COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS
4401 Wilson Boulevard, Suite 1110
Arlington, Virginia 22203
703-875-8059

April 29, 2013

Defense Acquisition Regulations System
Attn: Ms. Amy Williams
OUSD(AT&L)DPAP/DARS,
Room 3B855, 3060 Defense Pentagon
Washington, DC 20301–3060.
Via email: dfars@osd.mil

Re: **DFARS Case 2012–D038**
CODSIA Case 02-13

Dear Ms. Williams:

On behalf of the Council of Defense and Space Industry Associations (CODSIA)[1], we are pleased to submit the following comments on the proposed rule titled "**Unallowable Fringe Benefit Costs" (DFARS Case 2012–D038)** which was published in the Federal Register on February 28, 2013.

Introduction

CODSIA understands the basis for this new proposed rule is the Director of Defense Pricing policy memo ''Unallowable Costs for Ineligible Dependent Health Care Benefits", dated February 17, 2012. CODSIA disagrees with the conclusions in that memo. CODSIA does agree, however, that contractors should monitor healthcare dependent eligibility to ensure only proper healthcare charges are included as an element of fringe benefits. CODSIA has significant concerns regarding the proposed rule and believes the rule is unwarranted for a number of reasons.

Furthermore, CODSIA would note that while the Director's memo only addresses the cost of ineligible dependents, the proposed rule is expanded to address the broader category of fringe benefits. The industry is unaware of any data or finding that supports the need for a broader rule encompassing the larger category of fringe benefits, as the Government is already adequately protected within the existing regulations that address fringe benefits. The industry's

[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 Council of Engineering Companies (ACEC), the Association of General Contractors (AGC), the National Defense Industrial Association (NDIA), the Professional Services Council (PSC), The Technology Association of America (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.

experience over the last five years has solely been in addressing the Defense Contract Audit Agency's (DCAA) and the Department of Defense's (DoD) assertions regarding the cost of healthcare benefits for ineligible dependents; the expansion beyond this particular issue into the broader category of fringe benefit costs is, to the industry's knowledge, without prior expression of concern and/or audit findings. For these and other reasons elaborated below, CODSIA requests that this proposed rule be withdrawn.

Industry-Wide Ineligible Dependent Costs are, to Date, Immaterial

Based initially upon isolated and limited cases of contractor-initiated disclosures, the general topic of group insurance costs related to ineligible dependents (commonly referred to as "Dependent Eligibility") on U.S. Government (USG) contracts began to receive heightened industry-wide attention in 2008. Since then, various DoD agencies have asserted (via policy memos, guidance, Form 1 and audit reports) that the subject of Dependent Eligibility (DE) is systemically wide-spread, material, and significant.

DCAA policy memo 09-PSP-016(R), dated August 4, 2009, asserted that group insurance costs associated with ineligible dependents are unallowable based on FAR 31.205-6(m)(1) because such costs "[are not] in accordance with established contractor policy". Further, Defense Procurement and Acquisition Policy (DPAP) determined that voluntary contractor billing refunds or contract price adjustments might be in order. Today, over four years since the initial Government assertions were made, industry remains unaware of any DoD agency actions or reports which have substantiated these assertions (i.e. net, out of policy dependent medical costs) with fact-based audit results. Some contractors have factually demonstrated that no such refunds or adjustments are necessary because the issue has proven to be immaterial and thus has no impact on contract billing or pricing. Before proceeding with further rulemaking, we strongly urge a review of the numerous "findings" by DCAA that have subsequently been rejected by contracting officers and/or rescinded by DCAA due to lack of factual support.

Further, the Director's February 2012 memo properly acknowledges "It is our understanding that the contractors, in large measure, have already corrected the problem…" because, in fact, many contractors have implemented new, or enhanced existing, monitoring and/or audit programs related to the eligibility of dependents. These enhanced and/or additional programs produced the results noted above. At the same time, since these same contractors report that the current cost of these programs exceeds the cost of the ineligible dependent health care claims, this proposed rule would only increase the cost of the monitoring/audit programs, further exacerbating already diminished returns.

