

# COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS

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September 25, 2000  
CODSIA Case No. 12-00

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

Reference: FAR Case 1999-026, Proposed Rule on Final Contract Voucher Submission

Dear Ms. Duarte:

The undersigned members of the Council of Defense and Space Industry Associations (CODSIA) appreciate the opportunity to comment on the proposed rule in the above case which was published in the July 27, 2000 *Federal Register* (65 Fed. Reg. 46332). Formed in 1964 by industry associations with common interests in defense and space fields, CODSIA is currently composed of eight associations representing over 4000 member firms across the nation. Participation in CODSIA projects is strictly voluntary. A decision by a member association to abstain from participating in a particular activity is not necessarily an indication of dissent.

The proposed rule would amend the FAR 42.705 on final indirect cost rates to revise paragraph (b) and to add a paragraph (c), as follows:

(b) Within 120 days (or longer period, if approved in writing by the contracting officer) after settlement of the final indirect cost rates for all years of a physically complete contract, the contractor shall submit a completion invoice or voucher reflecting settled amounts and rates.

(c)(1) If the contractor fails to submit a completion invoice or voucher within the time specified in paragraph (b) of this section, the contracting officer may—

- (i) Determine the amounts due to the contractor under the contract; and
- (ii) Record this determination in a unilateral modification to the contract.

(2) This contracting officer determination is—

- (i) Final and binding upon the contractor in discharge of all obligations to the contractor arising under the contract; and
- (ii) Not subject to the right of appeal under the Disputes clause.

The proposed rule would incorporate the above by corresponding amendments to FAR clause 52.216-7, Allowable Cost and Payment.

The proposed rule, according to the *Federal Register* announcement, is the result of the recommendations of an April 7, 1999 report by the DoD Contract Close-out Working Integrated Process Team to improve the contract closeout process. The report found that the leading reasons for contracts to remain open after they are physically complete are contractors' failures to submit final vouchers to the government.

We are further advised that paragraph (c)(2) of the proposal quoted above is based on the 1989 decision of the Federal Circuit Court of Appeals in *Do-Well Machine Shop, Inc. v. United States*, 870 F.2d 637. That decision upheld the provision of the termination for convenience clause putting a one-year time limit from the effective date of contract termination on the contractor's submission of a termination claim. The contractor, having submitted an untimely claim that was rejected, argued that this time bar was contrary to the Contract Disputes Act because there was no such limitation in that Act. The court rejected that argument, stating in part:

If we are to conclude that the termination for convenience clause is contrary to the CDA, it must be on the basis that Congress did not intend for parties to be able to agree to a limitations period for the presentation of termination claims. We see no statements in the language of the CDA or its legislative history to this effect. Should such have been intended, it would be natural to have expressed it, the more so since the Termination Article much antedated the CDA. We see no reason why Congress might have wanted access to CDA procedure to remain open indefinitely.... 870 F.2d at 641.

The problem with this court decision as authority for paragraph (c)(2) of the proposal is that Congress in 1994 amended the CDA to establish time limits for the submission of claims. Thus Section 2351(a)(1) of the Federal Acquisition Streamlining Act of 1994, Pub. L. 104-106, stated the following:

Period for Filing Claims.—Section 6 of the Contract Disputes Act of 1978 (41 U.S.C. § 605) is amended in subsection (a) by inserting after the second sentence the following: "Each claim by a contractor against the government relating to a contract and each claim by the government against a contractor relating to a contract shall be submitted within 6 years after the accrual of the claim. The preceding sentence does not apply to a claim by the government that is based on a claim by the contractor involving fraud."

Paragraph (a)(2) then addressed the effect of this addition to Section 6(a) on existing contracts that prescribed shorter time periods for submitting claims by stating that "if a contract in existence on the date of the enactment of this Act [Oct. 13, 1994] requires that a claim referred to in that sentence be submitted earlier than 6 years after the accrual of the claim, then the claim shall be submitted within the period required by the contract."

We suggest that the effect of this 1994 amendment to the CDA is to deprive the *Do-Well Machine Shop* decision of current validity. Indeed, the court quoted from a 1985 Supreme Court decision that “We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against the waiver of the right to a judicial forum, that intention will be deducible from text or legislative history.” *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). We submit that paragraphs (a)(1) and (a)(2) quoted above plainly indicate that shorter limitations periods, such as would be imposed by paragraph (c)(2)(i) of the proposed rule, are not authorized after the October 1994 effective date of the amendment to the CDA.

In addition, we point out that paragraph (c)(2)(ii) of the proposed rule by providing that the contracting officer's determination of the amounts due the contractor is “Not subject to the right of appeal under the Disputes clause,” impermissibly attempts to deprive the boards of contract appeals and the Court of Federal Claims of jurisdiction under the CDA. This the FAR may not do, as the Federal Circuit decided in *Burnside-Ott Aviation Training Center v. Dalton*, 107 F.3d 854 (Fed. Cir. 1997). There the court held that a FAR Award Fee clause that stated that the award fee determination was not subject to the Disputes clause was unenforceable as contrary to the CDA. Clause (c)(2)(ii) of the FAR proposal is equally contrary to the CDA as unenforceable.

