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November 2, 2009

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

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

Subject: FAR Case 2008-016, Termination for Default Reporting
CODSIA Case 13-09

Dear Ms. Flowers:

The undersigned members of the Council of Defense and Space Industry Associations (CODSIA)¹ appreciate the opportunity to comment on the proposed rule entitled "Termination for Default Reporting" that was published in the *Federal Register* on September 2, 2009. The proposed rule would establish procedures for contracting officers to report terminations for cause or default and determinations of defective cost or pricing data to the Past Performance Information Retrieval System (PPIRS). In a separate proposed FAR rule (FAR Case 2008-027; published in the *Federal Register* on September 3, 2009) the Councils are proposing that PPIRS will be one data source for the planned Federal Awardee Performance and Integrity Information System (FAPIIS). CODSIA comments on FAR Case 2008-027 are addressed in a separate letter.

While our recommended changes below would improve any final FAR rule, we do not believe that defective pricing information should be included in PPIRS.

Termination for Cause and Termination for Default Reporting. The proposed rule would require agencies to ensure that information related to termination for cause or default notices are provided for inclusion in PPIRS within 10 days after a termination for cause or default notice has been issued.

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, and the 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.

Conversion or withdrawal. Agencies would be required to ensure that information related to any subsequent conversion or withdrawal is provided for inclusion in PPIRS within 10 days after issuance. Terminations for cause or default are converted frequently to terminations for convenience or withdrawn after the parties enter into negotiations or pursuant to a decision of a Board of Contract Appeals or the U.S. Court of Federal Claims. CODSIA recommends that any final rule require agencies to remove completely from PPIRS all information related to the termination for cause or default when this occurs. This information should be removed from PPIRS since it would no longer be accurate upon a withdrawal or conversion and subsequent use by contracting officers would be prejudicial and subject to challenge. This removal should be completed concurrently with the execution of any conversion modification since this information could impact responsibility determinations and source selections. CODSIA recommends revising the last sentence of the proposed changes to FAR 8.406-8 and 12.403 to read as follows: "In the event the termination for cause is converted subsequently to a termination for convenience or is otherwise withdrawn, the contracting officer shall, concurrent with the execution of the contract modification that converts or withdraws the termination for cause, remove from PPIRS any reference to the termination for cause." We also recommend including in FAR 42.1503(f) in any final rule the following: "In the event the termination for default is converted subsequently to a termination for convenience or is otherwise withdrawn, the contracting officer shall, concurrent with execution of the contract modification that converts or withdraws the termination for default, remove from PPIRS any reference to the termination for default."

Relevance. We agree with the current FAR that a contracting officer should only consider relevant information when making a responsibility determination (see FAR 9.105-1(c)) or evaluating past performance during source selection (see FAR 15.305(a)(2)(i)). The FAR does not provide any guidance with respect to relevance. We recommend adding the following to FAR 9.105-1(c) and FAR 15.305(a)(2)(i): "When determining the relevance and currency of any termination for cause or default information in PPIRS, the contracting officer shall consider: whether the information has a logical connection to the offer under consideration; the age of the information; location of the work performed; the business units involved; the levels of technology; contract type; type of product or service; scope of work or complexity of the tasks; contractor comments; and the status of any appeals."

Certification Regarding Responsibility Matters. FAR 52.209-5, Certification Regarding Responsibility Matters (Dec 2008) is inserted in solicitations where the contract value is expected to exceed the simplified acquisition threshold (FAR 9.104-6). FAR 52.209-5(a)(1)(ii) requires an offeror to certify, to the best of its knowledge and belief, that it has or has not within a three-year period preceding the offer had one or more contracts terminated for default by any Federal agency. We recommend deletion of this certification since the information will be available to contracting officers in PPIRS. Conforming deletions should also be made at FAR 52.204-8(c)(1)(v) and in the Online Representations and Certifications Application (ORCA) website. At a minimum, the text should be explicit that a termination for cause or default that is converted subsequently or otherwise withdrawn does not require the disclosure of the earlier action.

Defective Cost or Pricing Data. The proposed rule would require agencies to ensure that information related to a contracting officer's determination that the contractor submitted defective cost or pricing data is provided for inclusion in PPIRS within 10 days after the determination. The proposed rule does not specify how this information will be used by the contracting officer when making responsibility determinations or evaluating past performance during source selections. Defective cost or pricing data cases are typically complex, fact-specific, and take years of fact finding, negotiation, and sometimes litigation to resolve. A price reduction for defective pricing on a prior contract is not an indication of present responsibility. Defective cost or pricing data often relates to subcontractor data that may not be relevant to the prime contractor or any other procurement. We believe including defective pricing information in PPIRS will add a bureaucratic review for already overburdened contracting officers, will provide no value added, and will potentially delay contract awards. We recommend that this information not be included in PPIRS. Recurring or systemic issues are best addressed through estimating system reviews.

