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August 29, 2000
CODSIA Case 12-99

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

Re: FAR Case 1999-010

Dear Mrs. Duarte:

The undersigned members of the Council of Defense and Space Industry Associations (CODSIA) appreciate the opportunity to offer comments on the proposed rule on Contractor Responsibility, Labor Relations Costs, and Costs Relating to Other Legal Proceedings which was published in the *Federal Register* on June 30, 2000. 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.

We are opposed to the proposed changes included in the referenced FAR case and urge that they be abandoned. After a brief introduction, we will address the proposed changes specifically.

Introduction

We do not believe the proposed changes are necessary. Nor do we believe these proposals clarify the existing regulations. Further, the proposed changes add unnecessary burdens to the procurement process, will delay contract awards, and will make the Government contracting process even less like commercial processes.

We are not aware of any groundswell of requests from contracting officers seeking guidance on what to consider or how to carry out their responsibilities in making contractor responsibility decisions. Nor are we aware of any trend of recent cases indicating that

contracting officers have been doing business with contractors lacking the integrity to successfully complete their obligations to the Government under their contracts. There is no demonstrated need for these changes.

Under the proposed rule, a contractor could be precluded from bidding on Government contracts if it has a history of violation of labor relations, antitrust, environmental or tax laws. However, the rule fails to clearly specify what constitutes a history of violation of such laws. As such, we believe that the proposed rule lacks sufficient definition to be consistent and repeatable in its administration. It continues to place the contracting officers in a position of making determinations in areas in which they do not have expertise. This could produce inherently unfair, arbitrary results that will invite dispute, disagreement and litigation. In addition, there should be a relationship between grounds for debarment and factors considered in making responsibility determinations (both ultimately seek to determine present responsibility); merely listing causes for debarment and stating that they are entitled to the greatest weight in making responsibility determinations fails to clarify how the contracting officer should make responsibility determinations. This approach continues to confuse the lines of responsibility between debarment officials and contracting officers.

CODSIA members are extremely discouraged that the FAR Secretariat would suggest a new contractor certification after the progress that has been made in the procurement reform, especially in the implementation of the Clinger-Cohen Act of 1996, codified at 41 U.S.C. § 425, which prohibits the inclusion of a requirement for a non-statutory contractor or offeror certification in the FAR or its agency supplements unless certain justifications and approvals are executed. Since the proposed new certification is not required by statute, and we are unable to ascertain any meaningful justification for the certification, we believe this requirement must be dropped from the proposed rule.

We believe the cost principle change proposed with respect to labor relations costs unnecessarily and without a sound policy rationale deviates from the long held policy of neutrality of the buying agencies in contractor labor relations. The proposal regarding legal costs completely ignores the mandate of Congress with regard to what necessary and proper legal expense is to be unallowable.

The Responsibility Provisions

We do not believe the proposed changes actually clarify anything. The proposed rule indicates that the FAR Council intended these changes to clarify the requirement that federal contractors have a "satisfactory record of integrity and business ethics" before being awarded a Government contract. Responsibility determinations are to be based only upon the public's interest in assuring that the contractor has the qualifications to perform the work and will not undermine the integrity of public contracting by wrongdoing. The revised rule, however, does not focus on a pattern of violations or even whether a violation is sufficiently serious to taint the public contracting process, but rather allows one violation of any federal tax, labor and employment, environmental, antitrust, or consumer protection laws to be a basis for a non-

responsibility determination. In doing so, it does not require the contracting officer to find that a violation of any one of the listed laws would have had a negative effect on contract performance or reflect adversely on integrity or business ethics. The listing of items to be considered, the assignment of greater weight to some information rather than other information and the mandated referral to a lawyer do not adequately address the fact that the purpose of the process is to determine whether the contractor can be relied on to perform the contract and will not corrupt the integrity of public contracting by wrongdoing, not whether any of the events listed in 9.104-3 have occurred.

