

COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS

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November 8, 1999
CODSIA Case No. 12-99

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

Re: FAR Case 99-010

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 on Contractor Responsibility, Labor Relations Costs, and Costs Relating to Legal and Other Proceedings which was published in the *Federal Register* on July 9, 1999. 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.

CODSIA members are opposed to the proposed changes included in the referenced FAR case and urge that these changes be abandoned. After a brief introduction, we will address the proposed changes to Part 9 and Part 31 separately.

Introduction

We do not agree that the proposed changes clarify existing regulations nor do we believe that the current regulations require any clarification. Rather, we understand that these proposals refocus the fundamental nature of the responsibility determination. Instead of focusing on the capability of the contractor to perform the contract under consideration, the proposed regulations seem to direct the attention of the contracting officer to making an independent determination of the contractor's business integrity based on reference to previous events regarding compliance with innumerable labor, tax, environmental, consumer protection, employment laws, and other laws which may be quite irrelevant to successful contract performance.

This significant and unnecessary enlargement of the reasons for a determination of non-responsibility is purportedly justified by the "existing principle that the Federal Government should not enter into contracts with contractors who do not comply with law." That principle is unassailable only in the abstract. Application of this principle must be founded on due process and certainty of noncompliance.

The current regulations governing debarment reflect the proper balance of seriousness of the offense, certainty of the offense, relationship to present circumstances (present responsibility) and implementation of minimal due process requirements. We do not believe that a contractor should be subject to multiple decisions regarding its capability or eligibility to perform contracts based on subjective evaluations of the same facts or alleged facts by different contracting officers. When a question of responsibility relates to noncompliance with the law rather than the means of performing the particular contract, the decision should be made by one debarring official.

Part 9

Ambiguities

The proposed regulations raise serious interpretive and practical concerns. The language of the proposed rule is so ambiguous that its application becomes completely unpredictable. The proposed rule, "*Persuasive* evidence oflack of compliance with tax laws or *substantial* noncompliance with labor laws, employment laws, environmental laws, antitrust laws or consumer protection laws," requires definition in order to be uniformly (and reasonably) applied. "Persuasive evidence" is neither defined, explained or described in any context. Moreover, the proposed rule clearly requires a higher standard for violations of labor, employment, environmental, antitrust, consumer protection and employment law ("substantial noncompliance") over tax law ("lack of compliance") as a function of present responsibility. This hierarchy of legal compliance is as unjustified as the proposed regulation. Further, the absence of any definition, explanation, or description of "persuasive evidence," "lack of compliance" and "substantial noncompliance," makes the proposed regulation too vague to be enforced much less implemented and applied with the predictability necessary for a mutually acceptable, mutually responsible, contracting environment.

The ambiguities of the proposed regulation are multiplied by the ambiguities of the laws themselves which are only generally referenced. For example, the antitrust laws generally involve a division into those actions which are subject to a "*per se*" test and those subject to a "rule of reason" test. Antitrust law is so complex that the agencies responsible for antitrust law enforcement, the Federal Trade Commission and the U.S. Department of Justice, have recently published a 35 page draft attempting to explain the analytical approach they will apply to evaluations of business dealings between competitors. (Antitrust Guidelines for Collaborations Among Competitors, draft dated

October 1, 1999). No contracting officer has training in this area and should not be asked to evaluate such possible conduct as a prerequisite to contract performance. In fact, just in the antitrust area "anticompetitive situations" are sufficiently difficult to identify that DCAA was required to issue two Memorandums for Regional Directors regarding "Audit Guidance of Anticompetitive Exclusive Teaming Agreements." See MRD 99-PFC-084(R) dated 26 July 1999 and 99-PFC-038(R) 30 March 1999.

Duplication of Functions

There are existing mechanisms for determining the existence of a violation and the appropriate consequences to the violator of the labor, tax, employment, consumer protection, antitrust and environmental laws. The contracting officer should not be required or expected to replace this established legislative structure. All these laws have specific, often multiple proscriptions, remedies for noncompliance, enforcement mechanisms, and responsible agencies. For example, for late payment of taxes one would expect the IRS to impose a late penalty and interest. Adding ineligibility for a government contract is certainly disproportionate to the noncompliance. Tax fraud involves criminal prosecution. Conviction of tax fraud could lead to debarment following a due process hearing to determine present responsibility.

