

COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS

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August 9, 1999
CODSIA Case No. 13-99

Ms. Donna Fortunat
NASA Headquarters
Office of Procurement
Analysis Division (Code HC)
Washington, DC 20546

Dear Ms. Fortunat:

The undersigned members of the Council of Defense and Space Industry Associations are pleased to comment on the proposed NASA FAR Supplement (NFS) revision to the NASA structured approach for negotiating profit or fee objective.

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.

Overall we are pleased that NASA is adapting its approach to DFARS structured fee and profit objectives. However, we believe several key aspects of the proposed revision are inconsistent with the current DFARS structured approach, are at odds with current provisions in the Federal Acquisition Regulation, may violate legislation, or are detrimental to the goals of acquisition reform.

Proposed paragraph 1815.404-4(b)(1)(i)(a) requires that the structured approach be used for "...contracts greater than or equal to \$100,000..." The DFARS structured approach is required for contracts over \$500,000 and is permissible for those between \$100,000 and \$500,000. DFARS 214.404-4(b)(1) states that the structured approach shall be used when cost or pricing data is required and FAR 15.403-4(a)(1) does not require cost or pricing data below \$500,000. The NASA threshold for requiring use of the structured approach should also be \$500,000.

Proposed paragraph 1815.404-4(b)(1)(i)(b) states that "...the rate calculated for the basic contract may be used on all actions under the contract..." In FAR terminology "may" is permissive. Thus, this statement is unnecessary and implies a preference for using an assumed basic contract rate that is not necessarily appropriate.

Also, use of "the rate calculated for the basic contract" is not practical because during negotiations the parties do not necessarily agree on a profit or fee rate. FAR does not contemplate specific agreement on a rate of profit or fee. FAR 15.405 states that "...the contracting officer should not become preoccupied with any single element [of price] and should balance the contract type, cost, and profit or fee negotiated to achieve a total result--a price that is fair and reasonable to both the Government and the contractor." Furthermore, negotiation memoranda prepared by contractor and government personnel seldom agree on what the negotiated profit or fee rate was negotiated. This proposed provision should be deleted.

Another reason for opposition to the use of a basic contract rate is that profit is intended to reward risk. Risk for a change or modification could vary significantly between individual changes or modifications. For example, many government negotiators and DFARS 215.404-713 operate under the groundrules that "If a substantial portion of the costs have been incurred prior to definitization, the contracting officer may assign a value as low as 0 percent, regardless of contract type." This would be inconsistent with the "use of the basic contract rate" and would result in contractors being awarded the lower of these two competing concepts. The above-referenced language in proposed paragraph 1815.404-4(b)(1)(i)(b) should be deleted.

Proposed paragraph 1815.404-471-1(b) states that "...the contracting office need not explain assignment of the normal value, but must address conditions that justify assignment of other than the normal value." This proposed provision would incentive contracting officers to routinely use the normal value to reduce paperwork and controversy. Furthermore, FAR 15.406-3(a) adequately covers documentation of profit or fee: "...The documentation (e.g., price negotiation memorandum (PNM)) shall include the following...The basis for the profit or fee prenegotiation objective and the profit or fee negotiated." This proposed provision should be deleted.

Proposed paragraph 1815.404-471-3(c.) provides for a profit or fee for fixed-price redeterminable contracts of 0%. This may be a misprint because footnote (3) states that these contracts should be treated as fixed-price-incentive contracts with below normal provisions. This proposed range of profit or fee is insufficient for the contract type.

Proposed paragraph 1815.404-471-4(c.)(5) states that "Negative consideration may be appropriate when the contractor is expected to obtain spin-off benefits as a direct result of the contract, for example, products with commercial application." In other words, a contractor may obtain a greater profit or fee by neglecting, electing or refusing to develop commercial applications—a result that is not consistent with acquisition reform initiatives of the past five years. This proposed provision should be deleted.

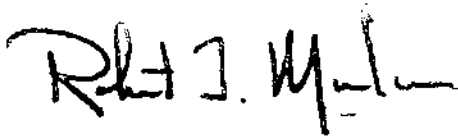
Proposed paragraph 1815.404-471-5(a) provides that "...a reduction in the profit/fee objective shall be made in the amount equal to the facilities capital cost of money allowed in accordance with FAR 31.205-10(a)(2). This mandatory dollar-per-dollar offset of a specifically allowable contract cost against negotiated profit or fee is not

appropriate. The FAR and Cost Accounting Standards have recognized this cost as allocable and allowable for government contracts. The FAR acknowledges that incurred costs include imputed cost of money. This proposed profit/fee provision is inconsistent with FAR and should be deleted.

Finally, we are concerned about a possible unintended consequence of prescribing precise ranges for each of the factors to be evaluated under weighted guidelines. Our concern is that the figures, when totaled, would add up to an amount which heretofore corresponded to an administratively-imposed 15% "cap" on profit – a "cap" no longer permissible under FAR Part 15 as revised in accordance with the Federal Acquisition Reform Act. To remedy this outcome, we recommend that the guidance note that the ranges are *illustrative only* and should not be construed as implying or establishing an overall limitation or "cap" on profit. What is important and what should be retained are the relative relationships of the ranges associated with each factor.

Thank you for the opportunity to comment on the proposed rule. If you have any questions, please call CODSIA Project Officer Ruth Franklin at (703) 247-2598.

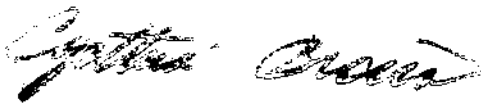
Sincerely,



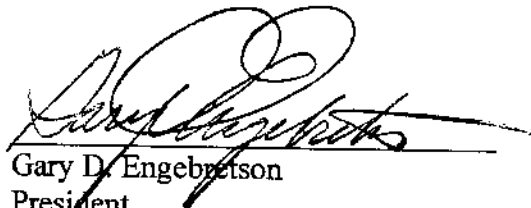
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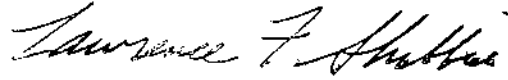
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