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September 28, 1999  
CODSIA Case No. 16-99

Mr. Kenneth A. Sateriale  
NASA Headquarters Office of Procurement  
Contract Management Division (Code HK)  
Washington, DC 20546

Subject: National Aeronautics and Space Administration FAR Supplement (NFS)  
Proposed Rule Entitled "Risk Management"

Dear Mr. Sateriale:

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 July 20, 1999 (Vol. 64, No. 138). Formed in 1964 by industry associations with common interests in the defense and space fields, CODSIA is currently composed of eight associations representing 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.

The proposed NASA rule would revise the NASA FAR Supplement (NFS) to emphasize within the acquisition process considerations of risk management, including safety, security (including information technology security), health, export control, and damage to the environment. The proposed rule addresses risk management within the context of acquisition planning, selecting sources, choosing contract type, structuring award fee incentives, administering contracts, and conducting contractor surveillance. Additionally, the proposed rule would require offeror proposals to include a risk management plan whenever the value of the resulting contract is expected to exceed \$5 million, or whenever the contracting officer determines that it would be appropriate. Furthermore, the proposed rule would allow that contractors not be paid award fee for any evaluation period in which there is a major breach of safety or security, as that term is defined in the proposed rule.

Our comments have been organized based on the key features of the rule:

**1. General.**

- The published rule implements only that portion of the risk management rule that pertains directly to the procurement process. The regulation states that risk issues will also be addressed in a separate NFS revision to the NASA structured approach for developing a fee/profit negotiation objective. Additionally, the proposed rule references critical definitions for mishap reporting and mission failure that are currently in draft form. The use of draft definitions in the proposed rule makes any serious analysis of the new risk management concepts undertaken at this time only of marginal value. It is not possible for industry representatives to truly gauge the full scope, impact, and expense of the proposed rule without seeing all elements in their entirety. NASA should publish the Risk Management rules as a complete package, and not individually, segment by segment.
- The proposed rule would counter the goals of acquisition streamlining, and other initiatives designed to encourage procurement of commercial items and adoption of commercial practices (FASA, FAR Part 12, Civil Military Integration, Commercial Items, etc.). It is a departure from the government's intent to become more commercial-like. This proposed rule imposes government oversight and approval of Risk Management Plans, along with post award surveillance. Our commercial customers do not have similar requirements. Commercial practices already address risk management, and unique requirements are not necessary to protect NASA's interest. OSHA and other government safety programs adequately address the issues in a commercial environment. The proposed rule is inconsistent with the spirit of moving to a commercial-like environment. It will act as a deterrent to commercial firms considering entry into the government/NASA marketplace and prevent access to the increased competition and valuable new technology they bring with them.
- This additional oversight will add costs to the program. Although risk management is an on-going contractor concern and process that it voluntarily imposes on itself on each program, the proposed rule adds unnecessary bureaucracy and rigidity to the process by imposing additional reporting requirements on the contractor and introducing unprecedented oversight and surveillance by NASA personnel. NASA's Procurement Information Circular (PIC) 99-9, identifies "transfer" as a method of risk treatment whereby the customer wants to transfer risk to the contractor and the contractor wants the customer to retain or accept the risk. This transfer of risk assumption has always been a matter of "negotiation" to settle on an appropriate contract type. This proposed rule imposes the entire risk assumption on the contractor, eliminating any flexibility to address unique program or contractor circumstances, while increasing proposal and program costs.
- The proposed rule adds another requirement for commercial items, which is contrary to acquisition reform and in particular Civil Military Integration. NFS 1812.301 adds

1852.223-75, Risk Management Plan, as a clause authorized for use in acquisitions of commercial items. This requirement is additional to any commercial practice and, when applicable, will add cost to NASA for any commercial product purchased and may impede NASA's access to commercial markets.

- The proposed rule needs clarification as to its effect on existing contracts. A loss may occur during a future award fee period but the cause of the loss may be attributed to events occurring years ago. CODSIA members do not believe that these changes should be imposed retroactively, i.e., on existing contracts.
- New requirements under 1815.201, exchanges with industry before receipt of proposals, are inappropriate if adequate competition is to be maintained. To comment upon perceived "other programmatic risk issues" might result in loss of a competitive advantage. Yet a failure to comment may have an effect on a contractor's legal claim or defense.
- The proposed rule makes NASA the arbiter of a contractor's compliance with complex environmental and safety regulations. CODSIA members are concerned that NASA contracting officers may not be qualified to make decisions on such issues.
- The proposed rule does not provide sufficient guidance to the contracting officer relative to tailoring or waiver of the subject provisions. The lack of such guidance raises concerns regarding consistent and uniform application of the provisions.

