August 28, 2013

MEMORANDUM FOR LINDA NEILSON
DEPUTY DIRECTOR
DEFENSE PROCUREMENT

THRU: WILLIAM CLARK
ACTING DIRECTOR
OFFICE OF GOVERNMENTWIDE ACQUISITION POLICY

FROM: HADA FLOWERS
DIVISION DIRECTOR
REGULATORY SECRETARIAT

SUBJECT: FAR Case 2012-017, Expansion of Applicability of the Senior Executive Compensation Benchmark

Attached are comments received on the subject FAR Case published at 78 FR 38535, June 26, 2013. The comment closing date was August 26, 2013.

Response Number	Date Received	Commenter	Organization
2012-017-1	08/26/2013	Mary Jane Mitchell	Aerospace Industries Associates
2012-017-2	08/26/2013	Chris Gilley	DynaCorp International
2012-017-3	08/27/2013	Bettie McCarthy A.R. “Trey” Hodgkins Alan Chvotkin R. Bruce Josten Peter Steffes Christian Marrone Richard L. Corrigan	Council of Defense and Space Industry Association

Attachments

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Federal Acquisition Regulations: Expansion of Applicability of the Senior Executive Compensation Benchmark; FAR Case 2012-017

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Comment on FR Doc # 2013-15214

Submitter Information

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Submitter's Representative: Mary Jane Mitchell
Organization: Aerospace Industries Association

General Comment

See attached file(s)

Attachments

8-26-2013Flowers2012-017

AEROSPACE INDUSTRIES ASSOCIATION

August 26, 2013

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

Subject: FAR Case 2012-017, Federal Acquisition Regulation; Expansion of Applicability of the Senior Executive Compensation Benchmark – Interim Rule

Dear Ms. Flowers,

Aerospace Industries Association (AIA) is pleased to submit the following comments regarding the Federal Acquisition Regulation (FAR) Case 2012-017; Expansion of Applicability of the Senior Executive Compensation Benchmark – Interim Rule (78 Fed. Reg. 38535 June 26, 2013). AIA represents over 350 of the nation's major manufacturers of commercial, military and business products such as aircraft, helicopters, aircraft engines, missiles, spacecraft and related components and equipment. Our comments closely relate to those submitted by AIA regarding the Federal Acquisition Regulation (FAR) Case 2012-025; Applicability of the Senior Executive Compensation Benchmark – Proposed Rule (78 Fed. Reg. 38539 June 26, 2013). Both the Interim Rule and the Proposed Rule (addressed separately) were issued on the same day, require comments to be submitted by the same date, address the same statute, and cross reference each other.

Introduction

AIA has significant concerns with the Interim Rule, and believes revisions are warranted which will benefit both the U.S. Government and contractors. AIA strongly recommends revisions be made to address concerns described in this letter related to the retroactive application of requirements in breach of contract, the lack of any guidance relating to exceptions noted in the relevant statute, the Effective/Applicability Date of the Interim Rule, and other potential comments from interested parties per the rulemaking process.

Background

The Proposed and Interim Rules represent a "bifurcated approach" to the implementation of Section 803 of the FY 2012 National Defense Authorization Act (NDAA). The Interim Rule purports to implement Section 803 prospectively, while the Proposed Rule purports to implement Section 803 retroactively. However, both rules suffer from the same flaw in attempting to apply Section 803 retroactively to contracts awarded prior to the change in the FAR.

Section 803 expands the applicability of the existing executive compensation allowability cap (i.e., "five most highly compensated" at each home office and segment) to now include all employees of the contractor. Section 803(c)(2) states that the expanded application 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." [Emphasis added]

Section 803 also includes provisions for the establishment of exceptions from application of the compensation for certain employees to ensure the Department of Defense has continued access to needed skills and capabilities. The pertinent language in Section 803 states:

> "...the Secretary of Defense may establish one or more narrowly targeted exceptions for scientists and engineers..."

The Interim Rule (FAR Case 2012-017) addresses the application of Section 803 to contracts awarded on or after the date of enactment (December 31, 2011) for compensation costs incurred after January 1, 2012. Accordingly, these comments are limited to the specific issues of the change in cost principle FAR 31.205-6(p) related to this Interim Rule.