Specifically, proposed paragraph 9.104-3 sets forth certain factors for a contracting officer to consider in making a responsibility determination (e.g., certain convictions or civil judgments). However, the regulation does not address consideration of the gravity of a contractor's acts or omissions, remedial measures, or mitigating factors. This narrow focus is not in consonance with the FAR Council's stated intent to clarify the requirement that federal contractors must have "a satisfactory record" of integrity or business ethics. A "satisfactory record" connotes consideration of context, and not undue focus upon a singular circumstance.

No guidance is given with regard to how the seriousness of the subject matter of any decisions, convictions, indictments, judgments, orders or complaints is to be accounted for in the decision making process. Under the revised proposed regulation, any violation of any one of the listed laws, no matter how trivial, could serve as the basis for denying the award of a Government contract. It is difficult to imagine, for example, that one incident of failure to provide notice of an entitlement to a three-day waiting period under a consumer protection law would justify a finding of non-responsibility even if it was a finding of a Federal Administrative Law Judge. Further clouding the waters is proposed FAR 9.104-3(c)(2), which advises the contracting officer to consider "complaints issued by any Federal agency, board or commission indicating the contractor has been found to have violated" one of the listed federal laws. A "complaint" is merely a collection of allegations—it is never a "finding." Moreover, even assuming there was a finding of a violation of law, a debarring official could not per se suspend or debar a contractor but would, rather, have to find the violation affected the contractor's integrity or affected the contractor's ability to perform a Government contract in order to do so. We also note that although compliance with environmental laws is a consideration in determining a satisfactory record of integrity and business ethics under proposed FAR 9.104-1(d), violation of environmental laws is not listed as a consideration in making the responsibility determination under FAR 9.104-3(c).

Further, the proposed paragraph is a significant deviation from the debarment and suspension regulations, which expressly recognize the discretionary aspects of debarment and suspension decisions while emphasizing that the existence of any particular enumerated basis for debarment or suspension is not itself dispositive. In this regard, FAR 9.406-1 (a) states: "The existence of a cause for debarment, however, does not necessarily require that the contractor be debarred; the seriousness of the contractor's acts or omissions and any remedial measures or mitigating factors should be considered in making any debarment decision." Likewise, FAR 9.407-1(b)(2) states: "The existence of a cause for suspension does not necessarily require that

the contractor be suspended. The suspending official should consider the seriousness of the contractor's acts or omissions and may, but is not required to, consider remedial measures or mitigating factors . . ." Moreover, FAR 9.402(b) emphasizes that: "The serious nature of debarment and suspension requires that these sanctions be imposed only in the public interest for the Government's protection and not for purposes of punishment. Agencies shall impose debarment or suspension to protect the Government's interest and only for the causes and in accordance with the procedures set forth in this subpart."

This could be addressed by adding to proposed paragraph 9.104-3, following the enumeration of factors for consideration, the following language: "The existence of any of the foregoing does not necessarily require that the contractor be found not responsible. The contracting officer should consider the seriousness of the contractor's acts or omissions and any remedial measures or mitigating factors in making a responsibility determination."

Another concern is that the proposed paragraph 9.104-3(c) broadly defines the scope of a contracting officer's review by providing that a contracting officer should consider "all relevant credible information," giving weight to certain, specified factors, but not limiting review to these factors. By this language, a contracting officer may consider a factor not listed in 9.104-3(c), so long as the factor may be characterized as "relevant credible information." This is a significant deviation from the scope of review permitted under the debarment and suspension regulations, which tailor the scope of review to certain, specified causes (see 9.406-2(a)), or to a "preponderance of the evidence" (see 9.406-2(b)) or "adequate evidence" (see 9.407-2) of certain other specified causes. Moreover, since "relevant credible information" is not defined, the proposed language introduces an ambiguity and vagueness that makes the regulation subject to inconsistent application. This could be addressed by modifying proposed paragraph 9.104-3(c) to read: ". . . contracting officers may consider, with regard to the three year period preceding the offer, the following: . . ."

