COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS
2111 Wilson Boulevard, Suite 400
Arlington, VA 22201
(703) 247-9490

July 6, 1999
CODSIA Case No. 10-99

Ms. Laurie Duarte
General Services Administration
FAR Secretariat (MVR)
Room 4035
1800 F Street, NW
Washington, DC 20405

Subject: Proposed Rule on Review of Award Fee and Other Unilateral Agency Determinations (FAR Case 98-017)

Dear Ms. Duarte:

The undersigned members of the Council of Defense and Space Industry Associations (CODSIA) appreciate the opportunity to offer comments on the proposed rule published in the Federal Register on May 6, 1999 at pages 24472-73. Formed in 1964 by industry associations with common interests in defense and space fields, CODSIA is currently composed of eight associations representing over 4,000 member firms across the nation. Participation in CODSIA projects is strictly voluntary. A decision by any member association to abstain from participating in a particular activity is not necessarily an indication of dissent.

Our comment is mostly limited to the proposed rule insofar as it relates to award fee contracts; and except as stated below, we have no objection to the proposed rule concerning unilateral government determinations relating to value engineering proposals and to small business and small disadvantaged business incentive subcontracting awards.

The proposed rule amends the FAR to implement the 1997 decision of the U.S. Court of Appeals for the Federal Circuit in *Burnside-Ott Training Center v. Dalton*, 107 F. 3d 854, and the 1998 decision of the Court of Federal Claims in *Rig Masters, Inc. v. United States*, 1998 WL 835097. The Court of Appeals held that the Contract Disputes Act renders unenforceable an FAR required contract provision that attempts to deprive the boards of contract appeals and the federal courts of jurisdiction to hear a contract dispute that otherwise falls under the Act because such a provision "conflicts with the normal de novo review mandated by the CDA and subverts the purpose of the CDA." 107 F.3d at 858. In so doing, it denied enforcement to a contract clause requirement in then FAR 16.404-2(a) that a contract award fee is a unilateral determination by the Government and not subject to the

Disputes clause of the contract. Based on that decision, the Court of Federal Claims in *Rig Masters, Inc.* reached a similar conclusion with respect to the FAR clause 52.248-1 Value Engineering clause which in paragraph (e)(3) stated that the contracting officer's decision to accept or reject a value engineering change proposal as well as which of the sharing rates would apply was to be "final and not subject to the Disputes clause or otherwise subject to litigation under" the CDA. The Court of Federal Claims dismissed the case for lack of jurisdiction without prejudice since the contractor had not submitted its claim to the contracting officer as required by the CDA.

With respect to award fees, the proposed rule would amend FAR Part 16, Types of Contracts, in two respects. First, it would amend FAR 16.405-2(a), describing cost-plus-award-fee contracts, to delete the last sentence which states, "This determination [of the award fee] is made unilaterally by the Government and is not subject to the Disputes clause." The proposed rule would substitute the following sentence: "This determination and the methodology for determining the award fee are unilateral decisions made solely at the discretion of the Government."

Secondly, the proposed rule would amend FAR 16.406(e) which directs contracting officers to insert an appropriate award-fee clause in fixed-price and cost-reimbursement award fee contracts. It would delete FAR 16.406(e)(3) which required that such a clause "Expressly excludes from the operation of the Disputes clause any disagreement by the contractor concerning the amount of the award fee." In its place, proposed FAR 16.406(e)(3) would state that such a clause "Expressly provides that the award amount and the award fee determination methodology are unilateral decisions made solely at the discretion of the Government."

