On November 22, 1996, the Section submitted comments to NASA regarding its rewrite of the NASA FAR supplement. The Section recommended that NASA rethink or clarify certain portions of the interim rule.

The Section recommended that NASA reconsider limiting the competitive range. The Section referred to comments already submitted by the Section to the FAR council expressing concerns regarding the FAR proposal to limit the competitive range. The Section next noted that the blackout notice in the proposed rule may confuse agency employees because it begins later than when the requirements of the Procurement Integrity Act apply.

The Section also expressed concern that NASA's evaluation of past performance as set forth in the proposed rule may have a negative impact on small businesses, and may give contracting officers too little discretion in this area. The Section expressed support for NASA's decision to change its very limited view of discussions, but also suggested that the proposed rule would be greatly improved by more explanation of the kinds of weaknesses that will require discussions.

The Section also suggested that NASA delete the provisions in the proposed rule on source selection statements that include the release of any confidential business information to competing offerors and the general public. The Section expressed concern that these provisions might cause source selection statements to be less detailed and create a risk that the statements will be superficial because of the disclosure requirement.

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November 22, 1996

Mr. Bruce King
Code HC
National Aeronautics and Space Administration
300 E Street, S.W.
Washington, D.C. 20546-0001


Dear Mr. King:
On behalf of the Section of Public Contract Law of the American Bar Association ("the Section"), I am submitting comments on the above-referenced matter. The Public Contract Law Section consists of attorneys and associated professionals in private practice, industry and Government service. The Section's governing Council and substantive committees contain a balance of members representing these three segments, to ensure that all points of view are considered. In this manner, the Section seeks to improve the process of public contracting for needed supplies, services and public works.

The Section is authorized to submit comments on acquisition regulations under special authority granted by the Association's Board of Governors. The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, therefore, should not be construed as representing the policy of the American Bar Association.

We have reviewed the interim rule referenced above to identify issues raised by the rewrite. It appears that for the most part, the interim rule carries forward previous policies. However, in the instances, discussed below, we suggest NASA may want to rethink or clarify portions of the interim rule.

**COMPETITIVE RANGE: WORKING GOAL OF THREE OFFERS**

NASA FAR Supp. 18-15.609 provides that three proposals shall be a working goal in establishing a competitive range. The Public Contract Section has already submitted comments to the FAR council expressing concerns regarding the FAR proposal to limit the competitive range. These comments are enclosed.

NASA's articulation of a numerical working goal will increase the tendency to limit artificially the number of offers in the competitive range. As explained in the attached comments, this is inconsistent with the provisions of FARA and the statutory mandate for full and open competition. Thus, a numerical working goal should not be specified. Instead natural breaks and groups among proposals after their evaluation should be used to establish a competitive range consisting of the highest number of proposals that can be efficiently considered.

**BLACKOUT NOTICE**

NASA FAR Supp. 18-15.408-70 provides that "[u]pon release of the formal RFP, the Contracting Officer shall direct all personnel associated with the acquisition to refrain from communicating with prospective offerors and to refer all inquiries to the Contracting Officer or other authorized representative." The regulation refers to this direction as a blackout notice.

Although the use of a blackout notice has certain advantages, we note that it is to be issued upon release of the formal RFP. This release time is much later than when the requirements of the Procurement Integrity Act apply. Pursuant to FAR 3.104.4-3(a)(3), the soliciting or obtaining of proprietary or source selection information during the conduct of any Federal agency procurement is prohibited. FAR 3.104-4(c)(i) defines "during the conduct of any federal agency procurement" as "the period beginning on the earliest date upon which an identifiable, specific action is taken for the particular procurement..." From the listed examples, this period clearly begins before the formal release of the RFP. The issuance of the blackout notice as currently prescribed may confuse agency employees and contractor employees concerning their obligations under the Procurement Integrity Act.

**EVALUATION OF PAST PERFORMANCE**

One of NASA's three standard evaluation factors is entitled relevant experience and past performance. NASA FAR Supp. 18-15.605-70. The proposed regulations instruct agency contracting officials evaluating this factor to base their assessments of relevant experience and past performance on the company and not individuals. NASA FAR Supp. 18-15.608(a)(vi)(2)(A). The Section is concerned about the potential negative impact of this provision on small businesses, and on new or newly acquired businesses. In addition, the Section questions whether NASA wants to reduce the current discretion given contracting officials in this area.
The proposal overlooks the fact that some newly emerging and/or small businesses may not possess extensive past performance as companies, but may be comprised of individuals with significant prior experience. If contracting officials apply the guidance in the new regulations without regard to the experience of individuals, they may find that they unreasonably downgrade new and/or small businesses with substantial capabilities. Moreover, established business that have lost most or all experienced personnel would be graded the same as if no change had occurred. This approach would limit competition and provide an unnecessary and unfair boost to established businesses. The Section urges NASA to reconsider this provision with an eye towards recognizing the significant benefits individuals often bring to the companies that employ them.

