

COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS

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July 6, 2001
CODSIA Case No. 12-99

Ms. Laurie Duarte
General Services Administration
FAR Secretariat (MVR)
1800 F Street, N.W.
Room 4035
Washington, D.C. 20405

RE: FAR Case 2001-014; Contractor Responsibility, Labor Relations Costs, and Costs Relating to Legal and Other Proceedings—Revocation

Dear Ms. Duarte:

The undersigned members of the Council of Defense and Space Industry Associations (CODSIA) appreciate the opportunity to offer comments on the proposed revocation of the final rule on "Contractor Responsibility, Labor Relations Costs, and Costs Relating to Legal and Other Proceedings," that was published in the *Federal Register* on April 3, 2001 (66 Fed. Reg. 17758).

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 firms across the nation who employ the preponderance of the two million men and women in the space and defense industry. 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.

This issue is of great concern to the defense and space community for many reasons, but particularly because the regulation's standard for eligibility for award of a federal contract – "satisfactory compliance" – covers an enormously complex matrix of laws, and is so broad and vague as to be meaningless. Furthermore, even the best-intentioned employer can be victimized by the vast maze of confusing and often conflicting federal, state and local laws and regulations. For example, regulations relating just to employment laws cover over 4,000 pages of fine print, environmental regulations cover over 14,000 pages, and the complexity of tax and antitrust laws is legendary. Therefore, the rule should be withdrawn.

Even agency procurement professionals have called for the regulation's withdrawal. The General Services Administration and the Environmental Protection Agency characterized the

rule as "seriously flawed" and "punitive." In addition, the Defense Acquisition Regulations Council, comprised of the Army, Navy, Air Force, Defense Logistics Agency, Defense Contract Management Agency, and NASA, expressed concern about the "adverse effect of these [proposed] revisions on the ability of contracting officers to meet mission requirements," and recommended that the Administration withdraw the regulation.

It should be further emphasized that the regulation circumvents the legislative process by adding, administratively, a major new draconian penalty – disqualification from Government contracts – to employment, tax, environmental, antitrust, and other laws of the land. Any changes to these laws should receive full consideration by the Congress. They should not be imposed in a back door fashion by this final rule.

Indeed, the Congress did address this matter to some extent in the last session – by taking action opposite to the Clinton Administration. Language to postpone the issuance of the regulation, introduced by Reps. Davis (R-VA) and Moran (D-VA) as an amendment to the Fiscal Year 2001 Treasury-Postal Appropriations bill, passed the House of Representatives last July by a strong bipartisan vote of 224-190. Support for withdrawal of this vague, unfair and costly regulation remains strong in both the House and the Senate.

Therefore, we are pleased that the FAR Council has recognized that it is **unclear** whether there is "*justification for including the added categories of covered laws in the rule and its implementing certification, that the rule provides contracting officer with sufficient guidelines to prevent arbitrary or otherwise abusive implementation, or that the final rule is justified from a cost benefit perspective.*" We agree that there is no justification for the final rule issued on December 20 and strongly support its revocation.

The undersigned CODSIA member associations strongly support the revocation of the contractor responsibility rule, as proposed in FAR case 2001-014. Please see the attached position paper in which a more detailed perspective of CODSIA members regarding this matter is provided. If you have any questions, please contact Project Officer Cathy Garman at (202) 347-0600.

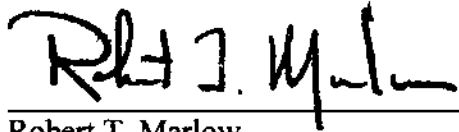
Sincerely,

(SEE ATTACHED CODSIA SIGNATORIES)

Ms. Laurie Duarte

July 6, 2001

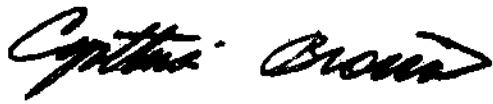
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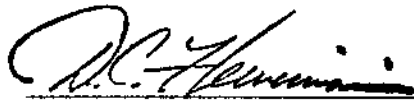
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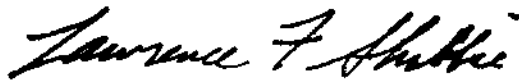
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Attachment

CODSIA POSITION PAPER: FAR CASE 2001-014
Contractor Responsibility, Labor Relations Costs, and Costs Relating to Legal and
Other Proceedings—Revocation

Introduction

CODSIA members opposed the promulgation of the contractor responsibility rule since it was first proposed over two years ago.