Breach of Contract

The Government states in the preamble to the Interim Rule (above-referenced Federal Register citation) that retroactive application of the changes to cost principle FAR 31.205-6(p) to contracts formed prior to the date of enactment of Section 803 is mandated by Section 803. As the preamble also acknowledges, it is well-established in case law that the Government's retroactive change to contract terms and conditions is a breach of contract entitling the contractor to breach damages. *General Dynamics Corp. v. United States*, 47 Fed. Cl. 514 (2000); and *ATK Launch Systems, Inc.*, ASBCA 55395, 2009–1 BCA ¶ 34118 (2009).

Indeed, this concept is expressly incorporated into the FAR. Specifically, FAR 1.108(d) provides that FAR changes apply only to solicitations issued and contracts awarded on or after the effective date of the FAR change and may only be applied to contracts awarded prior to the FAR change effective date if appropriate consideration is provided. This concept is incorporated in

cost-reimbursement contracts through the Allowable Cost and Payment Clause at FAR 52.216-7(a)(1) which states, in relevant part:

> "The Government will make payments to the Contractor when requested as work progresses… in amounts determined to be allowable by the contracting Officer *in accordance with Federal Acquisition Regulation (FAR) subpart 31.2 in effect on the date of this contract*…" [Emphasis added]

FAR 52.216-7 is the clause that implements the requirements of FAR 31.205-6. Thus, changes in FAR 31.205-6(p) may only be applied prospectively to new contract awards in which the revised FAR would be in effect on the date of the contract.

This basic and fundamental principle--breach of contract--was recognized in both cases under which the matter of retroactive application of a change in FAR 31.205-6 was considered. Similar to what is being currently proposed in this Interim Rule, in the late 1990s the Government attempted to apply retroactively a change to the very same cost principle at issue here. Contractors challenged the action before the U.S. Court of Federal Claims and the Armed Services Board of Contract Appeals. Both the Court and Board rejected the Government's assertion.

The above-referenced Federal Register Notice acknowledges these cases:

> "*There 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). 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 contractor's 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))." [Emphasis added]

In the Court of Federal Claims, General Dynamics asserted that the retroactive application of the cap to contracts awarded prior to the enactment of the FY 1998 NDAA was a breach of those contracts based on the Allowable Cost and Payment clause at FAR 52.216-7(a)(1) which states, in relevant part:

> "The Government will make payments to the Contractor when requested as work progresses… in amounts determined to be allowable by the contracting Officer *in accordance with Federal Acquisition Regulation (FAR) subpart 31.2 in effect on the date of this contract*…" [Emphasis added]

The relevant circumstances in *ATK* also apply to the Interim Rule. At the Armed Services Board of Contract Appeals (ASBCA), ATK asserted that contracts awarded prior to enactment of the same statute considered in *General Dynamics* (Section 808 of FY 1998 NDAA) were not affected contracts;; therefore the related compensation costs were allowable. In granting ATK's motion for summary judgment, the ASBCA focused on the above noted Allowable Cost and Payment clause and found that "the allowability amount for both direct and indirect costs must be determined by the FAR 31.2 cost principles in effect on the date of contract". The ASBCA determined there should be no cap limit applied to ATK's recovery of executive compensation costs on those same contracts, because the contracts at issue were awarded prior to the enactment of the statutory cap, and there was no limit to executive compensation in FAR 31.2 at that time. The ASBCA also rejected the Government's argument that the Allowable Cost and Payments clause could be interpreted to apply to the Cost Principles in effect in the periods when costs are incurred, rather than when the contract was awarded.

The retroactive application as written in the Interim Rule creates a breach of contract as described above, AIA strongly recommends that the Council revise the Rule to make application prospective to contracts awarded on or after the effective date of the Interim rule (June 26, 2013). Such a revision would avoid the unintended consequence of creating circumstances similar to those litigated in the *General Dynamics* and *ATK* cases. We believe this solution aligns with the Council's stated intention of applying Section 803 prospectively.

Contract Law Prevails

Where there is a conflict between contract law and the NDAA, based on established legal precedents, it is highly likely the contracts would still be honored. The Interim Rule reflects a premise that Section 803 of the NDAA must automatically prevail for contracts signed prior the effective date of the rule but after enactment of the NDAA. This premise is incorrect.

