

COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS

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August 16, 2000

CODSIA Case No. 16-99

Mr. James H. Dolvin
NASA Headquarters Office of Procurement
Contract Management Division (Code HK)
Washington, DC 20546

Subject: National Aeronautics and Space Administration FAR Supplement (NFS)
Interim Rule Entitled "Risk Management"

Dear Mr. Dolvin:

The undersigned members of the Council of Defense and Space Industry Associations (CODSIA) appreciate the opportunity to offer comments on the interim rule published in the Federal Register on June 13, 2000 (Vol. 65, No. 114). Formed in 1964 by industry associations with common interests in the defense and space fields, CODSIA is currently composed of eight associations representing 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. An initial proposed rule was published in the Federal Register at 64 FR 38880-84 on July 20, 1999. CODSIA members provided formal public comments on September 28, 1999, along with the United Space Alliance, and the Jet Propulsion Laboratory.

The interim NASA rule revises the NASA FAR Supplement (NFS) to emphasize within the acquisition process considerations of risk management, including safety, security (including information technology security), health, export control, and environmental issues. The interim rule addresses risk management within the context of acquisition planning, selecting sources, choosing contract type, structuring award fee incentives, administering contracts, and conducting contractor surveillance. Furthermore, the interim rule would allow that contractors not be paid an award fee for any evaluation period in which there is a major breach of safety or a major breach of security, as those terms are defined in the interim rule.

The CODSIA member associations and their member companies are committed to the health and safety of their employees, the members of the public, and NASA

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employees. We are pleased with and supportive of the steps taken in the interim rule to address some of the issues raised in the initial set of public comments. In particular--

1. The elimination of the requirement for a separate risk management plan, which was included in the proposed contract clause (1852.223-75, "Risk Management Plan"), is a significant improvement over the originally published proposed rule.
2. Removal of the "Type A" or "Type B" Mishap language from the award fee evaluation factors contained in the interim rule is also a vast improvement. However, as explained below, the award fee factors contained in section 1816.405-274, "Award Fee Evaluation Factors," remain difficult to comply with or to price for anticipated legal liability.
3. CODSIA members appreciate NASA's decision to limit a "major breach of safety" (NSF 1852.223-75, Major Breaches Safety or Security) to activities on NASA installations. By eliminating the language from the proposed definition of "a major breach of safety" which stated that major breaches of safety "may occur on or off Government installations," NASA has made clear the application of this portion of the interim rule. This clarification is consistent with the scope of the NASA occupational safety and health clauses (NSF 1852.223-70 and NSF 1852.223-73), both prior to and after the revisions of those clauses in the interim rule. Historically, these clauses have been, and continue to be, applicable only to a contractor's work on a Government installation.
4. CODSIA members support NASA's decision to limit application of the changes announced in the interim rule to solicitations issued on or after July 13, 2000 (65 FR 37057, "Applicability Date"). CODSIA members note that, with respect to post-July 12, 2000, solicitations to extend or modify an executed contract, any adjustment will require a subsequent contract modification to account for increased costs which would apply to the entire contract.

Without diminishing our appreciation for the significant improvements in this rule, CODSIA members continue to have concerns with the interim rule as published. We provide the following additional comments for your review and consideration prior to publication of the final rule.

1. General

- The interim rule still runs counter to the goals of acquisition streamlining and other initiatives designed to encourage procurement of commercial items and adoption of commercial practices (FASA, FAR Part 12, Commercial Items, etc.). It is a departure from the Government's intent to become more commercial-like. NASA contractors' commercial customers do not have similar requirements. Commercial practices already address risk management and, therefore, unique

requirements are not necessary to protect NASA's interest. OSHA and other government safety programs already address occupational safety and health, whether in commercial or traditional government acquisition. NFS 1812.301, "Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Items," adds items 1852.223-70, "Safety and Health," 1852.223-73, "Safety and Health Plan," and 1852.223-75, "Major Breach of Health and Security" as clauses authorized for use in acquisitions of commercial items. This requirement is additional to any commercial practice and, when applicable, will add costs to NASA for any commercial product purchased and may impede NASA's access to commercial markets. In fact, it may act as a deterrent to commercial firms considering entry into the government/NASA marketplace and prevent access to the increased competition and valuable new technology they bring with them.