We do not agree that the changes simply clarify the previous regulations nor do we believe that they need any clarification. Rather, these changes totally refocus the fundamental nature of the responsibility determination. Instead of focusing on the capability of the contractor to perform a pending contract, the regulations direct the contracting officer to make an independent determination of the contractor's integrity based on its historical conduct with regard to compliance with certain labor, tax, and other laws, which may have little or no relevance to the question of whether the contractor can be expected to successfully perform the contract in accordance with its terms.

This broadening of the basis for a determination of non-responsibility is allegedly justified by the "*existing principle that the Federal Government should not enter into contracts with contractors who do not comply with law.*" We have no disagreement with such a principle *per se*, but 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. In short, there is no demonstrated need for these changes.

Furthermore, CODSIA members are extremely concerned over the imposition of a new contractor certification. This is a big step backward from the significant progress that has been made in procurement reform, especially in the implementation of the 1994 Federal Acquisition Streamlining Act and the 1996 Clinger-Cohen legislation. Not only does it represent bad public policy, but it also creates an inequitable exposure for even unintentional violations of the Civil False Claims Act, the Truth in Negotiations Act, and other statutes that already prescribe adequate remedies for non-compliance.

We also believe the cost principle changes related to labor relations costs unnecessarily and without a sound policy rationale deviate from the long held policy of maintaining buying agency neutrality relative to contractor labor relations. And, the changes related to legal costs completely ignore the mandate of Congress with respect to the allowability of necessary and proper legal expenses.

We believe that current regulations governing debarment reflect the proper balance of seriousness of the offense, certainty of the offense, relationship to present circumstances (current responsibility) and recognition of minimal due process requirements. We do not believe that a contractor should be subject to multiple decisions regarding its capability or eligibility to perform contracts based on subjective evaluations of the same facts or alleged facts by different contracting officers. When a question of responsibility relates to noncompliance with the law rather than the means of performing the particular contract, the decision should be made by one debarment official. Hence, we can agree that there should be a relationship between the grounds for debarment and the factors considered in making responsibility determinations since both ultimately are seeking to determine present responsibility. However, merely listing a series of causes for debarment as information entitled to the greatest weight in making responsibility determinations fails to clarify the situation at all. Rather, it confuses the responsibility between debarment officials and contracting officers.

When the proposed rule was issued on June 30, 2000 (65 Fed. Reg. 40830), it was suggested that a FAR case would be opened to address formal debarment issues. At the time, we noted that any contractor responsibility rule should be withheld until such a FAR case was completed. However, no action was ever taken to address valid debarment concerns, and we can only conclude from this that the current debarment regulations are adequate.

The Responsibility Provisions

To reiterate, we do not believe the changes actually clarify anything. The listing of items to be considered, the assignment of greater weight to certain 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, not whether any of the events listed in FAR Part 9.104-3 have occurred.

No adequate 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. What exactly is the definition of a "bad contractor?" What is a measurable number of violations? What is a "cardinal sin" (to be deemed non-responsive)? It is difficult to imagine 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 technically it was a finding of a Federal Administrative Law Judge. But that could happen.

Coordinating non-responsibility decisions with legal counsel is not likely to overcome the shortcomings of the December 20 regulation. All that the counsel is likely to say is that the contracting officer's discretionary decision will be entitled to great deference in the event of a protest.

A serious violation of law that involves integrity or ethics is more properly considered in the debarment process where the present responsibility of the contractor may be evaluated. As already stated, the FAR Secretariat indicated its intent to open a new FAR case to address debarment separately, but has not done so. If such a case were opened, that would be the better forum to address some the issues raised.

A prospective contractor simply 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 FAR Part 9.104 increases the opportunity for confusion and inconsistent application. It does not clarify the determination process.

The contractor certification contemplated by the rule is an onerous and unnecessary requirement. We have long opposed unnecessary certifications and support reform efforts to eliminate any existing requirements for certifications not essential to the procurement process. We are unable to ascertain any meaningful justification for this requirement. 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. Under the December 20 rule, a certification would be required for three years after a judgment even if the judgment had been previously considered in a debarment proceeding resulting in an affirmative decision of present responsibility.