Although in setting forth the factors for a contracting officer to consider in making a responsibility determination (proposed paragraph 9.104-3(c) tracks the debarment and suspension regulations (9.406-2 and 9.407-2)) there are significant inconsistencies. First, proposed subparagraph 9.104-3(c)(1)(i) addresses federal, state, and local laws (which the debarment and suspension regulations also do), but proposed paragraph 9.104-1(d) limits the scope of a contracting officer's responsibility review to consideration of "satisfactory compliance with Federal laws." Second, proposed paragraph 9.104-3(c)(iv) adds, "Any other Federal or State felony convictions or pending Federal or State felony indictments" as a cause for a finding that a contractor is not responsible. This addition extends a contracting officer's review beyond the scope of review followed in debarment and suspension actions because of the word "pending." By encompassing "pending indictments", which may or may not ultimately proceed to an actual indictment, the contracting officer could make a finding of nonresponsibility based solely on speculation. Third, proposed paragraph 9.104-3(c)(1)(v) adds, "Federal court judgments in civil cases brought by the United States against the contractor" as a cause for a finding that a contractor is not responsible. This addition extends a contracting officer's review beyond the scope of review followed in debarment and suspension actions, and broadly would encompass

matters in civil cases that have no bearing upon integrity and business ethics, such as business disputes in the context of a Government claim under the Contract Disputes Act. Fourth, proposed paragraph 9.104-3(c)(2) adds, "Federal decisions by Federal Administrative Law Judges or Federal Administrative Judges and adjudicatory decisions, orders, or complaints issued by any Federal agency, board, or commission, indicating the contractor has been found to have violated Federal tax, labor and employment, antitrust, or consumer protection law" as a cause for a finding that a contractor is not responsible. This addition extends a contracting officer's review beyond the scope of review followed in debarment and suspension actions, is ill-defined, and would encompass matters that have no bearing upon integrity and business ethics.

Coordinating non-responsibility decisions with legal counsel is not likely to overcome the shortcomings of the proposed regulation. The buying agency legal counsel, like the contracting officer, may not possess the specialized expertise necessary to make non-responsibility decisions across the wide range of statutes and regulations that could be the basis of a non-responsibility determination. All that the counsel is likely to say is that the discretionary decision will be entitled to great deference in the event of a protest.

A serious violation of law, involving integrity or ethics is more properly considered in the debarment process where the current responsibility of the contractor may be evaluated. There is no indication in the proposed rule of the demarcation of responsibilities of the contracting officer and the agency debarring official in this area. We note that the FAR Secretariat intends to open a new FAR case to address debarment separately. The changes proposed in the current case should not be adopted until the debarment case has been resolved.

A prospective contractor should not be faced with the possibility of multiple inconsistent responsibility decisions based on the same facts if those facts could properly be considered as grounds for a debarment. The formal suspension and debarment process, including the recognition of a lead agency, avoids inconsistent treatment of a contractor. Merely repeating the grounds for debarment in 9.104 increases the opportunity for confusion and inconsistent application. It does not clarify the determination process. In addition, any final published rule must clarify whether a debarment would apply to an entire corporation or a single facility owned and operated by a corporation.

The proposed certification should not be required. We have long opposed unnecessary certifications and support reform efforts to eliminate any existing requirements for certifications not essential to the procurement process. Certainly, the Government will be aware of any adjudication of a serious fraud case or other case properly characterized as involving ethics or contractor integrity. Referral to a debarring official will likely have occurred before any certification is required. As written, the proposed changes would require certification for three years after a judgment even if the judgment had been considered previously in a debarment proceeding resulting in an affirmative decision of current responsibility. And, we believe there will be cases in which contracting officers will ignore best value considerations and award to less qualified or higher priced offerors merely to avoid having to investigate information provided on a certificate from an offeror who otherwise represents the best value to the Government. Finally,

this new certification requirement is contrary to the previously expressed congressional intent that new certification mandates only be created when required by a specific statute. The Clinger-Cohen Act of 1996, codified at 41 U.S.C. § 425, prohibits the inclusion of a requirement for a non-statutory contractor or offeror certification in the FAR or its agency supplements unless certain justifications and approvals are executed. Since the proposed new certification is not required by statute, and we are unable to ascertain any meaningful justification for the certification, we believe this requirement must be dropped from the proposed rule.