- This additional oversight will add costs to the program. Although risk management is an ongoing contractor activity and a process that a contractor voluntarily imposes on each of their programs, the interim rule adds considerable bureaucracy and rigidity to the process by imposing additional reporting requirements on the contractor and introducing unprecedented oversight and surveillance by NASA personnel. NASA's Procurement Information Circular (PIC) 99-9 identifies "transfer" as a method of risk treatment whereby the customer wants to transfer risk to the contractor and the contractor wants the customer to retain or accept the risk. This transfer of risk assumption has always been a matter of "negotiation" to settle on an appropriate contract type. By incorporating the draconian award fee provisions, this interim rule imposes the entire risk assumption on the contractor, eliminating any flexibility to address unique program or contractor circumstances, while increasing proposal and program costs.
- The revised interim rule still does not provide sufficient guidance to the Contracting Officer relative to tailoring or waiver of the subject provisions. The lack of such guidance raises concerns regarding consistent and uniform application of the provisions.
- Lastly, the clause pertaining to the contractor Safety and Health Plan, set forth at 1852.223-73, "Safety and Health Plan," still contains burdensome requirements. In addition to mandating that a prime contractor continually update its safety and health plan, the clause could be read to require a contractor to take responsibility for the safety and health of its subcontractors and the subcontractors' employees.

2. 1852.223-75, "Major Breach of Safety or Security"

The interim rule requires inclusion in many NASA contracts of the clause titled "Major Breach of Safety or Security." This clause, as written, could result in the

imposition of harsh penalties for even minor incidents, including occurrences unrelated to mission safety.

- Interim NFS 1852.223-75 provides that a major breach of safety may constitute a breach of contract, justifying termination for default, or may result in the total award fee being withheld during the period in which the major breach occurs. As defined, a "major breach of safety" could include relatively trivial deviations from OSHA requirements, or events (whether trivial or not) over which a contractor has virtually no control. Thus, a contract could be terminated for default or an award fee eliminated based on an accident that did not have severe consequences, had no impact on mission readiness or reliability, or for which the contractor had no culpable fault. Examples of situations that would arguably fit within the definition of major breach of safety include:
 - A fatal auto accident while an employee working on a NASA contract is traveling from one work-site or building to another.
 - A repeat violation of an OSHA record-keeping requirement because an occupational illness is mischaracterized as an occupational injury, or vice-versa.
 - Greater than \$1 million in damage caused by a storm.
- The definition of "major breach of security" likewise arguably includes incidents that have no substantial relationship to mission success or contract oversight. Examples include:
 - One employee assaults another employee in the workplace, and the offending employee is convicted of a criminal offense, even though the employer is without fault.
 - An earthquake causes a building structural element or a fixture to fall on a NASA part, causing \$260,000 in damage to the part.
 - An employee working on a NASA program takes a small amount of consumable supplies home for personal use, even though the employer has strict rules against such diversion of resources.
- Because the definition of major breach of safety (and major breach of security) are vague, NASA contractors operating under NFS 1852.223-75 are exposed to severe consequences for events that could be beyond the control of the contractor, or for events that are minor in nature and do not impair contract performance or mission safety. The "Major Breach of Safety and Security" clause should be revised to eliminate the specter of harsh penalties for minor occurrences and events beyond the practical control of the contractor.

- Under the interim regulations, a contractor's award fee may be eliminated for any evaluation period in which there is a "major breach of safety or security." There are four problems with this approach:
 - First, it is unclear whether the zero award fee provision in NFS 1816.405-274(c) is mandatory or discretionary. This is a critical distinction. A requirement that an award fee must be denied in total because of an accident or regulatory deviation, without any reference to the severity of the event or deviation, its relationship to mission success or failure or damage to Government property, or the culpability of the contractor, would be exceedingly harsh. CODSLA members urge NASA to clarify that triggering NFS 1816.405-274(c) is at the discretion of the Contracting Officer.
 - Second, there is no allocation of fault contained in the definition of "major breach of safety and security." A contractor may have its fee eliminated for a "major breach" even if the breach is not a substantial cause of the accident or security breach, or even if the contractor has no culpable fault.
 - Third, there is a problem of proportionality, as discussed earlier in this section. For instance, minor violations of OSHA rules can result in draconian penalties. A technical paperwork violation that cannot result in injury, but happens to be the second such deviation by the contractor, may qualify under the interim definition as a "major breach of safety." As such, it would allow an overall fee determination of zero to be made for the relevant evaluation period. Given the potential magnitude of award fees on NASA programs, this would be a grossly disproportionate penalty for so minor a violation.
 - Fourth, NFS 1852.223-75(a) and NFS 1816.405-274(c)(2) speak of violations of OSHA (or an equivalent state agency) cited by the relevant agency. There is a difference between a citation that has been or still may be appealed ("contested" in OSHA's parlance, which in legal effect is a mere allegation), and a citation that has been upheld by the appeals tribunal or for which the time to make an appeal has expired. The interim rule could be read to allow the award fee officer to make a decision to eliminate a contractor's award fee based on a mere allegation of a violation of an occupational safety regulation.
- To ensure proportionality, NASA should devise a way to classify the degree of seriousness of the safety problem and its impact on the NASA mission. A matrix system, similar to that used by OSHA to determine the amount of a penalty to be assessed, would be one idea. Under the typical matrix approach, the amount of the monetary sanction is determined by an evaluation of the degree of deviation and the extent of the harm to the Government's interests using a matrix. Other approaches might also be useful. Whatever the mechanism, it should be capable of objective application, and it should distinguish not only between degrees of

seriousness but also should recognize the nexus (or lack thereof) between the contractor's act or omission and mission goal.

