

COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS

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May 17, 2002
CODSIA Case No. 3-02

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

Re: FAR Case 2000-009, "Contract Terms and Conditions Required to Implement Statute or Executive Orders—Commercial Items"

Dear Ms. Duarte:

The undersigned members of the Council of Defense and Space Industry Associations (CODSIA) appreciate the opportunity to comment on the proposed FAR rule referenced above which was published in the *Federal Register* on March 20, 2002 (67 Fed. Reg. 13075).

Formed in 1964 by industry associations with common interests in 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 stated purpose of the proposed rule is to update FAR 52.212-5 for changes in contract terms and conditions required to implement statutes or executive orders. Several of the proposed changes to paragraph (e) dealing with the flowdown of clauses to subcontracts are of concern to our members. Those concerns follow.

The revised 52.212-5, paragraph (e) lead-in has been changed. The current introductory language in paragraph (e) states that the contractor is not required to flowdown clauses to subcontracts other than the clauses shown in paragraph (e)(1) through (e)(5). We are concerned that the absence of the current introductory language may cause contractors to infer that the thirty-three clauses in paragraph (b) and the five in paragraph (c) should also be flowed down to subcontracts. To avoid such a misinterpretation, CODSIA members request that the lead in to (e) be revised as follows:

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(e) Notwithstanding the requirements of the clauses in paragraphs (b), (c), or (d) of this clause, the contractor is not required to include any FAR clause, other than those listed below, in a subcontract for commercial items or commercial components -

The FAR clause 52.247-64, referred to in the proposed paragraph (e)(6), was included in the initial publication of the clause in 1995, but it was clearly stated at that time that this clause only needed to be flowed down to subcontracts awarded between October 1, 1995 (effective date of the rule) and May 1, 1996. Moreover, the current paragraph (e)(4) also states that the flowdown of 52.247-64 is not required for subcontracts awarded on or after May 1, 1996. Unless there has been an extension by law or executive order of the requirement to include 52.247-64 in the list of required flowdown clauses, we request that paragraph (e)(6) be deleted from the proposed coverage.

The final sentence of the proposed rule highlights the ability of the prime contractor to flowdown whatever additional clauses the prime contractor deems necessary to satisfy its contractual obligations. FAR 52.212-5 only discusses those clauses that are in the prime contract (paragraphs (a), (b), (c), and (d)) that are required to be flowed down. Since the prime contractor always has the right to include other additional discretionary terms to satisfy its contractual obligations, the inclusion of the language: "While not required, a prime contractor may include in its subcontracts a minimal number of additional clauses necessary to satisfy its contractual obligations" is unnecessary and, moreover, seems to provide regulatory endorsement of additional flowdown clauses for lower tier suppliers, which is contrary to the intention of the Federal Acquisition Streamlining Act. We recommend this sentence be removed in the interest of maximizing the use and availability of commercial vendors and suppliers at all levels of the supply chain.

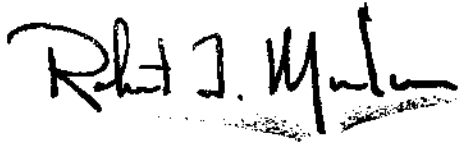
The Clinger-Cohen Act of 1996 further limited the applicability of provisions of law for commercially available off-the-shelf items. CODSIA members believe the regulatory adoption of the limitations authorized by the Clinger-Cohen Act at the earliest possible date would significantly improve the processes currently in place for the acquisition of commercial items by the federal government.

Thank you for the opportunity to provide our comments. If there are any questions, or if we can be of assistance, please contact Jim Serafin, the CODSIA Project Officer for this case at (703) 907-7585.

Sincerely,

(SEE ATTACHED CODSIA SIGNATORIES)

Sincerely,



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