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December 14, 2009

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

Re: FAC 2005-37, FAR Case 2008-031, Limitations on Pass-Through Charges

Dear Ms. Flowers:

The Council of Defense and Space Industries Association (CODSIA) appreciates the opportunity to provide comments on the interim rule, "Limitations on Pass-Through Charges," that was published in the *Federal Register* on October 14, 2009 (74 FR 52853). This interim rule amends the Federal Acquisition Regulation (FAR) to implement Section 866 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2009 (Public Law 110-417), enacted on October 14, 2008, which applies to Executive Agencies other than the Department of Defense (DoD). The interim rule also implements Section 852 of the NDAA for FY 2007 (Public Law 109-364) applicable to DoD. Both statutory provisions require regulations to minimize pass-through charges (e.g., indirect costs or profit/fee) by contractors from all tiers of subcontractors that add no or negligible value to meeting the contract objectives and have been the subject of two prior DFARS cases.

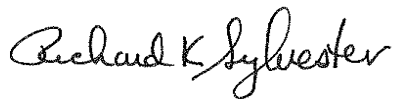
As noted above, this is the third proposed or interim rule to implement regulations related to excessive pass-through charges. Industry associations submitted extensive comments to the two DFARS interim rules in June of 2007 and July of 2008 and, on both occasions, recommended that the rules be rewritten in a manner more consistent with the intent of Congress. The resultant DFARS regulations have created a fairly confusing and overlapping body of guidance over the past 2-3 years and many of industry's concerns with the earlier DFARS rules still have *not* been satisfactorily addressed. This letter incorporates a number of the comments submitted to DoD by industry in response to the earlier rulemaking cycles.

Further, we note that the interim government-wide FAR rule repeats almost verbatim the guidance and clause language from the two earlier DFARS rules with some modifications to the prescriptions for civilian agency contracts. Our key concerns are enumerated in the Enclosure to this letter, but center on several key features of the interim FAR rules. These include an unduly complex set of pre and post-award notice and reporting requirements, the failure to include or recognize exceptions from the rule for certain types of contracts, and a lack of clarity of many of the terms of art. Also, there are two different regulatory threshold schemes for DOD and civilian agency contracts, including application at differing dollar thresholds and for differing contract types.

For the reasons set forth in this letter and its Enclosure, we believe this interim FAR rule should be rewritten and streamlined so it is consistent across all federal agencies and allows for comprehensible implementation and enforceability.

CODSIA, on behalf of its member associations, appreciates the opportunity to provide these comments and welcomes any opportunity to discuss them further to ensure the Councils have a full understanding and appreciation of our concerns. If you have questions or need any additional information, please contact Dick Powers at 703-358-1042 or dick.powers@aia-aerospace.org.

Sincerely,



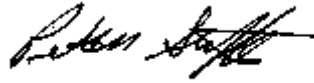
Richard Sylvester  
Vice President, Acquisition Policy  
Aerospace Industries Association



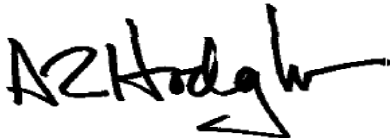
Alan Chvotkin  
Executive Vice President & Counsel  
Professional Services Council



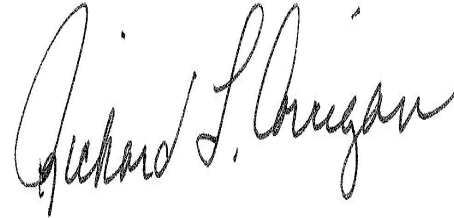
Cindy Brown  
President  
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R. Bruce Josten  
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Enclosure

**1. The statutory provisions cited by the Councils as the basis for the implementing regulations do not require a reopener provision. The reopener provision is cumbersome, unique in FAR-based contracting, and unnecessary to meet the statutory intent.**

We believe the rule should be placed in FAR Part 15 (for example, in 15.404-1, Proposal Analysis) rather than in a clause to affirm and emphasize the basic contract formation policy that contracts should not be entered into where the CO determines after a thorough proposal analysis that an offeror adds no or negligible value to the proposed acquisition. This need for a broad policy statement in FAR Part 15 speaks to a general lack of practical guidance for COs in the rule except for a brief allusion to a CO determination about “added value” in 15.408(n)(2)(iii).

With respect to this requirement, if it is applied correctly, a pre-award determination by a CO that an offeror adds value to its subcontractor’s performance should be conclusive and remain in effect throughout the remainder of the contract performance period, absent exceptional circumstances. To do otherwise places any contractor at risk of reopening the contract terms and being subject to arbitrary price reductions or cost disallowances. The Alternate I contract clause provision contemplates this type of CO affirmative determination, but structured as an alternate portion of the clause, its use is not a mandatory element of the basic clause. As constructed, the pass-through rule would unfairly continue to subject contractors to continuing post-award reviews by the government—with audit rights—of pass-through charges and potential disallowances and/or recoveries throughout the life of a contract. We continue to maintain that this open-ended aspect of the rule is unjustified, inappropriate, onerous, and not required by Sections 866 or 852 of the NDAs.

