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March 3, 2010

Mr. Julian Thrash
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DAR Council
241 18th Street South, Room 200A
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Subject: Class Deviation to Implement Additional Contractor Requirements and Responsibilities Restricting the Use of Mandatory Arbitration Agreements

Dear Mr. Thrash:

The undersigned members of the Council of Defense and Space Industry Associations (CODSIA) appreciate the opportunity to comment on the February 17, 2010 Class Deviation implementing Section 8116 of the Defense Appropriations Act for Fiscal Year 2010. CODSIA endorses and applauds DoD's request for comments on this deviation and hopes to see the practice become the norm.

We appreciate that many of the points we raised in our initial comments to the Office of Defense Procurement and Acquisition Policy are addressed in the Class Deviation. For example, we believe that excluding commercial item and commercial off-the-shelf acquisitions is appropriate and much needed to prevent further erosion of the preference for acquisition of commercial items. Also, the applicability of the deviation to contractors and subcontractors is appropriately restricted by date.

However, a number of interpretative and implementation issues and questions remain as outlined in the attachment to this letter. We appreciate your consideration of these remaining important issues as the interim rule is drafted.

Sincerely,

Dick Powers
Director, Financial Administration
Aerospace Industries Association

A.R. "Trey" Hodgkins, III
Vice President, National Security and Procurement Policy
TechAmerica

Alan Chvotkin
Executive Vice President & Counsel
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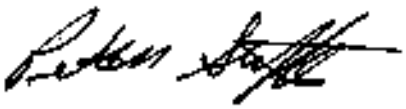

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ATTACHMENT – See following page

ATTACHMENT

1. The cover memo in several places uses the term "applicable item or service" but doesn't define that term. We recommend the Interim rule clarify the meaning of this term. It is logical that it would mean any item or service other than a commercial item or a COTS item that is acquired with a covered contract. A covered contract is one over $1 million awarded as a prime contract after 2/17, or any subcontract over $1 million awarded after 6/17 where the prime has "certified" by accepting the clause that "covered subcontractors" have accepted the prohibition.

2. In order to avoid disrupting ongoing proceedings the implementation should make it clear that the section 8116 restrictions only apply as follows:

    a. The restrictions would apply to new arbitration cases arising after the date the contractor or subcontractor accepted the new DFARS clause;
    b. The restrictions would not apply where a dispute has progressed to the point where the parties have agreed to the appointment of an arbitrator; and
    c. The restrictions would not affect, in any way, a company's enforcement of an arbitration award that was entered into prior to the date the contractor or subcontractor accepted the new DFARS clause.

3. The Class Deviation cover memo cites an example of orders placed against a GSA schedule contract for an "applicable item or service." FAR 8.402(a) describes Schedule contracts as follows: "The Federal Supply Schedule program is directed and managed by GSA and provides Federal agencies (see 8.002) with a simplified process for obtaining commercial supplies and services at prices associated with volume buying." We believe referring to the GSA Schedules may create confusion since, by definition, items and services on the Schedules must be commercial items or COTS. This example should be deleted.

4. The term "contractor" is used in the class deviation, but that term is not defined. We strongly encourage DOD to define that term as the business unit that signs the contract and is bound by the performance obligations of the contract. To read this term more broadly would potentially negate the very reasonable approach taken with regard to commercial items and commercial off-the-shelf items in commercial companies where government business is confined to a few business units. Such an approach would be consistent with the implementation of other statutes such as eVerify (see 73 FR 67669).

5. The clause includes a single definition of "covered subcontract" but that phrase is not used anywhere else in the clause; the term used elsewhere is "covered subcontractor". The distinction between these two terms should be clarified to distinguish the differences between the terms.

6. One challenge in implementation for primes and first tier subcontractors will be identifying a "covered subcontract" and/or knowing when DoD FY 10 funds are being used and when other funds are being used for a subcontract. This identification problem is not unique to this provision but takes on significance because of the prohibition and the "certification" of compliance. In the implementation of the Recovery Act, for example, agencies were required to specifically identify the funds as "recovery act funds" so that both

agencies and contractors knew when those funds were being used. We recommend the interim rule require that contracts and proposed modifications state if FY2010 funds are being used and prominently display the deviation and/or a statement that the action is implementing Frank amendment requirements.

7. Paragraph (b)(2) of the clause states that the contractor "Certifies, by signature of the contract,…". We suggest that the interim rule revise this language to simply state, "The offeror certifies that…" in the same manner as the certification requirement contained in the Certification of Independent Price Determination (FAR 52.203-2).

8. If a prime contractor accepts a $1M bilateral modification for additional work under the contract, must it certify that the clause requirements have been flowed down to all its subcontractors, or just those subcontractors that will be performing the work that has been added by the modification? Does accepting the clause as part of such a modification make the clause applicable to the work associated with the modification, or does the clause extend to the entire contract, including that portion that existed prior to the date the DFAR clause was incorporated into the contract or subcontract? When implementing the clause in an existing contract, we urge DoD to acknowledge that the clause could require additional costs and those additional costs may call for an equitable adjustment as part of the bilateral modification settlement process.

9. Industry interprets the class deviation to require the prime contractor to certify that it has flowed down the requirement to its subcontractors for contract actions executed after June 17. Therefore, no further flow down to lower tiers would be required by the clause, thereby limiting flow down to first tier subcontractors.

10. The Class Deviation makes an unexplained distinction in how the rule applies to subcontractor employees or independent contractors ("performing work related to such subcontract") and prime contractor employees ("…any agreement with any of its employees…"). There is no apparent basis for the distinction in the class deviation or in the legislative history. Without such a limitation, the impact of the clause would extend to employees of the prime contractor's business unit that may have no involvement in the covered contract…or perhaps government business at all. We recommend the Interim rule take the same approach with prime contractor and independent contractor employees as it does for subcontractor employees by limiting the impact to prime contractor employees "performing work on the subject contract". Alternatively, if it is not limited to prime contractor employees working on the contract, it should be limited to only those employees in the business unit performing the subject contract.

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