Duplication of Functions

In releasing the final rule, the FAR Council noted that the General Accounting Office has reported that companies have repeatedly violated procurement and other laws and paid hundreds of millions of dollars in penalties and fines. This statement does not support the need for this new rule. Rather, it indicates that the existing mechanisms are working to determine violations of labor, tax, anti-trust and environmental laws and impose appropriate penalties on the violators. The contracting officer should not be required or expected to replace this established remediation structure. All of the labor, tax, antitrust and environmental laws have their own, often multiple proscriptions, remedies for noncompliance, enforcement mechanisms, and responsible agencies. For example, for late payment of taxes one would expect the IRS to impose a late penalty and interest. Adding ineligibility for a Government contract is certainly disproportionate to the noncompliance. Tax fraud should involve criminal prosecution. Conviction of tax fraud could lead to debarment after a due process hearing to determine fault.

Comparable procedures exist with regard to the other laws referenced. Many of the labor laws, depending on their significance, already provide for debarment as a remedy. An individual contracting officer should not be expected to duplicate the functions already assigned by law and regulation to the Internal Revenue Service, the Department of Labor,

the Environmental Protection Agency, the Department of Justice, the Federal Trade Commission, the debarment officials of each agency and the Judiciary. It is not the proper function of the contracting officer to deny awards when there has been no determination of noncompliance with those laws by the cognizant Congressionally-mandated official. This is especially true when the offense has not been deemed serious enough by the Congress to justify debarment.

Contracting officers are reasonably expected to be experts in interpreting and administering the rules governing federal procurement consistent with their authority and warrants. They are not trained, however, to review a prospective contractor's history of compliance with numerous, complex *foreign, federal, state, and local* tax laws and regulations, environmental laws and regulations, consumer protection laws and regulations, antitrust laws and regulations, employment laws and regulations, and labor statutes and regulations. Even if it were considered necessary that they do so, the time, effort, funds and resources which would be required to educate acquisition personnel in these additional areas to the degree necessary to properly and conscientiously evaluate alleged violations of any of the multitude of laws and regulations would be prohibitive, especially at a time when all federal agencies are faced with an acquisition workforce crisis. At least 40 percent of the acquisition workforce is eligible to retire within the next five years. Requiring *fewer* people to perform more work for which they have *not* been – and cannot be adequately – trained will not lead to achievement of either agency budget or management goals and will only exacerbate the shortages that will be created as experienced personnel retire.

Small Business Impact

Small Government contractors would be most severely injured by the December 20 rule changes because, unlike major corporations, they often depend almost entirely on the revenues from current and future Government contracts for continued growth. Indeed, future Government contracts and growth is the foundation of the 8(a) program, the small disadvantaged business program, and the veteran-owned and women-owned small business programs. The final rule would discourage many small business owners from competing (or continuing to compete) for these contracts because of increased overhead and legal expenses or because of extra requirements that would be necessary to prove their eligibility. Medium sized firms are likely to have similar difficulties with the rule.

In order to ensure complete compliance with all areas of law covered by the changes and avoid the potentially devastating effects of a non-responsibility determination, a small business would have to spend considerable resources on compliance programs and training that, in many cases, are unrelated to the firm's ability to perform a contract successfully (*i.e.*, consumer protection, labor and employment laws that heretofore did not apply due to their small number of employees). Although these compliance expenditures could be included as part of a contract price, small businesses face fierce competition for federal business and risk losing contract awards for any overhead costs that unnecessarily inflate a proposed contract price.

Yet, the *Federal Register* notice for the December 20 rule indicated that the FAR Council certified that "this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. Section 601." This statement is made despite the fact that small businesses receive approximately 23 percent of federal procurement dollars each year. According to the Federal Procurement Data System, approximately 45,000 individual small businesses received contracts over \$25,000 in fiscal year 1998. In the notice for the *proposed* rule, the FAR Council stated that "approximately 171,000 small businesses will be affected by this rule" (65 Fed. Reg. 40832). This means that four times the number of small businesses will be affected by the rule than received contracts in 1998. From our perspective, this means that every one of the small business members of the CODSIA member associations will be affected.

