

COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS
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October 5, 2009

Ms. Hada Flowers
General Services Administration
FAR Secretariat Division (VPR)
1800 F Street, NW
Room 4041
Washington, DC 20405

Submitted via: <http://www.regulations.gov> and email

Subject: FAR Case 2008-011, Government Property
CODSIA Case 11-09

Dear Ms. Flowers:

The Council of Defense and Space Industry Associations (CODSIA)¹ is pleased to respond to the request for comments published in the August 6, 2009, *Federal Register*, regarding Government Property and its associated clauses in the Federal Acquisition Regulation. These changes are intended to clarify and correct the previous FAR rule for Part 45, published under Federal Acquisition Circular 2005-17, FAR Case 2004-025.

We welcome many of the proposed changes. Attached are our suggested clarifications to the proposed changes and additional recommendations. CODSIA has one significant area of concern that must be removed before a final rule is published. Language was added to FAR 15.404-4 that states, "Unless the contractor acquired property is a deliverable under the contract, no profit or fee shall be permitted on the cost of the property." The intent of this

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 seven associations – the Aerospace Industries Association (AIA), the American Shipbuilding Association (ASA), the National Defense Industrial Association (NDIA), the Professional Services Council (PSC), the American Council of Engineering Companies (ACEC), TechAmerica (formerly AeA and ITAA), and the Chamber of Commerce of the United States of America. 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.

proposed change is not clear, removing application of profit or fee **to a contract cost element** is not appropriate and such direction conflicts with the FAR profit policy.

Contractor-acquired property means property acquired, fabricated, or otherwise provided by the contractor for performing a contract and to which the Government has title (FAR 45.101). On fixed-price contracts, the Government acquires title to non-deliverables under contract financing clauses (FAR 45.202). Title reverts to the contractor for property not delivered to the Government or incorporated into end items when the payments are liquidated and the end items are delivered (e.g., FAR 52.232-32(f)(6)). In other words, this property loses its designation as contractor-acquired property since title reverts to the contractor. The proposed change is not clear whether this property is entitled to profit or fee. On cost-reimbursement contracts, the Government acquires title to all property for which the contractor is entitled to reimbursement (FAR 45.202). Why would the Councils intend to deny profit or fee on all property on cost-reimbursement contracts that is not a line item deliverable even though the Government has title?

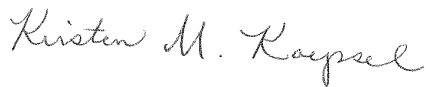
CODSIA believes there is no basis to eliminate profit or profit on any element of cost necessary for the performance of a contract. It is in the Government's interest to offer contractors opportunities for financial rewards sufficient to stimulate efficient contract performance, attract the best capabilities of qualified large and small business concerns to Government contracts, and maintain a viable industrial base (FAR 15.404-4(a)(2)). Eliminating profit or fee may create undesirable incentives for both Government and industry:

- Substituting labor for more efficient and effective equipment.
- Entering into operating leases for equipment.
- Charging to overhead instead of direct contract costs.
- Failing to take delivery on property for funding reasons or short-term benefit while sacrificing long-term capability.

No rationale or justification for this change was provided in the proposed rule. We believe some Government personnel may be under the impression that this language was at one time included in the FAR and that the proposed change is a simple correction. That impression is not true. Prior to FAR 45 rewrite, FAR 45.302-3 stated, "No profit or fee shall be allowed on the cost of the facilities when purchased for the account of the Government under other than a facilities contract. General purpose components of special tooling or special test equipment are not facilities." The definition of facilities did not include material, special test equipment, special tooling, or agency-peculiar property. So this prior prohibition of profit or fee was very narrowly applied to facilities acquired by the contractor for the Government under non-facility contracts. The FAR Part 45 rewrite eliminated "facilities" and the Government wisely chose not to expand this narrow profit or fee prohibition to a broader category of property. The proposed change is confusing and potentially a major change in Government policy that would cause harm to the industrial base. CODSIA strongly recommends that the proposed change to FAR 15.404-4 be eliminated.

Thank you for the opportunity to comment. If you need any additional information, please contact the CODSIA project officer, Richard Powers, AIA's Director of Financial Administration at (703)358-1042.

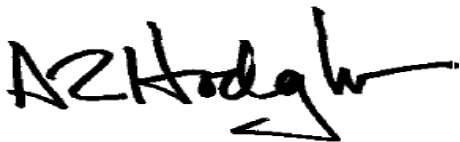
Sincerely,



Kirsten Koepsel
Director, Intellectual Property &
National Security
Aerospace Industries Association



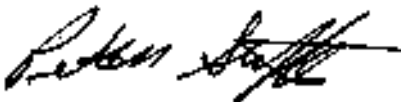
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Richard L. Corrigan
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Attachment