Notwithstanding the foregoing objections to paragraph (c)(2) of the proposed rule, we believe there is an appropriate way for the FAR to address the concerns underlying the proposed rule. That would be for the contracting officer to exercise his or her authority under the CDA by issuing a final decision under the Disputes clause as a decision on a government claim that determines the amount due the contractor when it fails to submit a timely completion invoice or voucher. Thus we recommend no change to paragraph (c)(1) of proposed FAR 42.705. However, we recommend that paragraph (c)(2) be revised to state instead of the proposed language that “This determination is the final decision of the Contracting Officer on the Government's claim as to any amounts due to closeout the contract”, and then add the language prescribed by FAR 33.211(a)(v) for final decisions under the Disputes clause. These recommendations apply equally to proposed FAR clause 52.216-7. Of course, should the contractor fail to take a timely appeal, the contracting officer's determination would be final and binding on the contractor. Should the determination be timely appealed, the issue on appeal ordinarily would be the merits of the amount due or why the resolution of pending or potential claims or other matters makes the submission of a completion invoice premature.

We are not persuaded that the DoD Contract Closeout Working Integrated Process Team has accurately concluded that contractors' failure to submit final vouchers to the government is the leading reason that contracts remain open after they are otherwise complete. We suggest that the bar of final payment to recovery on contractor and subcontractor claims, the delays in closing out subcontracts subject to government audit, the reconciliation of CLIN and subCLIN payments with appropriation accounts, among other matters, rather than contractor “failures”, more often explain the delays in the closeout of “physically complete” contracts. The FAR should recognize and accommodate these delays within reasonable limits as we believe our recommendations do.

To that end, we further recommend that proposed FAR 42.705(b) be revised to add the following:

In determining whether a period longer than 120 days after settlement of the final indirect cost rates for all years of a physically complete contract is needed for the contractor to submit a completion invoice, the contracting officer should, after consultation with the contractor, give due consideration to the fact there may be excusable reasons for contractor submission delays that are independent of the settlement of the contractor's final indirect cost rates. Among these are the closeout of subcontracts subject to government audit, the pendency of contractor, subcontractor, or government claims, the disposition of government property, the need to reconcile CLIN and subCLIN payments with appropriation accounts, and other factors not solely under the contractor's control.

We suggest further that the above recommendation be referenced in proposed FAR clause 52.216-7 by adding in (d)(5) at the end of the parenthetical phrase "in accordance with FAR 42.705(b)" after "Contracting Officer".

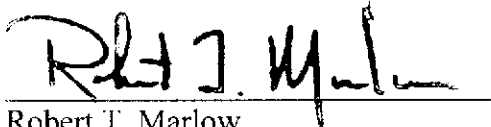
In addition, we raise these further points for your consideration in connection with the proposed rule:

- a) FAR 42.705 (b) refers to "after settlement of the final annual indirect cost rates for all years of a physically complete contract...". It may be helpful to further clarify when settlement takes place. For example, settlement could mean when the DACO signs the letter, or when the contractor receives the letter, or when the final rates are input into the computer system, etc. Perhaps FAR 42.705(b) should be changed to read: "after the DACO signs the letter confirming settlement of the final annual indirect cost rates for all years of a physically complete contract...". The date of the DACO's signature is probably the best date to use as it is the least ambiguous date.
- b) It is important for contracting officers to understand the difficulties imposed on a prime contractor in complying with a 120-day deadline when one or more of its subcontractors have not submitted completion invoices for a variety of reasons beyond the prime contractor's control. Our recommended addition to paragraph (b) is to enable the contracting officer, in consultation with the contractor, to arrive at a reasonable extension of the 120-day period to deal with this problem among others.
- c) While we recognize that this FAR revision will be effective only for the closeout of new contracts entered into after the effective date of this FAR revision unless the parties otherwise agree by contract modification, we nevertheless consider it important to point out that the FAR revision cannot be given retroactive application to contracts not incorporating these revised closeout procedures.
- d) A fundamental issue relating to late closeout is the lack of dedicated contractor and government personnel focused on closeout. The FAR proposal is

unlikely to resolve this problem. IPTs or joint commitments need to be made to do closeout work, including establishing the final indirect cost rates which are often unreasonably delayed by the government. DoD and other agencies should address this. Consideration should also be given to enlarging the scope of the quick-closeout procedure of FAR 42.708.

Should you have any questions concerning the foregoing, please address them to the Project Officer for this CODSIA case, Ms. Ruth Franklin, Director for Procurement, National Defense Industrial Association, 2111 Wilson Boulevard, Suite 400, Arlington, VA 22201-3061, telephone 703-247-2598.

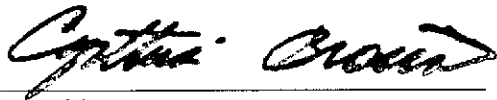
Sincerely,



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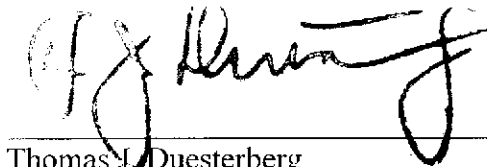
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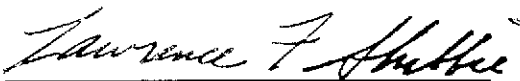
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