**2. Expansion of Oversight to Contractors' Own Facilities.** The clause contained in proposed NFS 1852.223-76 provides that a "major breach of safety," for which contractual remedies may apply, can occur either on or off government installations. We address later in these comments the draconian nature of the penalties imposed by this clause and NFS 1816.405-274. Here we address the apparent expansion of NASA's oversight role.

- Because NFS 1852.223-76 explicitly provides a contractual remedy for a "major breach of safety," which is defined to include mishaps both on and off NASA installations, we are concerned that NASA intends to require the contractor's health and safety plan, and the risk management plan where required, to address operations at the contractor's own facilities, as well as to operations on NASA installations. This proposal would constitute an unprecedented intrusion by NASA into the operations of contractors at their own facilities. Given the ability of a contracting officer to require the contractor to take occupational safety and health measures beyond those required by law (NFS 1852.223-70, Safety and Health, paragraph (b)), the contracting officer would supplant the contractor's management in directing operations that affect occupational safety and environmental matters. CODSIA members question whether

NASA wishes to become responsible for workplace safety and environmental operations at contractors' facilities.

- Expanding the applicability of the safety and health clause to workplace safety and environmental matters at contractor's facilities will result in a massive accident and environmental incident reporting requirement. New paragraph (c) of NSF 1852.223-70 would require each NASA contractor to immediately inform NASA of every occupational lost-time injury, occupational disease claim, or contamination of any property. It is not even clear that such reports would be limited to the contractor's facilities engaged in the performance of a NASA contract. Nor is it clear that reporting of contamination of property would be limited to the area in and around the contractor's facility, as opposed to contamination at a waste disposal facility used by the contractor. As the proposal is currently drafted, NASA will be inundated with information that has little or no value in managing the contracts it has awarded. This information will not enhance NASA's ability to ensure that the product being built or developed by a particular contractor meets contract specifications, or is otherwise safe and reliable.
  - We do not question that NASA may legitimately request a contractor that is building mission hardware to develop a plan to integrate systems safety into the contractor's operations under the NASA contract at the contractor's facility. However, unlike systems safety concerns, or concerns about workplace safety when the contractor is operating on a NASA installation, there is no legitimate basis for NASA to require that its contractor develop and obtain NASA approval of a plan addressing occupational safety or environmental issues on the contractor's own facilities. Likewise, there is no legitimate basis for requiring a contractor to prepare a risk management plan with regard to occupational safety and environmental issues at the contractor's facility, or to make that plan a part of the proposal evaluation (proposed NFS 1815.305(a)(vi)). The extension of these requirements to the contractor's operations at its own facilities will only increase cost, without measurable benefit to NASA's mission.
  - Nothing in current public policy or the history of NASA contractor operations justifies an expansion of NASA control to include workplace safety and environmental issues at the private facilities of its contractors. The proposal goes far beyond the issue of a responsibility determination under the current FAR and NFS. The proposal also goes well beyond the July 9, 1999, proposed modification of FAR 9.104-1(d), which would expressly include workplace safety and environmental considerations in the responsibility determination made prior to a contract award. The NASA proposal is without precedent or justification.
3. **Thresholds.** Risk Management Plan requirements contained in the proposed rule will be inserted in NASA solicitations and contracts exceeding \$5 million (see

proposed NFS 1823.7001(d)). NASA proposes to require flow down of the requirement for a risk management plan to subcontracts whose value is expected to exceed \$500,000 (see proposed NFS 1852.223-75). Further, even if a contract instrument is not in excess of the \$5 million dollar threshold, the contracting officer still has the option to use this clause.

- Because of the requirements being imposed on the prime, the potential for punitive remedies, and the proposed flowdown threshold (\$500,000), some primes may, in order to fully protect their interests, require subcontractors regardless of size to provide information and maintain systems to support the prime's risk management plan. This activity will have a substantial impact, as many small businesses are ill equipped to comply. This will also impact source selection criteria and have a cost impact due to additional post award surveillance and reporting on subcontractors. Even where a prime limits flowdown of any requirement to subcontractors meeting the \$500,000 threshold, the proposed rule will impose an unreasonable burden on subcontractors who are doing a relatively small amount of work on the overall project. From at least the occupational safety and environmental perspective, requiring a risk management plan from a \$500,000 subcontractor, especially one not performing on a NASA installation, will result in an increase in program costs out of proportion to any benefit to be gained by NASA in carrying out its program management responsibilities.
- At a minimum, it is recommended that the threshold for prime contractors be increased to \$100 million and the subcontractor flowdown threshold be increased to \$10 million. The option to use the clause in contracts not meeting \$5 million threshold should be deleted. This will limit the cost impact to be incurred by the contracting community.