**2. The final rule should include appropriate exemptions for certain contract types based on overlapping and/or conflicting regulatory requirements**

- a. The final FAR Rule should include an exemption for Cost Accounting Standard (CAS)-covered contracts because the allocability and allowability of pass through charges (as that term is identified in the interim rule) is addressed principally in CAS and FAR 31.2, Cost Principles, and therefore remedies already exist in law and regulation for violating those requirements.
- b. The final FAR rule should include an exemption for contracts issued subject to TINA requirements. It is reasonable to conclude that the submission of cost or pricing data that meets the criteria in FAR Table 15-2 would provide all the necessary detailed information needed by a CO to have visibility into the subcontract costs and efforts and allow the CO to make the required determination one way or the other about pass-through charges prior to award. Moreover, such a data submission is subject to eventual TINA certification of currency, completeness and accuracy. After extensive analysis, audit and negotiation of a TINA proposal, the question of the value add at any level should be absolutely clear and the mechanisms contemplated in the rule should be totally unnecessary. Thus, if a CO concludes at the time that an award price is determined to be reasonable and the information submitted

and TINA certified is current complete and accurate, there does not appear to be a supportable basis to later determine that there are excess pass-through charges in the performance of that contract. Contracts subject to TINA requirements should be exempt.

- c. The final FAR rule should include an exemption for all commercial item acquisitions. Neither the civilian agency nor the DOD clause prescription fully addresses commercial items or services. While the civilian agency application is tailored to apply to cost reimbursement contracts and DOD exempts some fixed price contracts for commercial items, an exclusion for commercial item acquisition is not stated clearly enough. There is a possibility in the current construction of the guidance that commercial items/services purchased by DOD through a T&M or labor hour contract could be subject to the excess pass-through cost clause. Such application would be contrary to acquisition policy for the acquisition of commercial products and services wherever practicable to fulfill the government's requirements and serves no practical purpose since cost data is not provided nor required for commercial items to the extent needed to assure pass-through charges compliance enforcement.

### **3. Including Additional Audit Rights in this Rule is not Justified**

As noted in our previous comments of June 29, 2007 and July 14, 2008, the right of access to records already exists in FAR 52.215-2. We are unaware of what additional records or data the new language in FAR 52.215-23(e) is intended to target. We believe further justification should be provided for this new language or it should be removed as redundant.

### **4. The 70% Threshold should be Increased**

The 70% supplier content threshold established for applicability of the interim rule is arbitrary and is not a legislative requirement. The threshold should be increased to the 90% level initially contemplated by Congress (as documented in the Senate version of the bill -- Section 844 of S2766). Increasing the threshold to a 90% level would substantially reduce the number of proposals that will be burdened with the additional requirement for proposal detail. This would result in a cost savings to both contractors and the Government.

### **5. The Flowdown should be Limited to First-tier Subcontractors**

Flowdown of the solicitation provision and the contract clause should be limited to first-tier subcontracts. Experience with the previous interim rules has shown that it is extremely difficult and burdensome for prime contractors to obtain relevant data from subcontractors below the first tier, particularly in a timeframe that supports timely proposal submittal. In order to comply with the solicitation provision, prime contractors will have to delay proposal submittal while awaiting information from lower-tier subcontractors. There is little benefit to the government in micromanaging pass-through charges deep in the supply chain, particularly when the requirement to submit cost or pricing data on subcontracts that do not qualify for an exception gives the government visibility into lower-tier subcontractor cost structures in appropriate cases.

### **6. The terms of art contained within the clause should be clarified**

The interim clauses contain a multitude of terms including, but not limited to, “no or negligible value,” “substantive value,” and “added value” that could be construed in many different ways without a governing standard. For example, the definition of “added value” in 52.215-23 (a) has a parenthetical which has the abbreviation “e.g.” followed by some examples of contract or managerial activities, which could be considered “added value.” One way to be less exclusive would be to delete the “e.g.” and substitute “including, but not limited to...” in its place. It is also reasonable to conclude that any detailed description of “added value” contained in a proposal for the proposed prime and subcontractors will be protected under the relevant “Rights in Bid and Proposal Information” clauses, but there is no specific language confirming this interpretation. Because such gaps in the terminology of pass-through charges exist, and the penalties for not complying with excess pass-through charges regulations are so draconian, the final rule should include a set of narrowly tailored definitions for all the key terms that comport with the relatively clear requirements of the underlying statutes.

## **7. Potential for Misapplication of the New Contract Clauses**

We believe that there is a significant probability that Contracting Officers will include the clauses at 52.215-22 and 52.215- 23 in all solicitations over the TINA threshold (for DoD) or over the simplified acquisition threshold (for all other Executive Agencies) regardless of contract type or competitive environment as a default procedure to avoid having to procedurally go back and insert (and then request the detailed information required by the clauses) after discovering that there is no competition. It is also highly probable that Contracting Officers will include the provisions in all solicitations whether or not price competition is to be expected and regardless of contract type, if only to avoid situations where they later have to request such cost information and tactically reveal to an offeror that there is no competition. Considering the potential for such contract formation problems, the use of these clauses should be limited to only sole source contracts (FFP, T&M or otherwise) below the TINA threshold in which the Contracting Officer may request the detailed information and conduct the “added value” justification process and/or negotiate the proper limitation on the scope of pass-through charges language and monetary arrangements if required.

Regarding Alternate I, it appears that the DoD is making the assumption that contracting officers will include Alternate I in the solicitation. It has been industry’s experience that contracting officers are frequently reluctant to make the decision to include Alternate I in the solicitation placing the offerors in a difficult position.

## **8. Clarification of how the clauses will be enforced vis-à-vis the unwarranted distinctions in the remedies for differing contract types**

There is a concern among many in industry that a look back provision such as in 52.215-23(d) is an open invitation for CO’s to revisit contract terms, conditions and price agreements to locate excessive pass-through charges and generally revisit the agreement. This would be an unfair and unproductive outcome and must be discouraged. The rule would also benefit from more specific guidance on how subsection (d) will be implemented with respect to other contract compliance requirements and/or its impact on other operative contract clauses.

**9. DFARS Provisions need to be Removed**

With the publication of this FAR interim rule, the DFARS language established with the 2<sup>nd</sup> interim rule in 73 FR 27464 should be eliminated as the requirements are now unnecessary as they are included in the FAR language.