In addition, the Section notes the reduction of discretion of contracting officials to consider information reasonably related to this evaluation factor. Although some solicitations are written to specifically exclude consideration of the experience of individuals, contracting officials generally may consider reasonably relevant information in making assessments in this area. At a time when the prevailing thrust of government contracting reform is to provide agency officials more, not less, discretion, the Section believes NASA's proposal in this area is not the best policy.

DISCUSSION OF ALL WEAKNESSES

Traditionally, NASA has followed its alternate source selection procedures rather than the FAR's guidance on discussions. See generally FAR 15.613; NASA FAR Supp. 1815.613. These NASA procedures operated to limit the requirement for discussions in all but very limited circumstances. NASA FAR Supp. 18-15.613-70. In negotiating cost reimbursement and research and development (R&D) contracts, contracting officials were advised not to point out proposal weaknesses where the meaning of the proposal is clear, and the weakness is "inherent in an offeror's management, engineering or scientific judgment or which is the result of its own lack of competence or inventiveness in preparing its proposal." Id. at 18-15.613-71(5)(ii)(C).

In negotiating fixed-price (non R&D) contracts, contracting officials were required to point out weaknesses in relation to the government's requirements but were admonished not to reveal the relative strengths or weaknesses of a proposal in relation to those of other offerors. Id. at 18-15.613-71(5)(iii).

Under its new regulations, NASA has broadened the discussions standards of the FAR. NASA FAR Supp. 18-15.610(c)(2)(A), now requires contracting officers to identify and "give offerors a reasonable opportunity to address all weaknesses that have an adverse impact on the evaluation." The new provision defines a weakness as any deficiency (as defined by FAR 15.601) or other proposal inadequacy.

The Section supports NASA's decision to change its very limited view of discussions. It should result in improved proposals, and greater competition. Contractors submitting proposals rated good overall—i.e., technically sound proposals with some weaknesses but without deficiencies—will be given a previously unavailable opportunity to address matters that could improve their standing in the competition and consequently result in better contracts for the Government.

On the other hand, NASA's instruction that contracting officers must discuss all weaknesses is ambiguous and could lead to future disputes. The term "weakness" as used here is new in this area, and is not defined in the FAR. NASA's general definition of a weakness as any matter that has an adverse impact on the evaluation leaves open a host of interpretation issues. While this uncertainty is helped by the guidance in the provision stating that weaknesses may include "all proposal areas that are inadequate for evaluation, contain contradictory statements, or strain credibility," the provision would be greatly improved by more explanation of the kinds of weaknesses that will require discussions.

SOURCE SELECTION STATEMENTS

The recent FAR coverage on debriefings provides that certain information, at a minimum, shall be provided. Pursuant to FAR 15.1004(d)(4), one debriefing requirement is to provide "[a] summary of the rationale for award." The proposed section 15 of the NASA FAR Supplement provides guidance for this summary. FASA 1014 requires disclosure of a summary rationale but does not require the award justification document itself to be disclosed.
NASA FAR Supp. 18-15.611(d)(iii) provides that prior to award, the Source Selection Authority "shall sign a source selection statement that clearly and succinctly justifies the selection." The same provision requires this statement to "describe the acquisition; the SEB evaluation procedures; the substance of the Mission Suitability evaluation; and the evaluation of the Cost/Price and Relevant Experience and Past Performance factors." This statement must also address "unacceptable proposals, the competitive range determination, late proposals, or any other considerations pertinent to the decision." Thus, the regulation requires a comprehensive source selection statement justifying the award decision. This will be a key document for the source selection process.

This same provision, however, also states "the statement shall not reveal any confidential business information." This requirement is included because the statement "shall be releasable to competing offerors and the general public on request."

Although FASA requires broad disclosure of the basis of a contract award decision, such disclosure should not be a factor in preparing the internal document justifying award. Contracting officials may be unnecessarily challenged to draft a source selection statement which is responsive to all of the particular information requirements while not disclosing confidential business information. At the very least, the source selection statements will be less detailed because of this requirement. Indeed, there is a risk that the statements will be superficial because of this disclosure requirement.