Comparable procedures exist with regard to the other laws referenced. Many of the labor laws, depending on their significance, already provide for debarment as a remedy. An individual contracting officer should not be expected to duplicate the functions already assigned by law and regulation to the Internal Revenue Service, the Department of Labor, the Environmental Protection Agency, the Department of Justice, the Federal Trade Commission, the debarment officials of each agency and the Judiciary. We believe that it is not the proper function of the contracting officer to deny awards when there has been no determination of noncompliance with those laws by the congressionally mandated official. This is especially true when the offense has not been deemed serious enough by the Congress to justify debarment.

Increase of Protests

The proposed regulations will undoubtedly increase the number and complexity of award protests. It should be readily apparent that there is no necessity for a non-responsibility determination under these rules unless the contracting officer seeks to disqualify an otherwise successful offeror. That offeror will, in many cases, feel compelled to protest in any available forum in order to defend its reputation and challenge the application of these ambiguous rules to its circumstances. Such protests are inevitable.

Impact on Procurement Reform

CODSIA members further believe that encumbering the procurement process with these vague rules incorporating indirectly untold volumes of law and regulations applicable to a host of topics independent of acquisition runs completely counter to the goals of procurement reform and simplification. We have and continue to support all reasonable efforts to reduce impediments to doing business with the government, the adoption of commercial practices and the simplification of processes. The proposed regulations are completely incompatible with these objectives.

Part 31

We believe that all reasonable and allocable costs of doing business should be allowable unless the nature of the cost is such that there is a compelling public interest to be served in denying the allowability of the cost. FAR 31.205-47, "Cost related to legal and other proceedings," reflects a decision by Congress in the Major Fraud Act of 1988 that it is contrary to the public interest to allow the costs of a legal proceeding in which there was a criminal conviction, a finding of liability where fraud was alleged, or the imposition of a monetary penalty was awarded. To go beyond this determination by Congress and disallow costs in the event of purported, alleged, or actual noncompliance is inappropriate. There is no compelling public interest served in disallowing legal defense costs where the noncompliant conduct does not result in a monetary penalty (versus payment and interest thereon).

The proposed new paragraph FAR 31.205-21 (b) would make costs of "influencing" employees' decisions regarding unionization expressly unallowable. This new provision will limit contractors' ability to ensure that employees have information on both sides of labor/management issues. The labor laws, and the agencies responsible for their enforcement, recognize that some activities which could be construed as "related to influencing employees' decision regarding unionization" are not improper while other apparently similar activities may in fact constitute unfair labor practices. Disregarding subtle distinctions in arcane areas of labor laws (or any other laws) in order to justify a policy that disallows the costs of such activities is contrary to the enlightened and businesslike procurement policy of neutrality in labor relations. Again, CODSIA members emphasize that the federal acquisition process should not contain (or create) a sanction for conduct which is already the subject of a well-established legislative and regulatory restrictions that are unrelated to the acquisition process.

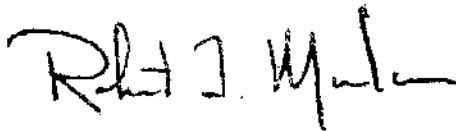
We also emphasize that the proposed revisions to FAR 31.205-47 will force all contractors (i.e., large, small, disadvantaged, 8(a), women-owned) to spend much more time, resources and money to defend themselves against allegations of "noncompliance" because a burden will be placed on them to judicially exonerate themselves before recovering their costs of litigation as a normal, indirect cost that benefits the business overall. In this circumstance, settlements would be discouraged rather than encouraged

because of the subsequent penalty of suspension and debarment from federal contracting. Furthermore, the proposed measures would increase costs, prolong disputes, disrupt the procurement process and potentially agitate and exacerbate, rather than facilitate, labor-management relations.

Conclusion

The concerns expressed above are widespread in the business community, and are shared by our member companies. We urge that FAR Case 99-010 be withdrawn from further consideration.

Sincerely,



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



Lorraine M. Lavet
Chief Operating Officer
American Electronics Association




Cynthia Brown
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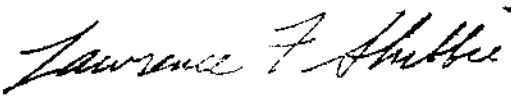
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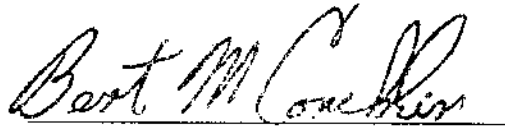
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