**4. The "Major Breach of Safety or Security" Clause.** The proposed rule would require inclusion in most NASA contracts of a new clause titled "Major Breach of Safety or Security." This clause, as written, would impose harsh penalties for even minor incidents, including occurrences unrelated to mission safety.

- Proposed NFS 1852.223-76 would provide that a major breach of safety may occur on or off government installations and that such major breach of safety may constitute a breach of contract justifying termination for default. As defined, a "major breach of safety" could include a single OSHA citation for a minor deviation from OSHA requirements. A major breach of safety also could include an accident that results in hospitalization of three people, even if the injuries are minor or were not caused by and did not involve a violation of OSHA requirements. See 1852.223-76, paragraph (a)(2), and the proposed definition of a "Type B Mishap" contained in the supplementary information to the July 20, 1999 proposal, 64 FR 38881. Thus, a contract could be terminated for default based on an accident that did not have severe

consequences, had no impact on mission readiness or reliability, or for which the contractor was not at fault. The Major Breach of Safety and Security clause should be withdrawn, or at least rewritten to eliminate the specter of exceedingly harsh penalties for minor occurrence.

- Other issues concerning the definition of major breach safety are discussed below, under the heading of Award Fee Ramifications.
- To the extent that the clause set forth in NFS 1852.223-76 remains, the following revisions should also be made.
  - In 1852.223-76, paragraph (c), add "The contractor is not required to include in any report an expression of opinion as to the fault or negligence of the contractor or any employee."
  - In 1852.223-76, NASA should make clear that "a major breach of safety" is an act or omission of the contractor that is a substantial cause of the mishap, and that the mishap resulted in a fundamental negative impact on the safety, readiness or reliability of a NASA mission or mission hardware.

##### **5. Safety and Health Clause.**

- Paragraph (b) of 1852.223-70(b) requires the contractor to "take, or cause to be taken, any other safety and occupational health measures the contracting officer may reasonably direct." The term "reasonably" is ambiguous, and there is no requirement for consistency among NASA contracting officers or with the interpretation of the Responsible Agency of its rules and regulations.
- In 1852.223-70, last sentence of paragraph (c), add the words "contractor or" before "employee".
- Under NFS 1852.223-70, Safety and Health, paragraph (h) inserts a new requirement to continually update the safety and health plan when necessary, inclusive of subcontracts above the threshold. The inclusion of the word "continually" implies a nearly constant review of the health and safety plan for potential updating. Such a level of effort would be costly, with no benefit. A statement that the plan should be updated when necessary would suffice. The word "continually" should be stricken from paragraph (h).
- NASA proposes to delete from the existing safety and health clause the qualification that the contractor must comply with occupational safety and health requirements in effect on the date of the contract. Thus, the proposal would require the contractor to comply with new workplace safety requirements imposed after the award of the

contract. Under current law the cost of complying with such new requirements would not be a basis for an equitable adjustment under a fixed price contract. Contractors under fixed price contracts should not be exposed to financial risk over matters not under their control, but obviously under the control of the government.

- NFS 1852.223-73, Safety and Health Plan, states that contractors are to deliver products to NASA "that will be safe and successful for their intended use." This could be construed as a warranty of fitness for a particular purpose. If this is the case, such a requirement is inappropriate for the majority of effort conducted under a NASA contract.
- The degree of contractor oversight can lead, and in fact has led, to assertions of responsibility for safety and environmental incidents at subcontractor facilities in civil litigation. NASA should be prepared to indemnify its contractors against losses that may result from implementation of these requirements.

**6. NASA Evaluation Factors.** NASA proposes to add NFS 1815.304-70(d)(4), which would require contracting officers to evaluate a contractor's past performance in occupational health and environmental protection, among other factors, during the contract award process. The Civilian Acquisition Agency Council and the Defense Acquisition Regulations Council have jointly proposed a modification to the FAR to include compliance with employment and environmental laws in the consideration of the proposed contractor's record of integrity and business ethics. See 64 FR 37360, July 9, 1999. NASA should withdraw its proposed 1815.304-70(d)(4), at least as it would relate to occupational safety and environmental considerations in a responsibility evaluation, as the Acquisition Councils are addressing this issue.