We believe that the goal of creating comprehensive source selection statements is more important than crafting a statement for public disclosure. The source selection statement should be prepared with the single focus on justifying the award. Its releasability should be determined later and separately from its preparation. Thus, we recommend the deletion of the provisions for 1) not including business confidential information and 2) requiring disclosure to competing offerors and the general public. This, however, should not be construed as recommending that NASA withhold any properly releasable information concerning the award decision.

**FEE AND FACILITIES COST**

NASA FAR Supp. 18-15.970-2 adds new language, to wit: "...neither cost of facilities nor the amount calculated for the cost of money for facilities capital shall be included as part of the cost basis" for profit computation. The cost of money for facilities capital might be properly excluded from the cost basis for fees, see DFARS 215.973(b), OFPP Policy Letter 80-7. However, the regulation also seems to exclude "cost of facilities." What costs, if any, beyond cost of money for facilities capital, are meant to be excluded by this regulation?

**INCENTIVIZATION BASE FEE**

NASA FAR Supp. 18-16.402-270(e)(2)(ii) makes base fee a part of the incentive fee, or at least subject to adjustment based on performance. With respect to incentivizing base fee, such a concept conflicts with the essence of a CPAF contract. The purpose of the base fee in a CPAF contract is to guarantee an amount to the contractor for "minimum acceptable performance" in a contractual arrangement where the incentivized aspects of the contract are governed solely by the subjective analysis of performance by the government. This adjustment to fee for more than minimum performance is not subject to question by the contractor through the Disputes clause. When this contract type was created, the notion of a firm base fee was meant in part to offset the subjective standard of performance appraisal granted to the government. To change the original concept would be to unfairly put the government contractor in a position of total reliance on the opinion of the government evaluator, without recourse.

To provide that base fee ". . .shall be paid only if the final award fee evaluation is `satisfactory' or better. . . " would accomplish that very result. This treatment may also conflict with FAR 16.404.2. Moreover, calling something a "base fee" which is subject to adjustment based on performance is inherently misleading.

**NASA OMBUDSMAN**

NASA's implementation of the Ombudsman statute should be revised. Section 10 U.S.C. 2304c(e)
provides:

(e) **Task and delivery order ombudsman.** - Each head of an agency who awards multiple task or delivery order contracts pursuant to section 2304a(d)(1)(B) or 2304b(e) of this title shall appoint or designate a task and delivery order ombudsman who shall be responsible for reviewing complaints from the contractors on such contracts and ensuring that all of the contractors are afforded a fair opportunity to be considered for task or delivery orders when required under subsection (b). The task and delivery order ombudsman shall be a senior agency official who is independent of the contracting officer for the contracts and may be the agency's competition advocate.

NASA has implemented this statutory mandate through section 1852.215-84, "Ombudsman." The Section's two principle concerns are:

1. The clause now requires that all issues be brought first to the attention of the contracting officer before contacting the Ombudsman. Specifically, new wording requires that "...before consulting with the Ombudsman, interested parties must first address their concerns, issues, disagreements, and/or recommendations to the contracting officer for resolution. If resolution cannot be made by the contracting officer, ..." the Ombudsman may be contacted. Though the Section understands the goal of allowing the C.O. the first opportunity to correct any concerns that may arise, this requirement will discourage discussion of some controversial issues. This could be particularly problematical if the complaint is that the C.O. has been unduly favoring another contractor in award of task orders. The Section recommends that this provision be rewritten to encourage issues to be raised first with the C.O., but still allow the Ombudsman to be contacted initially by interested parties. This would allow some confidentiality for any party raising sensitive issues that may risk offending the C.O. It could also be argued that the Ombudsman's independence is compromised by requiring all complaints to be first raised with the contracting officer.

In this regard, the Ombudsman after reviewing the complaint could always recommend that the contracting officer be contacted directly. In appropriate cases, this could address some of the issues leading to an exhaustion requirement.

2. The clause no longer specifically requires that the Ombudsman notify appropriate officials of matters raised by interested parties. The new provision deletes the wording that the Ombudsman is "to communicate concerns, issues, disagreements and recommendations of interested parties" to the appropriate officials. The Section recommends that this wording be returned to ensure that appropriate officials address issues raised to the Ombudsman.

This Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.

Sincerely,

John T. Kuelbs
Chair, Section of Public Contract Law

cc: Section Officers and Council Members
    Alan C. Brown
    John S. Pachter
    Alexander Brittin
    NASA Rewrite Group