SEC. ___. PREFERENCE FOR PERFORMANCE-BASED CONTRACT PAYMENTS.

Section 2307(b)(2) of title 10, United States Code, is amended—

(1) by striking "shall not be conditioned upon costs incurred in contract performance but on" and inserting "shall be conditioned upon"; and

(2) by inserting before the period at the end the following: "and shall not exceed total costs incurred at any point during contract performance".

[Please note: The "Changes to Existing Law" section below sets out in red-line format how the legislative text would amend existing law.]

Section-by-Section Analysis

This proposal is a top Acquisition and Sustainment efficiency initiative to ensure that the Department is able to appropriately provide contract financing in the form of performance-based payments while protecting the taxpayers' liability. The fundamental purpose of all contract financing is to assist the contractor in paying costs incurred during the performance of the contract. As such, financing is intended to be provided only to the extent actually needed for prompt and efficient performance. Unless the Department contractually agrees that it is in the public interest to provide advance payments, which in accordance with 10 U.S.C. 2307(d) requires the contractor to give adequate security, a contractor should never be reimbursed more than its actual costs incurred at any point in time. This would result in negative levels of contractor investment in the contract and provide a disincentive for contractors to complete work on the contract and deliver goods and services in a timely manner, if at all.

Budget Implications: This proposal has no significant budgetary impact. Resources impacted are incidental in nature and amount, and are included within the Fiscal Year (FY) 2021 President's Budget Request.

Changes to Existing Law: This proposal would make the following changes to section 2307 of title 10, United States Code:

§2307. Contract financing

(a) Payment Authority.-(1) The head of any agency may

(A) make advance, partial, progress, or other payments under contracts for property or services made by the agency; and

(B) insert in solicitations for procurement of property or services a provision limiting to small business concerns advance or progress payments.

(2)(A) For a prime contractor (as defined in section 8701 of title 41) that is a small business concern (as defined in section 3 of the Small Business Act (15 U.S.C. 632)), the Secretary of Defense shall, to the fullest extent permitted by law, establish an accelerated payment date with a

goal of 15 days after receipt of a proper invoice for the amount due if a specific payment date is not established by contract.

(B) For a prime contractor that subcontracts with a small business concern, the Secretary of Defense shall, to the fullest extent permitted by law, establish an accelerated payment date with a goal of 15 days after receipt of a proper invoice for the amount due if-

(i) a specific payment date is not established by contract; and

(ii) the prime contractor agrees to make payments to the subcontractor in accordance with the accelerated payment date, to the maximum extent practicable, without any further consideration from or fees charged to the subcontractor.

(b) Preference for Performance-Based Payments.-(1) Whenever practicable, payments under subsection (a) shall be made using performance-based payments on any of the following bases:

(A) Performance measured by objective, quantifiable methods such as delivery of acceptable items, work measurement, or statistical process controls.

(B) Accomplishment of events defined in the program management plan.

(C) Other quantifiable measures of results.

(2) Performance-based payments ~~shall not be conditioned upon costs incurred in contract performance but on~~ shall be conditioned upon the achievement of performance outcomes listed in paragraph (1) and shall not exceed total costs incurred at any point during contract performance.

(3) The Secretary of Defense shall ensure that nontraditional defense contractors and other private sector companies are eligible for performance-based payments, consistent with best commercial practices.

(4)(A) In order to receive performance-based payments, a contractor's accounting system shall be in compliance with Generally Accepted Accounting Principles, and there shall be no requirement for a contractor to develop Government-unique accounting systems or practices as a prerequisite for agreeing to receive performance-based payments.

(B) Nothing in this section shall be construed to grant the Defense Contract Audit Agency the authority to audit compliance with Generally Accepted Accounting Principles.

(c) Payment Amount.-Payments made under subsection (a) may not exceed the unpaid contract price.

(d) Security for Advance Payments.-Advance payments made under subsection (a) may be made only if the contractor gives adequate security and after a determination by the head of the agency that to do so would be in the public interest. Such security may be in the form of a lien in favor of the United States on the property contracted for, on the balance in an account in which such payments are deposited, and on such of the property acquired for performance of the contract as the parties may agree. This lien is paramount to any other liens and is effective immediately upon the first advancement of funds without filing, notice, or any other action by the United States.

(e) Conditions for Progress Payments.-(1) The Secretary of Defense shall ensure that any payment for work in progress (including materials, labor, and other items) under a defense contract that provides for such payments is commensurate with the work accomplished that meets standards established under the contract. The contractor shall provide such information

and evidence as the Secretary of Defense determines necessary to permit the Secretary to carry out the preceding sentence.

(2) The Secretary shall ensure that progress payments referred to in paragraph (1) are not made for more than 80 percent of the work accomplished under a defense contract so long as the Secretary has not made the contractual terms, specifications, and price definite.

(3) This subsection applies to any contract in an amount greater than $25,000.

(f) Conditions for Payments for Commercial Items.-(1) Payments under subsection (a) for commercial items may be made under such terms and conditions as the head of the agency determines are appropriate or customary in the commercial marketplace and are in the best interests of the United States. The head of the agency shall obtain adequate security for such payments. If the security is in the form of a lien in favor of the United States, such lien is paramount to all other liens and is effective immediately upon the first payment, without filing, notice, or other action by the United States.

(2) Advance payments made under subsection (a) for commercial items may include payments, in a total amount of not more than 15 percent of the contract price, in advance of any performance of work under the contract.

(3) The conditions of subsections (d) and (e) need not be applied if they would be inconsistent, as determined by the head of the agency, with commercial terms and conditions pursuant to paragraphs (1) and (2).

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