COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS
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August 26, 2013

General Services Administration
Regulatory Secretariat (MVCB)
ATTN: Hada Flowers
1800 F Street NW, 2nd Floor
Washington, DC 20405

Re: **FAR Case 2012–017 - Federal Acquisition Regulation - Expansion of Applicability of the Senior Executive Compensation Benchmark – Interim Rule**
CODSIA Case 05-13

Dear Ms. Flowers:

On behalf of the Council of Defense and Space Industry Associations (CODSIA)[1], we are pleased to submit the following comments on the interim rule entitled "**Expansion of Applicability of the Senior Executive Compensation Benchmark" (FAR Case 2012-017)** which was published in the Federal Register on June 26, 2013.

Although we appreciate the Interim Rule is being issued solely to implement section 803 of the National Defense Authorization Act for Fiscal Year 2012 (Pub. L. 112– 81), we are concerned because the Interim Rule (1) suffers from the same retroactivity problem the FAR Council acknowledged affects the companion June 26, 2013 Proposed Rule, and (2) imposes significant additional recordkeeping burdens which will particularly negatively impact small business. The FAR Council has not provided any explanation for publishing this rule more than one year after the deadline set forth in section 803.

The Compensation Benchmark Cannot Be Retroactively Applied.

[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 six associations – the Aerospace Industries Association (AIA), the American Council of Engineering Companies (ACEC), the National Defense Industrial Association (NDIA), the Professional Services Council (PSC), TechAmerica and the Chamber of Commerce of the United States. 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.

The Interim Rule suffers from the same retroactivity problem as the Proposed Rule.

In section 803(c)(2) of the Fiscal Year 2012 National Defense Authorization Act, Congress stated that the expanded reach of the compensation cap "shall apply with respect to costs of compensation incurred after January 1, 2012 under contracts entered into before, on, or after the date of the enactment of this Act" (which was December 31, 2011). This Interim Rule amends FAR 31.205-6(p) to require that the incurred compensation costs for all contractor employees on all DoD, NASA, and Coast Guard contracts awarded on or after December 31, 2011, be subject to the senior executive compensation amount.[2]

The preamble to this Interim Rule indicates that the FAR Council is properly concerned that ''[t]here are challenges with respect to the retroactive application of section 803 (i.e., to the application of section 803 to contracts awarded before the enactment of section 803)" because the

> "…. implementation of section 803 is similar to the implementation of section 808 of the National Defense Authorization Act for Fiscal Year 1998 (Pub. L. 105-85, November 18, 1997), which imposed a cap on Government contractors' allowable costs of 'senior executive' compensation. Section 808, like section 803, retroactively applied to contracts that already existed on the date of its enactment; both statutes contain text which applied the statute to contracts awarded before, on, or after the date of enactment of the underlying act. In litigation on the application of section 808 to contracts awarded before the date of the enactment of the statute, the courts held that section 808 breached contracts awarded before the statutory date of enactment (General Dynamics Corp. v. U.S., 47 Fed. Cl. 514 (2000); and ATK Launch Systems, Inc., ASBCA 55395, 2009-1 BCA ¶ 34118 (2009)).
>
> "For these reasons, DoD, GSA, and NASA are implementing section 803 with both an interim rule and a proposed rule. This interim rule addresses only the prospective application of section 803, i.e., to contracts awarded on or after its enactment (December 31, 2011). The separate proposed rule (FAR Case 2012-025) addresses the retroactive application of section 803 to contracts that had been awarded before its enactment. In other words, under this bifurcated approach, DoD, GSA, and NASA are implementing section 803 through this interim rule for contracts awarded on or after the date of enactment (December 31, 2011) and, at the same time, DoD, GSA, and NASA are addressing in the proposed rule the retroactive application of section 803. DoD, GSA, and NASA seek public comments on both the interim and proposed rules (and, on the

[2] The background section accompanying the Interim Rule provides that: "DoD will separately handle the implementation of authority provided by 10 U.S.C. 2324(e)(1)(P), as amended by section 803(a), in which Congress has authorized the Secretary of Defense to establish 'one or more narrowly targeted exceptions for scientists and engineers upon a determination that such exceptions are needed to ensure that the Department of Defense has continued access to needed skills and capabilities.'"

> proposed rule, especially with respect to the potential complexities associated with applying section 803 to contracts that had been awarded before the date of its enactment)." 78 Fed. Reg. 38535.

The FAR Council is mistaken in its conclusion that the holdings in the *General Dynamics* and *ATK Launch Systems* decisions cited in the preamble would impact only contracts awarded before the effective date of section 803. A close reading of those decisions reveals the Government would also be in breach of FAR 52.216-7, "Allowable Cost and Payment" in implementing the Interim Rule because it attempts to impose its requirements to contracts awarded before the June 26, 2013 effective date of the Interim Rule, more specifically to contracts awarded after the December 31, 2011 effective date of section 803 and before the June 26, 2013 effective date of the Interim Rule.

In General Dynamics Corp. v. U.S., 47 Fed. Cl. 514 (2000), the National Defense Authorization Act for Fiscal Year 1998, Public Law No. 105-85, 111 Stat. 1629, was enacted on November 18, 1997. Sec. 808 of the Act imposed a cap on defense contractors' allowable costs of "senior executive" compensation by making unallowable all such costs that exceed a "benchmark compensation amount." The Cap applied to all senior executive compensation costs incurred by defense contractors after January 1, 1998, regardless of whether the contracts were executed after that date or were already in existence prior to January 1, 1998. Because GD paid compensation to some of its senior executives that exceeded the cap and were incurred prior to the date of the enactment of Section 808, GD was negatively impacted by the government's proposed plan to apply the Section 808 compensation cap retroactively.