**7. Award Fee Ramifications.** Under the proposed regulations, a contractor's award fee may be eliminated for any evaluation period in which there is a "major breach of safety or security." There are four problems with this.

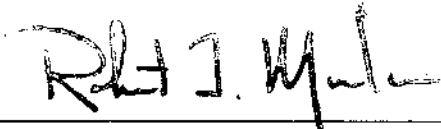
- First, applicable definitions used to define "major breach of safety and security" are contained in another document which is referred to in the proposed regulation and which is not yet finalized. Second, the draft definitions of Type B Mishap and Mission Failure are so broad and vague that minor accidents resulting in some personal injury or property damage could be classified as a major breach of safety. Third, there is no allocation of fault contained in the definition of "major breach of safety and security." A contractor may have its fee eliminated for a "major breach" even if it is not a substantial cause of the accident or security violation. Fourth, NASA is able to eliminate the award fee even if the amount of the fee is more than the actual damage to the Government caused by the "major breach of security or safety."

- Rather than penalizing the contractor for one specific incident, a much better way to handle this is to do away with the concept of "major breach of safety or security" and make the contractor's overall compliance with its safety, health and risk management plans an evaluation factor in the negotiated award fee plan, just like any other factor to be used in evaluating the contractor for award fee purposes.
- In addition, there is a problem of proportionality. For instance, minor violations of OSHA rules can result in draconian penalties. A technical paperwork violation that cannot result in injury, but which carries a penalty of a few hundred dollars, would qualify under the proposed definition as a "major breach of safety." As such, it would allow "an overall fee determination of zero" to be made for the relevant evaluation period. Given the potential magnitude of award fees on NASA programs, this seems a grossly disproportionate penalty for so minor a violation.
- Further, the draft definitions of "Type A Mishap," and "Type B Mishap" contained in the preamble are rendered meaningless in the Award Fee Evaluation Factors section. Both kinds of mishaps are lumped into the "major breach of safety" definition--meaning that safety problems NASA deems less severe, and which had little or no nexus with hardware or mission reliability or safety, would subject contractors to penalties equal to those resulting from a major occurrence that had a direct and very substantial impact on mission safety or readiness. The lack of a clear distinction between the consequences of the various categories of mishaps will create the threat of arbitrary decisions and contentious NASA-contractor relations.

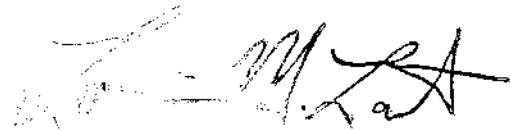
Taken as a whole, this proposed rule burdens NASA contractors and subcontractors with significant new liability while allowing NASA unprecedented managerial control over operations at contractor facilities. Minor wording changes will not fix the problems identified. If the rule is not entirely withdrawn, a major overhaul is necessary. To ensure proportionality, there should be some way to classify the degree of seriousness of the safety problem and its impact on the NASA mission. A matrix system like that used by environmental agencies to determine the amount of a penalty to be assessed would be one idea. Perhaps there are others that NASA would find useful. Whatever the mechanism, it must be capable of objective application, and it must distinguish not only between degrees of seriousness but it must also recognize the nexus - or lack thereof - between the contractor's act or omission and mission goal.

CODSIA members appreciate the opportunity to comment on the proposed rule. Should you require further information regarding this issue, please contact CODSIA project officer Meredith Murphy at (703) 465-3673.

Sincerely,



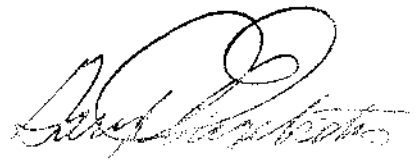
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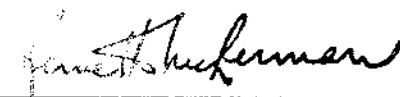
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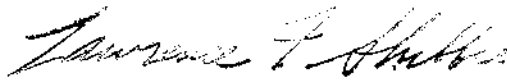
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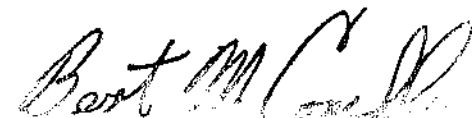
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