The Cost Principle Proposals

We oppose the proposed amendment to the labor relations cost principle. Federal procurement regulations consistently have required complete neutrality by the Government in the area of contractor labor relations. In our opinion, this policy has served the Government, industry and labor well and should not be abandoned. The costs that would be disallowed, i.e. those that "assist, promote, or deter unionization", would encompass virtually all of the costs allowed under proposed paragraph (a), setting up an inherent conflict between two paragraphs of the same cost principle. The seemingly neutral words could be interpreted to allow costs only if a union decision has been made but not before. For example, costs incurred by management in voicing its opinion on unionization would be unallowable while costs incurred for pro union activities such shop stewards, labor-management committees and employee publications could be considered allowable. Not only would such an interpretation abandon the neutrality sought but would greatly confuse the allowability issue, as the question whether to form or continue union representation often can be a recurring question.

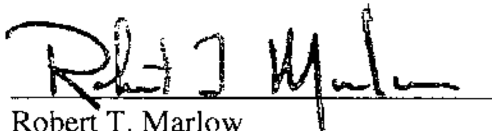
With regard to the proposed change to the FAR 31.205-47, in an effort to avoid confusion and clearly broaden the scope of the disallowance, the proposal deletes the definition of fraud presently in the regulation. This proposal ignores the basic history of the provision and the policy expression of the Congress regarding the legal costs it considered appropriate for disallowance. The current regulation is an implementation of the Major Fraud Act of 1988, Pub. L. 100-700, 102 Stat. 4631 (Nov. 19, 1988). The Act added Section 293 to Title 18 of the United States Code specifically enumerating the circumstances in which the Congress considered the disallowance of costs to be appropriate. The current proposal would completely ignore this statutory mandate by making costs unallowable, that would clearly be considered allowable under the standard imposed by the Congress. It will also serve to increase costs to the Government because it provides a disincentive to contractors to settle disputes, since maximum cost allowability can only be achieved by completely litigating the matter to a successful conclusion for the contractor. This will hit small businesses particularly hard because small businesses often do not have the resources to completely litigate a matter and therefore may try to cut their losses by mounting no defense, even to a baseless claim. The scope of the current language in FAR 31.205-47 was recently addressed in a decision of the Armed Services Board of Contract Appeals in which the Board held the provision was "out of harmony with the statute [thus] a mere nullity." DynCorp, ASBCA No. 49714, 2000, ASBCA Lexis 104 (June 21, 2000).

In summary, none of the changes related to the cost principles should be adopted.

Conclusion

The undersigned member associations strongly urge that FAR case 1999-010 be completely withdrawn. The proposed rule changes the contracting process in a manner contrary to the Government's own attempts to reform and streamline the acquisition process. As such, it is counterproductive to attracting commercial firms to the defense and space marketplace. If not withdrawn, the proposed rule should be held in abeyance pending publication for comment of the proposed rule on debarment, so that the proposals may be considered together. Finally, we recommend that a public meeting be held to ensure complete discussion and understanding of this matter.

Sincerely,



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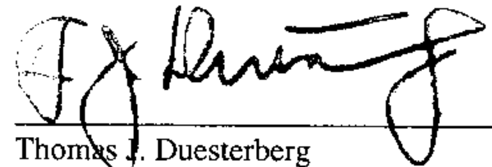

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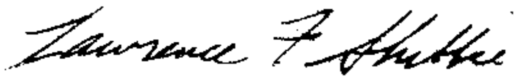

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