

COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS

2111 Wilson Boulevard, Suite 400

Arlington, VA 22201

(703) 247-9490

March 30, 1999

CODSIA Case 5-97.3

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

REF: FAR Case 98-006, Interest and Other Financial Costs

Dear Ms. Duarte:

The undersigned members of the Council of Defense and Space Industry Associations (CODSIA) appreciate the opportunity to comment on the proposed amendment to the Federal Acquisition Regulation (FAR) which would add interest charges or other amounts as a consequence of late contractor payments to the list of unallowable costs in the "Interest and Other Financial Costs" cost principle. This proposed rule appeared in the January 29, 1999 *Federal Register* (64 FR 4760).

Formed in 1964 by industry associations with common interests in the defense and space fields, CODSIA is currently composed of eight associations representing over 4,000 member companies 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.

We oppose the proposed change because the expressed concept of "late contractor payment" is overly broad. Furthermore, rule revisions that attempt to address a court decision will result in inefficient, piecemeal development of rules that override unbiased cost allowability determinations for ordinary costs of doing business. This is especially true in this decision in which the preamble to the proposed rule does not fully explain the facts of the case or the decision.

CODSIA members agree with the concept that "It is Government policy to encourage contractors to pay their financial obligations on time." This concept is evident in provisions of the Allowable Cost and Payment Clause and the Progress Payment Clause. However, the Lockheed court decision that prompted this proposed amendment to FAR did not involve a contractor "not paying financial obligations on time."

Ms. Laura Duarte
March 30, 1999
Page 2

The statement "Government reimbursement of contractor interest charges for underpayment of taxes or other expenses resulting from late contractor payments of legal obligations is counter to this policy and an inappropriate expenditure of public funds" is not objectionable if it addresses only deliberate or intentional underpayment of obligations. The Lockheed decision, however, did not involve deliberate or intentional underpayment of taxes.

A contractor is obligated to prudently manage its tax liability by paying only its equitable share of taxes. Due to the complex rules and regulations that govern the computation of a tax liability, differing interpretations and tax amounts by a contractor and by taxing authorities are common. A contractor pays the tax liability it believes is supported by its interpretation of the regulations. Any additional contractor tax payment resulting from subsequent negotiation between the parties generally includes a factor for the time value of money. This would also apply to a situation where the government was obliged to reimburse the contractor for an overpayment of taxes.

We believe that the drafters of the proposed FAR revision recognize that the time value of money payments are allowable because FAR provisions already exist to make interest payments related to underpayment of taxes allowable by use of an advance agreement. However, requiring an advance agreement for multiple taxing jurisdictions creates an unnecessary administrative burden for both the government and the contractor. In addition, the government expects to share in the interest arising from an overpayment of taxes to compensate it for the time value of money. Equity requires that the government share in any interest expense due to the underpayment of such taxes.

Inadvertent underpayment of taxes that results in an interest charge should be allowable as a normal cost of doing business. A prudent business person should not be placed in a position of overpaying (allowable) state taxes to assure that no (unallowable) interest expense is incurred. Such an overly conservative approach to potential "overpayment" of state taxes to avoid interest charges would cost the government more money in the form of a higher state tax than might otherwise be necessary.

Conclusion. The proposed rule is too broad, fails to recognize prudent practices that may be beneficial to the government and violates acquisition reform initiatives. For these reasons, the proposed rule should be withdrawn.

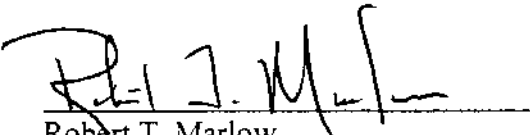
If any change is made it should be limited to deliberate underpayment, i.e., the rule could propose to revise FAR 31.205-20, Interest and Other Financial Costs, to add interest charges or other amounts paid as a consequence of [intentional] late contractor [tax] payments to the list of unallowable costs."


Ms. Laura Duarte
March 30, 1999
Page 3

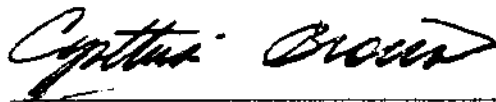
Without the word "tax," the proposed provision would go beyond the issues attributed to the court decision. Furthermore, without the word "tax," the application of this revised provision could be expanded to many unanticipated transactions.

We appreciate the opportunity to provide these comments. If you have any questions, please contact CODSIA Project Officer Ruth Franklin at (703) 247-2598.


Sincerely,

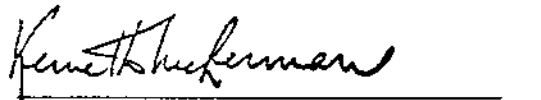

Robert T. Marlow
Vice President, Government Division
Aerospace Industries Association

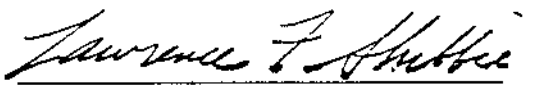

Lorraine M. Lavet
Chief Operating Officer
American Electronics Association


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 for Productivity
and Innovation


Lawrence F. Skibbie
President
National Defense Industrial Association


Bert M. Concklin
President
Professional Services Council