

# COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS

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February 11, 2002

CODSIA Case No. 15-01

Ms. Sandra Haberlin  
Defense Acquisition Regulations Council  
OUSD (AT&L) DP (DAR), IMD 3C132  
3062 Defense Pentagon  
Washington, D.C. 20301-3062

Ref: DFARS Case 2000-D306; Performance-Based Contracting Using FAR Part 12 Procedures

Dear Ms. Haberlin:

The undersigned members of the Council of Defense and Space Industry Associations (CODSIA) appreciate the opportunity to comment on the interim DFARS rule regarding performance-based service contracts, published in the *Federal Register* on December 6, 2001 (66 Fed. Reg. 63335).

Formed in 1964 by industry associations with common interest in the defense and space fields, CODSIA is currently comprised of seven associations representing over 4000 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.

The undersigned members of CODSIA support the interim DFARS rule and urge that it be adopted as a final rule with the changes recommended below. This rule is based on Section 821(b) of the National Defense Authorization Act (NDAA) for Fiscal Year 2001 (P.L. 106-398) which establishes a preference in service contracting for performance-based acquisitions. Any performance-based service contract or performance-based task order under \$5 million would be treated as a commercial contract, and could be purchased using the simplified commercial procedures under FAR Part 12.

This section in the NDAA is intended to improve the manner in which the Department does service contracting and is a positive step forward. The interim rule generally conforms to the statute and also is in line with the April 2000 memo from Under Secretary of Defense Gansler outlining a policy that 50 percent of service acquisitions should be performance-based by the year 2005. This departmental policy was reaffirmed by Under Secretary of Defense for Acquisition, Technology and Logistics Aldridge in his 2 January 2002 memorandum on "*Use of Performance-Based Contracts for the Acquisition of Services*".

The upward trend in service acquisitions is evident. Yet, innovation and acquisition reform in the way services are acquired lags behind the vast improvements achieved in weapon systems acquisitions. A performance-based approach is a best commercial practice that takes advantage of industry's knowledge and eliminates expensive and time-consuming steps from the department's acquisition process.

An overriding concern of CODSIA members is the continued lack of proper training for the acquisition workforce on the proper use of performance-based contracts, and the misunderstanding of the methodology for properly using such contracts, as highlighted in a March 2000 Department of Defense (DOD) Inspector General (IG) report. For example, we have discussed with the Army our concerns with their new AFARS regulation that requires all performance-based service contracts to be awarded on a firm fixed-price basis unless a waiver is granted after higher-level review.

We also recommend that several modifications be made when adopting the final rule. First, Part 212.102(a)(1)(A) should be modified to add after the phrase "*Is entered into*" the phrase "*after October 30, 2000, but*". The statute became effective on October 30, 2000, and this new authority is not available to task orders that were awarded prior to that date, but would be available to new task orders awarded after that date even if the underlying contract was awarded prior to October 30, 2000. When establishing the effective date of the final rule, care should be taken to ensure that the implementing regulations are applied prospectively only to new contracts and their corresponding new task orders.

Second, Part 212.102(a)(1)(D) should be deleted from the rule. While quality assurance plans are a common best practice for performance-based contracts, this requirement was not part of the statutory requirement and is not "(i)n accordance with" the Act. Further, the background section of the rule properly points out that inspection and acceptance provisions are examples of the type of modification to FAR 52.212-4 (a) that the contracting officer should consider incorporating into the solicitation.

Third, Part 212.102(a)(1)(G) should be modified to add, before the period at the end of the sentence, the phrase "or task order". It is clear under the law that the two "similarity" tests are appropriately applied at either the contract level or at the task order level.

Fourth, the cross-reference text included in Part 237.601 should be modified by deleting the phrase "the use of" and inserting the phrase "additional authority and specific conditions where it is appropriate to use". This change is necessary to avoid any misconception that Part 212.102 contains the only provisions for the use of FAR Part 12 for performance-based contracts. The Act clearly established these specific conditions as an additional "incentive" for the use of performance-based services contracts under FAR Part 12.

Fifth, Part 212.201(a)(ii) should be modified by deleting the word "modify" and inserting the word "tailor".

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Finally, we are very concerned about one of the examples used in the background explanation of the rule, but properly not included in the text of Part 212.102(a)(ii). The background suggests that a remedy available to the contracting officer is the "right to reduce the contract price" in order to reflect any reduced "value" of services. Although the statute and the interim rule specifically requires that the contract (or task order) be firm fixed-price, nothing in the legislative history of the Act or the rule suggests a "reopener" of the contract price and we strongly oppose any effort to "reopen" firm fixed-price contracts. We acknowledge that the Government has other tools and remedies that are more appropriately applied, on a case-by-case basis, should performance not meet the requirements of the contract. The interim rule is correctly silent on the nature of remedies that the contracting officer should consider in preparing any solicitation modification to FAR 52.212-4 or 52.212-5; the final rule should not include any reference to the "right to reduce the contract price."

Again, thank you for the opportunity to provide these comments. If you have any questions, please contact CODSIA Project Officer Cathy Garman at 202-347-0600.

Sincerely,

(SEE ATTACHED CODSIA SIGNATORIES)



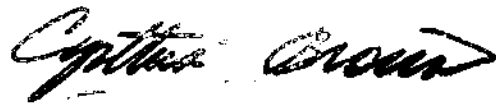
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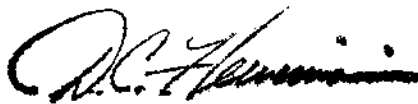
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