GD alleged that the enactment of Section 808 breached a 1996 contract ("-2100") because the cap was sought to be retroactively imposed on a contract that was awarded in 1996, prior to the November 18, 1997 effective date of Section 808, which, according to GD, breached the requirement in FAR 52.16-7, "Allowable Cost and Payment" that the contracting officer determine allowable amounts "in accordance with [FAR] subpart 31.2 .... in effect on the date the contract was awarded."

In finding that application of the statutory cap to contracts awarded before the effective date of the statute constituted a breach of FAR 52.216-7, the Court of Federal Claims held:

> "The contract language is clear and unambiguous -- the provisions of FAR subpart 31.2 in effect on the date of this contract, which were incorporated into Contract -2100 through FAR 52.216-7, govern the determination of allowable executive compensation costs. The statutory cap violated this contract provision. The court finds, therefore, that the enactment of Sec. 808 of the FY 98 Authorization Act breached Contract -2100."
> 47 Fed. Cl. 514, 546 (2000).

Similarly, in ATK Launch Systems, Inc., ASBCA 55395, 2009-1 BCA ¶ 34118 (2009)), ATK Launch Systems, Inc. filed a motion for partial summary judgment, contending that the government's failure to fully pay executive compensation costs under contracts entered into prior to November 1997 was a breach of contract. In analyzing FAR 52.216-7, the Board held that it was clear that allowability is determined by the FAR 31.2 cost principles in effect on the date of the contract. As of the "date" of the award of the contracts in question, there was no cap or limit to executive compensation costs under FAR Subpart 31.2, and thus the Board held that no cap could be applied to limit these costs. In granting the ATK motion for partial summary judgment, the Board held that since ATK was not allowed to include these clearly allowable costs in its rates, the Government was liable for damages for its breach of FAR 52.216-7. 2009-1 BCA ¶ 34118 at 168706.

As can be seen from these decisions, the critical determination is whether the Government is attempting to determine allowability of contract costs using ***other than*** the version of FAR subpart 31.2 that existed on the date the contract was awarded. That would appear to be the case here because the Interim Rule indicates that it applies to contracts awarded after the December 31, 2011 effective date of section 803 and before the June 26, 2013 effective date of the Interim Rule. Since FAR 31.205-6, "Compensation for Personal Services," which is part of FAR subpart 31.2, was not modified by the Interim Rule to incorporate Section 803 requirements until June 26, 2013, it is reasonable to legally conclude that any attempt to apply the Interim Rule to contracts awarded before June 26, 2013 will result in a breach of all contracts to which the interim rule is applied, as was held to have occurred in both the *GD* and *ATK* decisions, because the Government would be seeking to determine allowable costs by applying to contracts awarded before June 26, 2013 a version of FAR subpart 31.2 that did not exist until June 26, 2013.

The Regulatory Flexibility Act Statement is Incorrect and should be corrected

The Regulatory Flexibility Act section of the preamble to the rule states:

> "The interim rule imposes no reporting, recordkeeping, or other information collection requirements. The rule does not duplicate, overlap, or conflict with any other Federal rules, and there are no known significant alternatives to the rule."

This statement is inaccurate as the interim rule imposes a burden on contractors (and particularly small businesses) to maintain more than one billing rate structure for at least 2012 and 2013 and perhaps several years into the future as rates used for interim billing purposes and for incurred costs are contractually required. Many current contractor billing and payment processing systems are not designed or configured to process differing rates. Therefore, this requirement will increase costs for most small business contractors.

Numerous small businesses receive contracts that are subject to the FAR Cost Principles and will be required to change the way they manage their cost identification

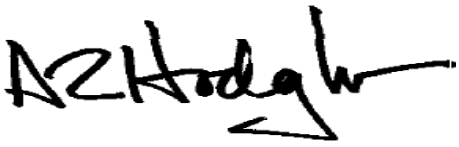
procedures and processes and the manner in which they segregate costs not previously required. Given the Administration's policy of promoting the use and growth of small businesses, the pressures that sequestration are putting on procurement dollars and the impact on small businesses in particular, whether the FAR Council can exempt these organizations from the requirement or not, the FAR Council has failed to account for the additional costs imposed on small businesses by the statutory change.

Conclusion

In the proposed rule on contractor compensation published on June 26, the FAR Council properly identified that any effort to retroactively change the cost principles before the effective date of the regulatory change to the cost principles would trigger a government breach of all affected contracts and exposure to damages. We share in those views. For those reasons, we strongly oppose the same action by this Interim Rule and recommend it be rewritten to provide for only a prospective application after June 26, 2013,

CODSIA appreciates this opportunity to comment on the Interim Rule, and we would be pleased to respond to any questions the Council may have on these comments. Trey Hodgkins of TechAmerica serves as CODSIA's project lead on this case and he can be reached at 703-284-5310 or at thodgkins@techamerica.org. Bettie McCarthy, CODSIA's administrative officer, can serve as an additional point of contact and can be reached at codsia@pscouncil.org or at (703) 875-8059.

Sincerely,



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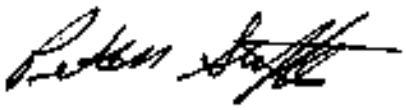

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