We believe that the paperwork burden cited in the *Federal Register* notice accompanying the rule is significantly understated. Relatively modest changes in the assumptions regarding the number of submissions, the number of firms making submissions, and the time required to prepare those submissions yield astonishing increases in the burden imposed. Hence, we believe the burden could easily amount to 10 million hours per year, more than 15 times the 660,667 burden hours estimated by the FAR Council. The paperwork burden for compliance is clearly significant.

Acquisition Reform

This requirement is not in keeping with the thrust to utilize more commercial practices and may in fact discourage non-traditional contractors from doing business with the Government. We should be focusing on eliminating unnecessary certifications and procedures to encourage a widening of the Government's vendor base.

We also believe that encumbering the regulations with these vague rules, incorporating indirectly untold volumes of law and regulations applicable to a host of topics independent of the acquisition function, runs completely counter to the goals of procurement reform and simplification. We have supported and continue to support all reasonable efforts to reduce impediments to doing business with the Government, the adoption of commercial practices and the simplification of processes. The final rule is completely incompatible with these objectives.

Cost Principles

The change to the labor relations cost principle lacks a sound policy rationale and deviates from the long held policy of maintaining the neutrality of the buying agencies with respect to contractor labor relations. The final rule regarding legal costs completely ignores the mandate of Congress with regard to the allowability of legal expenses.

Federal procurement regulations have consistently attempted to maintain complete neutrality in the area of contractor labor relations. In our opinion, this policy has served the Government, industry and labor well over the years. The costs that would be disallowed under the final rule, FAR Part 31.205-21, *i.e.*, those which "assist, promote, or deter unionization," encompass the same types of costs allowed under the original regulation and is repeated unchanged as paragraph (a) of the final rule. The seemingly neutral words could be interpreted to allow costs only if a union decision has been made but not before. Additionally, the costs of shop stewards, labor management committees, employee publications and other related activities that are currently allowable and would remain allowable under paragraph (a) of the final rule are also activities that may assist, if not promote, unionization. To the extent that any of these activities were considered an activity that promoted or assisted unionization, the costs would be expressly unallowable under the final rule. Such an interpretation would abandon the neutrality sought and would greatly confuse the allowability issue since the question of whether or not to form or continue union representation often can be a recurring question.

The final rule change to FAR Part 31.205-47 is equally devoid of any demonstration of need or policy justification. In an ostensible effort to avoid confusion and clearly broaden the scope of the disallowance, the final rule deleted the definition of fraud presently in the regulation. This change would result in ignoring the basic history of the provision and the policy expression of the Congress regarding the legal costs it considered appropriate for disallowance. The regulation (prior to the December 20 changes) implemented 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 final rule completely ignores this policy directive by making costs unallowable, that would clearly be considered allowable under the standard imposed by the Congress. The scope of the language in FAR Part 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).

The final rule makes unallowable any "*legal and other proceedings*" costs related to defending a contractor where the outcome is a "*finding*" that the contractor violated a law or regulation, including cases that are settled by consent or compromise. "*Finding*" is not defined for cost allowability purposes. It could be misinterpreted to include a preliminary agency determination of "*probable*" or "*reasonable cause*" that a violation has been committed, rather than a final adjudication on the merits.

A large number of cases are settled prior to a court decision, not because of wrongdoing or legal responsibility, but purely as a business decision to avoid high financial costs through full use of the court system and administrative appeals processes, as well as the costs of unwanted publicity. The final rule would be detrimental to the Government because it removes a contractor's incentive to compromise and settle and encourages the possibility of more extended litigation in order to maximize recovery of proceedings

costs. It would also severely undermine "*the corporate business judgment rule*" because it would encourage cases with a high probability of success to be taken full term through the court system since the costs would be allowable only if the court found in favor of the contractor. By expanding the influence of this cost principle to costs associated with defending against alleged tax law noncompliance, consumer protection laws, environmental laws, etc., it would increase the potential for poor business decisions and increased costs to contractors as well as the Government

Conclusion

The December 20, 2000, final rule is contrary to acquisition streamlining reform, the adoption of commercial practices and encouraging entry of new commercial businesses into the Government marketplace. The rule would deter the expansion of available new technologies to the Government. It will likely result in increased cost to the Government for staffing and administration, and will cause duplication of effort among federal agencies. Sufficient criteria for responsibility determination and protection against lack of contractor compliance with laws and regulations are already in the place.

Therefore, CODSIA members strongly support the revocation of the contractor responsibility rule, as proposed in FAR case 2001-014.