On the merits, the issue in *Burnside-Ott* was the methodology used to determine the amount of the award fee. The contract clause, "Performance Evaluation Report Criteria," established numerical point score ranges from 0-100 for various categories (0-60 Submarginal, 61-70 Marginal, 71-80 Average, 81-90 Above Average, 91-100 Excellent) but did not include the methodology for converting the point scores to award fee dollars. The contractor who received a point score of 93.65 contended that it should receive a corresponding percentage of the award fee pool under a "1-to-1" conversion method used by the Government in other cases. The Navy instead used an undisclosed conversion methodology that excluded any award fee for point scores below 60 and determined that the contractor would receive 84.15% of the award fee (93.65-60 x 2.5%). The Court of Appeals stated:

> Burnside-Ott cannot point to any part of the contract that requires the award fee to correspond directly with the performance rating. Indeed, the text of Clause H-21 unmistakably grants unilateral discretion to the government to determine the award fee. The choice of conversion method was left by the contract to the [Fee Determining Official] and should not be disturbed by the [ASBCA] or by this court unless the CO's affirmance of the FDO decision was arbitrary or capricious. There is no evidence of record to show that the CO acted arbitrarily

> or capriciously. Therefore, the decision of the Board [denying the contractor's claim] is affirmed.

In our opinion, the proposed rule should require both the solicitation and the contract for an award-fee contract to state the methodology for determining the amount of the award fee to avoid a repetition of the dispute in the *Burnside-Ott* case. This is already partially achieved in FAR 16.405-2(a) which in describing cost-plus-award-fee contracts states, "The amount of the award fee is determined by the Government's evaluation of the contractor's performance in terms of the criteria stated in the contract." We would then add, in lieu of the language of the proposed rule for the next sentence, "That determination is a unilateral decision made at the discretion of the Government, subject to review under the "Disputes" clause." We further recommend deleting "solely" in the phrase "unilateral decisions made solely at the discretion of the Government." This is to enable the parties to discuss the award fee prior to the contracting officer's determination and to preclude contracting officers from relying on "solely" as precluding such discussions.

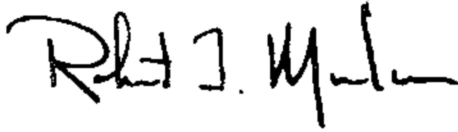
With regard to FAR 16.406(e)(3), in lieu of the proposed rule we suggest that "an appropriate award-fee clause in solicitations and contracts when an award-fee contract is contemplated... (3) Expressly set forth the methodology for determining the amount of the award fee and provide that the determination of the award fee is a unilateral decision made at the discretion of the Government but is subject to appeal by the contractor under the Disputes." The inclusion of such a clause in the solicitation and the contract removes the need to cover methodology in the unilateral decision. Moreover, it is appropriate to explain the FAR change by further providing in the clause that the unilateral decision made at the discretion of the Government is subject appeal by the contractor under the Disputes clause.

This last point we think equally applies to the implementation of *Burnside-Ott* in the remainder of the proposed rule in FAR Part 48, Value Engineering, and in the various clauses of FAR Part 52 relating to value engineering and subcontracting programs. For each of these proposed changes we would add at the end of the proposed texts the substance of the phrase that the unilateral decision or determination is subject to review under the Disputes clause.

If you have any questions concerning the foregoing, please contact Ruth Franklin, Director of Procurement, National Defense Industrial Association, at 703-247-2598.

Sincerely,

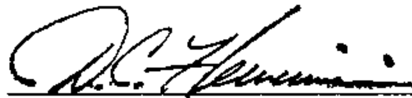
SEE ATTACHED CODSIA SIGNATORIES



Robert T. Marlow
Vice President, Government Division
Aerospace Industries Association

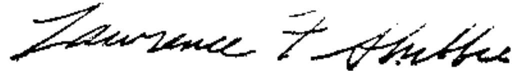
Cynthia Brown
President
American Shipbuilding Association

Gary D. Engebretson
President
Contract Services Association



Dan C. Heinemeier
President, GEIA
Electronic Industries Alliance

Kenneth McLennan
President
Manufacturers Alliance/MAPI



Lawrence F. Skibbie
President
National Defense Industrial
Association

Bert M. Concklin
President
Professional Services Council