

COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS

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March 13, 2000

CODSIA Case No. 4-00 P

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

Ref: FAR Case 1999-003, Liquidated Damages

Dear Ms. Duarte:

The undersigned members of the Council of Defense and Space and Industries Associations (CODSIA) appreciate the opportunity to offer comments on the proposed rule published in the *Federal Register* on January 13, 2000 at pages 2271-76. 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 limited to proposed FAR 11.501(d) which states:

The amount of liquidated damages assessed under a contract is a unilateral decision made solely at the discretion of the Government.

That sentence does not appear in the existing FAR coverage of liquidated damages in FAR Subpart 11.5.

In contacting Ms. Victoria Moss "for clarification of content" as stated in the *Federal Register* announcement of the proposed rule, we were referred to Ms. Melissa Rider of the DAR Council staff. From her we were surprised to learn that this sentence was added at the request of the DAR Council attorneys in order to parallel the coverage of the recent FAR rule on award fee and value engineering determinations published on December 27, 1999 in the *Federal Register* at pages 72449-50. That coverage in the policy statements and contract clauses does state, both for award fees and value engineering determinations, that they "are unilateral decisions made solely at the discretion of the Government." This rule was adopted to implement the decision of the Court of Appeals for the Federal Circuit in *Burnside-Ott Training Center v. Dalton*, 107 F. 3d 854 (1997), which held that agency award fee determinations were subject to appeal under the

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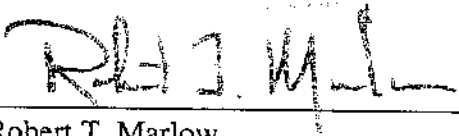
contract Disputes clause notwithstanding a then mandated FAR clause that sought to make the agency determination final and not subject to the Contract Disputes Act.

We submit that these considerations and the proposed sentence have no application to liquidated damages. The amount of liquidated damages assessed under a contract is determined solely by the contract clauses prescribed by proposed FAR 11.503, and not by "a unilateral decision made solely at the discretion of the Government." The clauses further recognize that excusable delay will operate to reduce or eliminate the amounts assessed and that assessments of liquidated damages are subject to the procedures of the Disputes clause. If not removed, the proposed sentence could create confusion and needless controversy in the administration of liquidated damages. To repeat, unlike award fee and value engineering decisions, the Government's discretion has nothing to do with the assessment of liquidated damages.

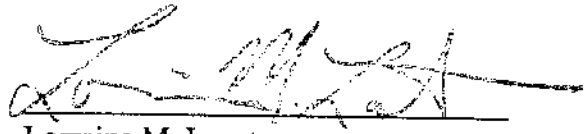
Accordingly, we recommend that the sentence proposed at FAR 11.501(d) be eliminated.

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

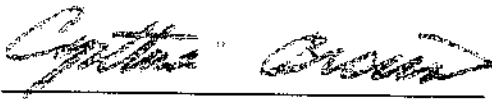
Sincerely,



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



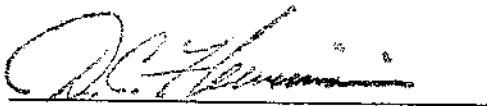
Lorraine M. Lavet
Chief Operating Officer
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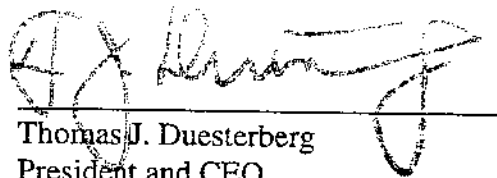
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Electronic Industries Alliance

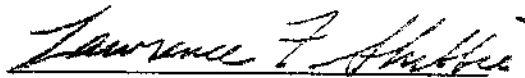


Thomas J. Duesterberg
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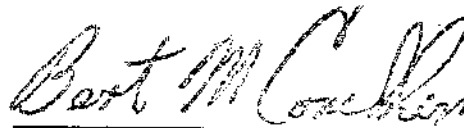
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