIU (Defense Innovation Unit) are indicative of the emphasis on outreach to non-traditional vendors. It is essential that the Department’s future contract financing policies align with the needs of these future buying partners.

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<sup>3</sup> See GAO Report to Congress: Government Contracting -- Assessment of the Study of Defense Contractor Profitability, GAO/NSIAD 87-50 (B-224639); December 23, 1986; available at: <https://www.gao.gov/products/NSIAD-87-50>.

We do not believe that a one-size-fits all contract financing policy can or should be adopted. While I'm not asking you to provide an exemption for services, it is essential that the Department's future contract financing policies align with and provide the flexibility to address the WHO, WHAT and HOW of the Department's acquisition of services and major systems and components over the next decade.

### Focus on Performance

The Department is right to be concerned about contractors' performance against contract requirements. But success starts with a clear set of requirements and performance metrics developed before, and refined during, the solicitation, evaluation and award phases of the procurement. In addition, the Department has numerous techniques and remedies available during the contract administration phase to hold contractors accountable for the contract performance that is under their control. But there is no, and there should be no, uniformity in the performance objectives, or in the metrics, or in the measurement of those objectives. That is one of the reasons why PSC has urged the Department to address contract performance issues on a contract-by-contract (or program-by-program) basis, even where a single contractor has responsibility for more than one major system. And that rationale for applying these objectives, metrics and measurements, where they exist, on a contract-by-contract basis is also the reason why we have opposed evaluating a contractor's performance on an enterprise-wide basis unless that is how the contracting was done. Of course, there are company-wide systems that are applied to all of a contractor's work – but those also support the contract-specific performance objectives that should be included in the contract.

When evaluating acquisition policy changes, I encourage policy makers to follow the mantra of "first do no harm." The area of contract financing policy is an area where it is easy to do that harm, even though unintentional. We appreciate the communications since the August rule was withdrawn and we encourage the Department to continue those discussions based on the information learned at these public meetings and from any further areas of review you deem appropriate.

In addition, we recommend that, as part of the acquisition strategy for each major program, the buying activity must be able to articulate the program risk and reward it expects. And in conjunction with the program market research and discussions with potential offerors, the program leaders should be able to address the associated contract financing needs of those program providers. Each major program should also develop the tailored performance metrics associated with the acquisition and the reporting requirements associated with those performance metrics as part of the program acquisition strategy and solicitation process. These steps will ensure that there is a tailored application of contract financing needs for each program based on an assessment of actual program risk and the "who, what and how" of each specific acquisition. These steps will also ensure that there is a mutual government/contractor view of the performance requirements and status that should minimize or eliminate any disagreement about actual contract performance.

### Conclusion

PSC appreciates the opportunity to provide these comments and we stand ready to assist you and the Department in following through on our recommendations and the appropriate data collections, particularly for services. In the interim, if PSC can provide you with any additional information, or if I can answer any questions here or after this meeting, please do not hesitate to let me know. -0-