If the Councils believe that the inclusion of this information must be retained in the final rule, then CODSIA recommends the following revisions to the proposed language.

Timing and content. If the Councils decide to proceed with a final FAR rule, the timing and content of information must be clarified to ensure that an allegation of defective cost or pricing data is not included in PPIRS. A contracting officer's determination triggers the 10 day clock for including the information in PPIRS. The FAR does not provide any guidance regarding the timing of this determination. For example, does the determination follow the issuance of a defective cost or pricing data report but precede negotiations with the contractor? The proposed rule links inclusion in PPIRS with a contracting officer's determination that the contractor submitted defective cost or pricing data rather than a price reduction for defective cost or pricing data. Submittal of defective cost or pricing data without a price reduction would clearly be immaterial to future responsibility determinations and source selections. We believe the Councils' intent is to include only final information in PPIRS. If the Councils decide to proceed with a final FAR rule, we recommend including the following statement at FAR 15.407-1(d): "****When the parties execute a modification that the contractor submitted defective cost or pricing data and reduces the contract price, or the contracting officer issues a final decision that determines the contractor submitted defective cost or pricing data and reduces the contract price, the contracting officer, in accordance with agency procedures, shall ensure that a copy of the modification or final decision is included in PPIRS in accordance with FAR 42.1503(f)."

Relevance. If the Councils decide to proceed with a final FAR rule, the rule must explain how the contracting officer will evaluate defective pricing information recorded in PPIRS. We recommend adding the following statement to FAR 9.105-1(c) and FAR 15.305(a)(2)(i): "When determining the relevance and currency of any defective cost or pricing information in PPIRS, the contracting officer shall consider: whether the information has a logical connection to the offer under consideration; the age of the information; location of the work performed; the business units involved; contract type; type of product or service; the current status of the contractor's estimating system; the

responsible party (prime or subcontractor); contractor comments; and the status of any appeals.”

Reversal. Contracting officer’s final decisions with respect to defective cost or pricing data issues are often reversed by a Board of Contract Appeals or the U.S. Court of Federal Claims. The proposed rule is unclear with respect to the treatment of the information related to defective cost or pricing data in the event of a subsequent reversal. If the Councils decide to proceed with a final FAR rule, we recommend that the rule require agencies to remove completely from PPIRS all information related to the defective cost or pricing data. This information should be removed from PPIRS since it would not be accurate upon a reversal and consideration by contracting officers would be prejudicial and subject to challenge. This removal should be completed concurrently with the execution of any contract modification that reverses a contracting officer’s final decision. If the Councils decide to proceed with a final FAR rule, FAR 42.1503(f) should be modified to read as follows with respect to defective cost or pricing data: “Within 10 days after the parties execute a modification that the contractor submitted defective cost or pricing data and reduces the contract price, or the contracting officer issues a final decision that determines the contractor submitted defective cost or pricing data and reduces the contract price, the contracting officer shall ensure that the contract modification is provided for inclusion in PPIRS. In the event a contracting officer’s final decision is reversed by a Board of Contract Appeals or the U.S. Court of Federal Claims, or otherwise withdrawn, the contracting officer shall, concurrent with the execution of a contract modification that reverses the contracting officer’s final decision, remove from PPIRS any reference to the defective cost or pricing data.”

Contractor Input. Following a past performance evaluation, contractors are given a minimum of 30 days to submit comments, rebutting statements, or additional information (see FAR 42.1503(b)). Copies of the evaluation, contractor response, and review comments, if any, must be retained as part of the evaluation (see FAR 42.1503(b)). Completed assessments are available to contractors through PPIRS. It is critical that contractors also be given the opportunity to respond to information related to termination for cause or default notices, and, if retained by the Councils in any final rule, information related to any defective cost or pricing actions included in the PPIRS. To allow such information to be posted in PPIRS without notification and the opportunity to respond lacks fairness and is inconsistent with the underlying policy of ensuring that the information in PPIRS is accurate.

Therefore, we recommend that the proposed FAR 42.1503(f) be modified by adding at the end the following: “Contractors shall be notified of the incorporation of such information in PPIRS and given access to PPIRS to post comments, rebutting statements, or additional information. These comments, rebutting statements, or additional information shall be retained in PPIRS as long as the underlying information is retained in PPIRS.”

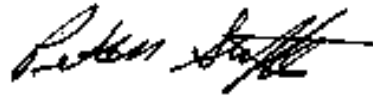
Thank you for the opportunity to comment. If you have any questions, please contact the CODSIA project officer, Ric Sylvester, AIA’s Vice President, Acquisition Policy, at

703-358-1045 or Bettie McCarthy, CODSIA's Administrative Officer, at 703-875-8059.

Sincerely,



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