The Treatment of "Expressly Unallowable" Does Not Comport with the Plain Language of Cost Accounting Standard (CAS) 405 and its Preambles

In the Preamble to the original publication of CAS 405, the CAS Board explained its use of the term "expressly" in the definition of "expressly unallowable cost as "…that which is in direct and unmistakable terms." Alcohol is a direct and unmistakable cost. Donations are a direct and unmistakable cost. By contrast, the "Cost for Ineligible Dependent Health Care Benefits" (per

the DPAP memo) or (the now-expanded) "fringe benefit costs… contrary to law, employer-employee agreement, or an established policy of the contractor" (per the proposed rule) are not direct and unmistakable as these cost are determined on a contractor-by-contractor (and in some cases segment by segment) basis, based upon each contractor's separate, different, and distinct fringe benefit policies and collective bargaining agreements. Therefore, these costs are not and cannot be deemed expressly unallowable as the proposed rule is trying to achieve.

The FAR Cost Principles Already Protect the Government

The Cost Principle at FAR 31.205-6(m) Fringe Benefits states in part:

> "…the costs of fringe benefits are allowable to the extent that they are *reasonable* and are required by law, employer-employee agreement, or an *established policy of the contractor*." [emphasis added]

As such, to the extent these costs do not meet the requirements for "reasonableness" per FAR 31.201-3, contractors are currently required to exclude these costs. Based on the foregoing, the proposed rule is unnecessary since, as acknowledged by the Director, contractors are already required to exclude any costs that may be in violation of law, employer-employee agreement, or an established policy.

The Proposed Rule Does Not Conform with the FAR as it Relates to the Application of Penalties

The proposed rule would modify FAR 31.205-6(m)(1) as follows:

> "(m)(1) Fringe benefit costs incurred *or estimated* that are contrary to law, employer-employee agreement, or an established policy of the contractor are unallowable." [Emphasis added.]

The *Federal Register* notice for this proposed rule states the purpose of this change is "to make clear that the penalties at FAR 42.709-1 are applicable…" In FAR 42.709-1, however, penalties are applied to amounts "for which an indirect cost proposal has been submitted," (i.e. costs that have been incurred). There is no language in FAR 42.709-1 about "estimated" costs. Therefore, if this rule is not withdrawn, the words "or estimated" in proposed FAR 31.205-6(m)(1) must be deleted.

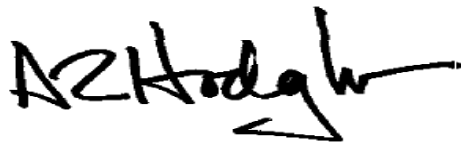
Summary

CODSIA strongly urges the DAR Council to withdraw this proposed rule. The proposed rule is unwarranted and will result in no or limited benefit versus the costs to implement. Further, contrary to CAS 405, the proposed rule inappropriately tries to arbitrarily make the subject cost into an "expressly" unallowable cost.

CODSIA appreciates this opportunity to comment on the Proposed Rule, and we would be pleased to respond to any questions the Council may have on these comments.

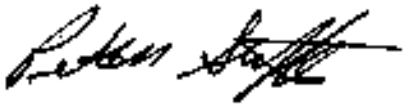
We welcome the opportunity to discuss these comments further and to respond to any questions the Council may have. Trey Hodgkins of TechAmerica serves as CODSIA's project lead on this case and he can be reached at 703-284-5310 or at thodgkins@techamerica.org. Bettie McCarthy, CODSIA's administrative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

Sincerely,



A.R. "Trey" Hodgkins, III
Senior Vice President, Global Public Sector
TechAmerica

Alan Chvotkin
Executive Vice President & Counsel
Professional Services Council



Peter Steffes
Vice President, Government Policy
National Defense Industrial Association

Richard L. Corrigan
Policy Committee Representative
U.S. Chamber of Commerce