

COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS
4401 Wilson Boulevard, Suite 1110
Arlington, Virginia 22203
codsia@codsia.org
www.codsia.org

CODSIA Case – 2020-003

June 8, 2020

Defense Acquisition Regulations System
Attn: Ms. Kimberly Bass
OUSD(A&S)/DPC/DARS
Room 3B941
300 Defense Pentagon8
Washington, D.C. 20301-3060

Ref: DFARS Case 2017-D042: Expediting Contract Closeout
CODSIA Case: 2020-003

Dear Ms. Bass:

On behalf of the member associations of the Council of Defense and Space Industry Associations (CODSIA),¹ we are pleased to submit these comments on the proposed rule to amend the DFARS to provide for expedited contract closeout, as published in the April 8, 2020, Federal Register.² We support the rule but recommend changes to make the closeout opportunity more readily available.

The proposed rule adds a new DFARS contract clause that allows the contractor and the Government to expedite a contract closeout by waiving any entitlement that may accrue to either party for residual dollar amounts up to \$1,000 at the time of final contract closeout. Based on the supplemental information in the *Federal Register* notice, DoD proposes to also apply this clause to solicitations and contracts for the acquisition of commercial items, including commercially available off-the-shelf items, and to acquisitions at or below the simplified acquisition threshold; we support that application.

¹ CODSIA was formed in 1964 by industry associations with common interests in federal procurement policy issues at the suggestion of the Department of Defense. CODSIA consists of eight associations – Aerospace Industries Association (AIA), American Council of Engineering Companies (ACEC), Associated General Contractors (AGC), CompTIA, Information Technology Industry Council (ITI), National Defense Industrial Association (NDIA), Professional Services Council (PSC), and U.S. Chamber of Commerce. CODSIA's member associations represent thousands of government contractors nationwide. The Council acts as an institutional focal point for coordination of its members' positions regarding policies, regulations, directives, and procedures that affect them. A decision by any member association to abstain from participation in a particular case is not necessarily an indication of dissent.

² 68 Fed. Reg. 19719, April 8, 2020, available at <https://www.govinfo.gov/content/pkg/FR-2020-04-08/pdf/2020-06724.pdf>

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Proposed DFARS 204.804-70 Contract Clause

The prescription applies to all contracts and explicitly makes it available to the acquisition of commercial items, including commercially available off-the-shelf items, and to acquisitions at or below the simplified acquisition threshold. We strongly support that coverage. We recommend that the prescription also specifically include DoD awards made from the GSA Schedules, for orders under DoD-awarded multiple-award contracts, and to DoD-funded assisted acquisition, regardless of the agency providing the assistance or the vehicle used (hereafter “covered awards”). Separately, we are writing to the Administrator of the Office of Management and Budget’s Office of Federal Procurement Policy to recommend that the FAR Council adopt this rule – with our recommended modifications.

The prescription directs contracting officers to include the DFARS clause 252.204-70XX in solicitations and resulting contracts “when the contracting officer intends to expedite contract closeout through the waiver of entitlement...”. We recommend that this provision be included in all solicitations and resulting contracts (“covered awards”) but that the determination to invoke the clause and the expedited contract closeout process be mutually agreed to by the government and the contractor at the time of final contract closeout. Some contract performance, such as many professional services contracts, reach their final contract closeout stage rapidly after the end of performance and within a reasonably short period of time after contract award. Too many other contracts, such as for development or manufacturing, might not reach the contract closeout stage until years after contract award. Rather than require a contract modification “when the contracting officer determines” to use the expedited contract closeout process, it would be better to include the clause from the beginning and not need any subsequent contract or order modification.

Proposed DFARS Clause 252.204-70XX

We generally support the clause as drafted.

However, before a contractor recommends a waiver of a dollar value, it is unstated whether the contractor will have to perform all true-up actions required before submitting the final invoice. Is this residual amount subject to audit? Upon approval of the waived amount, will that action serve as the modification to close the contract and establish the final contract value and funding or is additional action by the contracting officer required?

Subsection (c) of the clause provides that, for the purpose of determining the residual dollar amounts, “offsets (for example across multiple contracts or orders) may be considered to the extent permitted by law.” This subsection provides both significant

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opportunities for both the government and the contractor but is also extremely subjective and ill-defined in how it could be applied. We recommend that additional coverage be added.

We also recommend that the clause be added as a mutual modification to existing contracts without the need for additional consideration by either party; in our view, the mutual waiver of entitlement to residual dollar values below \$1,000 is itself sufficient consideration for the action.

Applicability to Subcontracts

A continuing challenge to the timely closeout of a prime contract is the effort required of the prime to closeout subcontractors, and the risk if the prime contract is closed before all subcontracts are closed. Quick contract closeout procedures could be invoked between the prime and the sub. And while nothing in the FAR or the DFARS prevents a prime contractor and its subcontractors from agreeing to waive entitlement to a residual outstanding dollar amount to close out a subcontract, we recommend that the final rule specifically authorize prime contractors to apply this same waiver concept to closing out subcontracts.

Thank you for your attention to these comments. We welcome the opportunity to discuss them with you and/or the drafting team at your convenience. If you have any questions or need any additional information, please do not hesitate to contact CODSIA's lead on these comments, Alan Chvotkin, Executive Vice President and Counsel for the Professional Services Council. He can be reached at (703) 875-8059 or at chvotkin@pscouncil.org.

Sincerely,



John Luddy
Vice President National Security
Aerospace Industries Association



Steve Hall
Vice President, Government Affairs
American Council of Engineering
Companies



Jimmy Christianson
Regulatory Counsel
Associated General Contractors of America

David Logsdon

David Logsdon
Senior Director
CompTIA Federal Procurement Council

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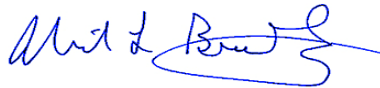
Gordon Bitko
Senior Vice President of Policy, Public
Sector
Information Technology Industry Council
(ITI)



Wesley P. Hallman
Senior Vice President for Policy
National Defense Industrial Association



Alan Chvotkin
Executive Vice President and Counsel
Professional Services Council



Neil L. Bradley
Senior Vice President & Chief Policy Officer
U.S. Chamber of Commerce