It is well-established in the Federal Circuit that, under certain circumstances, a contract that conflicts with federal statute should still be honored. For instance, in *AT&T v. United States*, 177 F.3d 1368 (Fed Cir. 1999) (en banc), the court refused to invalidate a contract that concededly violated a federal statute. The court held that "[i]nvalidation of the contract is not a necessary consequence when a statute or regulation has been contravened, but must be considered in light of statutory or regulatory purpose, with recognition of the strong policy of supporting the integrity of contracts made by and with the United States," and that "the policy underlying the enactment must be considered in determining the remedy for its violation, when the statute itself does not announce the sanction of contract invalidity." Id. at 1374. Even when a contract is held to be unenforceable in light of a federal statute, the Federal Circuit has made clear that a contract may still be entitled to payment under equitable principles such as quantum meruit. See, e.g., *Gould, Inc. v. United States*, 67 F.3d 925, 930 (Fed Cir. 1995) and *United States v. Amdahl,* 786 F.2d 387, 393 (Fed. Cir. 1986).

AIA prefers that contractors not be placed in circumstances in which they must litigate to resolve such a conflict, even one in which contractors would be highly likely to prevail. Rather, AIA appeals to the FAR Council to make use of the opportunity to revise the interim rule to resolve this conflict.

Align Effective Date and Applicability Date of FAR Change

Contractors reasonably expected the NDAA to be implemented through a promulgated change to the FAR Cost Principle. The NDAA itself states that it will be implemented through regulation. Additionally, the Government informed contractors that a regulation changing the cost principle was in the process of being developed. Contractors were notified by the U.S. Government of a pending change to regulation, as a FAR Case was opened (2012-017) in early 2012 with the stated synopsis "Implements Section 803 of the National Defense Authorization Act for Fiscal Year 2012 (Pub L 112-81)". Contractors reasonably deferred action as result of the statute pending the promulgation of the implementing rule, relying upon language of the FAR, language of the statute, and evidence of the Government's actions. Essentially, contractors continued to comply with FAR 31.205-6(p) in effect at the time of contract award as required contractually by the clause at FAR 52.216-7.

Case law establishes that statutory language which explicitly requires the issuance of implementing regulations is not self-executing but instead takes effect upon the promulgation of implementing regulations. *Reynolds v. United States*, 132 S. Ct. 975 (2012) (federal criminal statute did not apply until the Attorney General promulgated a new rule); *Sweet v. Sheahan*, 235 F.3d 80, 86-87 (2d Cir. 2000) (finding statutory language to be non self-executing); *Gholston v. Housing Auth. of City of Montgomery*, 818 F.2d 776, 785-86 and n.11 (11th Cir. 1988) (finding that statutory language "shall comply with such procedures and requirements as the Secretary may prescribe" required promulgation of regulations to be effective and enforced); see also *Gass v. United Sta*tes, 2000 WL 1204575 at n.3 (D. Colo. Mar. 28, 2000) (distinguishing between a statute that imposed penalties when conduct proscribed by the statute itself occurred (self-executing) and a statute that imposed penalties only when there was a violation of implementing regulations (not self-executing)). These cases make clear that Section 803 is not self-executing because it explicitly requires implementation through regulation. Thus, contractors' compliance with existing FAR 31.205-6 pending implementing regulation to Section 803 was appropriate.

The retroactive application as written in the Interim Rule creates a breach of contract as described above, AIA strongly recommends the Council revise the Rule to make application prospective to compensation costs incurred on or after the effective date of the Interim rule (June 26, 2013). Such a revision would avoid the unintended consequence of creating circumstances similar to those litigated in the *General Dynamics* and *ATK* cases. This resolution is provided for by the language in Section 803 itself and aligns with the Council's stated intention of applying Section 803 prospectively.

The Applicability Date is not prescriptive in the statute. Section 803 states "[it] shall apply with respect to costs of compensation incurred after January 1, 2012."[Emphasis added] The Council apparently interpreted Section 803 to mandate that the new cost principle must be effective starting on January 1, 2012. That interpretation is unwarranted, especially given the unintended consequence of breaching contracts. Section 803 states that the cost principle applies to cost incurred "after" January 1, 2012. The plain meaning is that any effective date "after January 1, 2012" is consistent with Section 803. If Section 803 were intended to mandate that the new cost principle shall be effective starting on January 1, 2012, it would have so stated. As it is worded, however, any applicability date occurring after January 1, 2012--including June 26, 2013, the effective date of the interim rule--would be consistent with Section 803. Thus, Section 803 provided for a prospective application by the FAR Council in its implementing regulation.

Exceptions for Scientists and Engineers Must be Addressed

In Section 803(c)(2), Congress explicitly 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."

The Interim Rule does not address these provisions of Section 803. Instead, the preamble for the Interim Rule states:

> "DoD will separately handle the implementation of authority provided by 10 U.S.C. 324(e)(1)(P), as amended by section 803(a), in which Congress has authorized the Secretary of Defense to establish ."