- Finally, the interim clause set forth in NFS 1852.223-75 should also be revised as follows:
 - In 1852.223-75 (c), at the end of the existing text add a new sentence as follows: "The contractor is not required to include in any report an expression of opinion as to the fault or negligence of *the contractor* or any employee." Given the prospect of litigation or other claims after any significant accident or incident, a contractor should not be required to express an opinion regarding ultimate fault that may be binding in any subsequent litigation. NASA can obtain the information it needs for contract oversight and corrective action from the root cause evaluation required under 1852.223-70(d).

3. NFS 1852.223-70, Safety and Health

NASA has deleted from the prior version of the safety and health clause the qualification that the contractor must comply with occupational safety and health requirements in effect on the date of the contract. (NFS 1852.223-70(a), second sentence.) Thus, the proposal would require the contractor to comply with new workplace safety requirements imposed after the award of the contract. Under current case law the cost of complying with such new requirements would not be a basis for an equitable adjustment under a fixed-price contract. Contractors under fixed-price contracts should not be exposed to financial risk over matters not under their control, but obviously under the control of the government. CODSLA members view this as an issue of fundamental fairness in the relationship between NASA and its contractors and recommends that "in effect on the date of the contract" be added back to NFS 1852.223-70(a)

4. NFS 1852.223-70, Safety and Health Plan

The interim rule adds to NFS 1852.223-73, "Safety and Health Plan", a requirement that contractors develop, in the case of subcontracts over \$500,000, a plan to "address safety and occupational health for subcontractor employees." While this new requirement applies only to subcontract performance on a NASA installation, CODSLA members are concerned about the intrusion into the subcontractor's operations that this provision will require. Contractors are concerned that this provision may make the prime contractor contractually and legally responsible for the occupational safety and health programs of its subcontractors. The degree of prime contractor oversight of its subcontractors could lead to claims made in civil litigation of liability of the prime contractor for safety and environmental incidents under circumstances not traditionally understood to be the legal responsibility of the prime contractor. The specter of such

liability, and the additional planning and oversight by the prime contractor to guard against such liability, will result in an additional cost to NASA.

5. NASA Evaluation Factors

NFS 1815.304-70(d)(4) would require Contracting Officers to evaluate a contractor's past performance in occupational health and environmental protection, among other factors, during the contract award process. The Civilian Acquisition Agency Council and the Defense Acquisition Regulations Council have jointly proposed a modification to the FAR to include compliance with employment and environmental laws in the consideration of the proposed contractor's record of integrity and business ethics. See 65 FR 40830, June 30, 2000. NASA should withdraw the interim rule at 1815.304-70(d)(4), at least as it would relate to occupational safety and environmental considerations in a responsibility evaluation, as the Acquisition Councils are addressing this issue.

Taken as a whole, this interim rule may burden NASA contractors and subcontractors with significant new risks and liabilities. We remain available to assist NASA in making the interim rule stronger and more protective of the public, the contracting community, and NASA. CODSIA members encourage assembling a NASA/industry team to address this subject for better alignment of common interests.

We appreciate the opportunity to comment on the proposed rule. Representatives of CODSIA member associations are available to discuss these industry comments at your convenience. Should you require further information regarding this issue, please contact CODSIA Project Officer Meredith Murphy at (703) 465-3673.

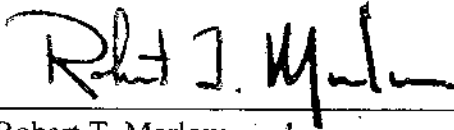
Sincerely,

SEE ATTACHED CODSIA SIGNATORIES

Mr. James H. Dolvin

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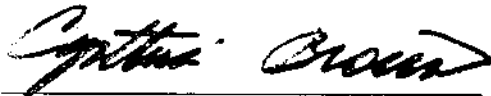
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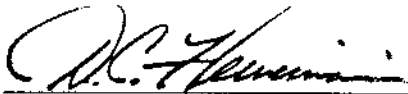
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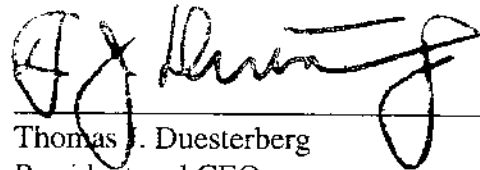
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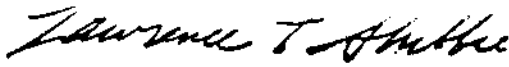
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