Presumably this implementation will be through revision of the DFARS. However, we are concerned that as of the DFARS case listing dated August 12, 2013, there is no open case identified to address this revision.

If it is the intention of DoD to address the exceptions through a revision to the DFARS, it is unclear to us how this may be accomplished within the regulatory framework. If DoD promulgates a corresponding DFARS provision to implement the exception requirements, such a provision would likely be in conflict with this interim FAR rule. Presumably the DFARS rule would provide for the treatment of compensation costs for scientist and engineers in excess to the FAR cap as allowable costs; however, those same costs would be treated as unallowable by FAR 31.205-6(p).

As a practical matter, the applicability date of both of the regulations implementing Section 803—the expansion of the cap to all contractor employees and the exceptions for scientists and engineers—must align.

AIA recommends that the regulatory requirements related to the exceptions be addressed before advancing to a final FAR rule to ensure appropriate alignment between the implementing regulations. The Final rule must address all aspects of implementing Section 803 comprehensively. The Interim Rule, as written, is incomplete and cannot be effectively implemented by contractors.

Other Potential Comments from Interested Parties per the Rulemaking Process

Notwithstanding the above noted concerns, and contrary to the good public policy which provides the basis for the rulemaking process, the Interim Rule was published, effective immediately, without providing opportunity for interested parties to comment. The Federal Register Notice states, in part, "A determination has been made… that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment." We believe that the council reached this determination in error because the preamble in the Interim 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 is inaccurate.

Furthermore, it is inconsistent to wait 18 months after the enactment of a statute to issue a regulation that is effective immediately due to "urgent and compelling" reasons. If circumstances were truly urgent and compelling, presumably a rule would have been issued much sooner.

Regrettably, the Interim Rule deprived the public of the opportunity for comment before the regulation becomes effective. Alternatively, in the intervening 18 months a Proposed Rule could have been issued to solicit comments to assist the Council in identifying the issues described above and offering potential solutions.

Summary

The policies underlying the Court's decision in *General Dynamics* and the Board's decision in *ATK* apply equally to Section 803 and the Interim Rule. To the extent that either Section 803 or the Interim Rule purports unilaterally to change a contract term – a cost principle – without consideration or compensation, they constitute a breach of contract.

The relevant facts and circumstances in the Interim Rule have clearly been rejected in two separate court decisions. Advancement of this Interim Rule to a Final Rule without correcting the retroactive application of it to contracts awarded prior to the effective date would likely result in litigation since it creates circumstances similar to those litigated in the *General Dynamics* and *ATK* cases.

For the clear and plain reasons outlined above, AIA strongly recommends the Interim Rule be revised to be applicable to contracts awarded on or after the effective date of the Interim Rule (*i.e.*, June 26, 2013) for compensation costs incurred on or after the effective date. In addition,

we strongly recommend the exceptions for scientists and engineers be addressed in the Final Rule ~~to~~ allowing contractors to implement these requirements simultaneously.

AIA appreciates this opportunity to comment on the Interim Rule. Any questioned related to these comments may be directed to Mr. Terrence Marcinko at 703.358.1042 or via email at terry.marcinko@aia-aerospace.org .

Sincerely,

Mary Jane Mitchell
Assistant Vice President, Acquisition Policy
Aerospace Industries Association

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Comment on FR Doc # 2013-15214

Submitter Information

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General Comment

DynCorp International Comments on Retroactive Applicability of Section 803 of the National Defense Authorization Act for Fiscal Year 2012.

Attachments

GFC 13 060 Proposed Rule Exec Comp Retroactive Application

DynCorp INTERNATIONAL

GFC 13 059 25 August 2013

Via fax: 202-501-4067

General Services Administration
Regulatory Secretariat (MCCB)
ATTN: Hada Flowers
1800 F Street, N.W.
2nd Floor
Washington DC 20405

Subject: FAC 2005-68, FAR Case 2012-017

Reference: Proposed Regulatory Change: Expansion of Applicability of Senior

Ms. Flowers:

DynCorp International (DI) appreciates the opportunity to comment on the interim rule published in the Federal Register on June 26, 2013 amending FAR 31.205-6(p). The interim rule expands the applicability of the existing executive compensation cap to the incurred compensation costs for all employees on all DOD, NASA and Coast Guard contracts awarded on or after December 31, 2011. Currently, application of the existing compensation cap applies to the "five most highly compensated" employees in management positions at each home office and segment. In addition to the interim rule a separate proposed rule (FAR Case 2012-25) addressing the retroactive application of the requirements of Section 803 of the National Authorization Act for Fiscal Year 2012 (Public Law 112-81). DI's comment to the proposed rule are addressed in a separate letter.

For the reasons discussed more fully below, DI believes that the interim rule is ill-founded and will provide a disincentive to companies to pursue United States Government (USG) business opportunities to the detriment of the procuring agencies and the taxpayers of the United States.

Impact on Contractors

USG contactors provide a variety of goods and services to the United States Government. As in the case of DI, many of these goods and services are in direct support of America's war fighters in Afghanistan and other hazardous areas throughout the world. DI must compete with the Government and the rest of the world for the best and brightest talent to ensure the successful execution of these critical missions. Application of an arbitrary cap on the compensation of all DI's employees will reduce our ability to attract and retain experienced and talented individuals. As a result, the lives of American soldiers and contractor personnel supporting these contingency operations would be placed in greater

danger. Though not the intent of the interim rule, it clearly jeopardizes contractors' ability to support USG mission critical requirements.

In addition to interim rule's impact on the successful completion of USG missions, the rule is a disincentive and creates a barrier to commercial firms and small businesses entering the Federal Government market. Profit margins on Department of Defense and other agencies are very small in comparison to the commercial market. Commercial firms will obviously evaluate the rationale for entry into a market which imposes arbitrary caps on payments to company personnel resulting in lower profit margin than those obtainable in the commercial market. Small businesses will consider both the impact on profitably and the additional burden placed on their limited resources to ensure compliance with this requirement.

The interim rule will also have a direct impact on company cash flows that will again provide a disincentive to commercial firms as well as small business to enter the Government market. In publishing the interim rule the government itself indicates that "at this time an estimate of small entities whose reimbursement for the compensation of cost of [their] employees will be limited by this rule is not available." Application of this rule is contrary to USG policy to encourage small business participation in USG contracting. In fact, contractors are given specific requirements for small business participation in USG contracts and this interim rule impacts the ability of contractors to comply with these contractual small business participation requirements

Not only will the interim rule provide a disincentive for creating additional opportunities for competition by the entrance of these firms into the Federal market place, the lower margins and negative impact on cash flow could force current USG contractors out of the Government market thus weakening the defense industrial base.

Reporting and Record Keeping Requirements

As published, the interim rules states that it "imposes no reporting, record keeping, or other information collection requirements." This statement is unrealistic at best. To comply with the requirements of the current rule imposing a cap on the five most highly compensated individuals, DI must perform a detailed, manual analysis aggregating the individual cost elements defined as "compensation" in the regulation. Like most companies, DI's accounting system is not configured in a manner to capture this data in the form required by the Government. This manual analysis involves multiple functions throughout the DI organization. A conservative estimate is that this analysis requires a minimum of 200 man hours a year.

The expansion of the requirement to all employees will significantly increase the man hours required to comply with the requirements established by the interim rule. DI has two alternatives: add additional resources to comply with the requirement resulting in increased cost for personnel, benefits, facilities, etc. or invest in the development of an IT solution for compliance with the requirements. Internal development of a software solution is both lengthy and expensive. In both alternatives, costs and administrative

effort will increase by a significant factor. These additional costs will be flowed through to the USG resulting in increased costs for implementation of this requirement.

Summary

DI recommends that the current rule be withdrawn pending further evaluation of the impact to both current and prospective USG contractors. However construed, the rule imposes an additional administrative burden to both large and small contractors, provides a disincentive to small and commercial contractors considering entry into the Federal market place and will result in lower margins forcing current contractors to consider the feasibility of remaining in the USG market place.

I would be happy to discuss these comments at your convenience. I can be reached at 817-224-1448 or at Chris.Gilley@dyn-intl.com.

Sincerely,

Chris Gilley
Senior Director, Government Finance & Compliance
DynCorp International LLC

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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

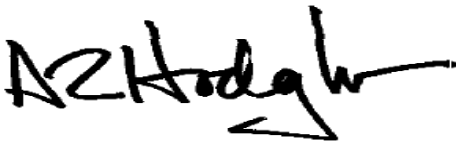
procedures and processes and the manner in which they segregate costs not previously required. Given the Administration's policy of promoting the use and growth of small businesses, the pressures that sequestration are putting on procurement dollars and the impact on small businesses in particular, whether 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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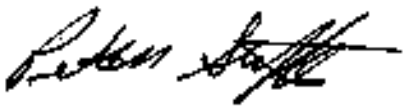

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