Dear Ms. Lee and Mr. Drabkin:

On behalf of the American Bar Association ("ABA") Section of Public Contract Law ("Section"), I am submitting comments to assist the Section 809 Panel in reviewing acquisition regulations applicable to the Department of Defense ("DoD") with a view towards streamlining and improving the efficiency and effectiveness of defense acquisition and defense technology advantage, along with achieving related goals.\(^1\) The Section consists of attorneys and associated professionals in private practice, industry, and government service. The Section’s governing Council and substantive committees include members representing these three segments to ensure that all points of view are considered. By presenting their consensus view, the Section seeks to improve the process of public contracting for needed supplies, services, and public works.

The views expressed herein are presented on behalf of the Section. They have not been approved by the House of Delegates or the Board of Governors of the ABA and, therefore, should not be construed as representing the position of the ABA.\(^2\)

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1 Mary Ellen Coster Williams, Section Delegate to the ABA House of Delegates, and Marian Blank Horn, Kristine Kassekert, and Heather K. Weiner, members of the Section’s Council, did not participate in the Section’s consideration of these comments and abstained from the voting to approve and send this letter.

2 This letter is available in pdf format at http://www.americanbar.org/groups/public_contract_law/resources/prior_section_comments.html under the topic “Contract Formation & Bid Protests.”
I. INTRODUCTION

The Section’s comments for the Section 809 Panel focus in this letter on the use of weighted guidelines in federal procurements.

One goal of current defense procurement reform is to shorten procurement action lead times (“PALTs”). Shortening PALTs will enable DoD components to award contracts and contract modifications more quickly. PALTs have gradually lengthened over time in response to new statutory compliance requirements. PALTs also have expanded based on revisions to Federal Acquisition Regulation (“FAR”) supplements and local acquisition centers’ policies made in response to the perceived need to reduce program risk posed by poorly drafted or improperly awarded contracts and contract modifications. These revisions have added levels of reviews, gradually reduced the discretion and decision-making authority of contracting officers and, as a result, lengthened PALTs.

One component of the PALT that has been affected by these policies is the negotiation timeline. As the levels of reviews and required analyses have expanded, so has the time required to reach agreement on cost and price. As one example, negotiations often hit a bottleneck on profit. The generally-applicable profit requirements in FAR Part 15 negotiations can make it difficult and time-consuming to agree on profit in a timely manner. The comments below propose changes that, if enacted, would shorten the negotiation timeline in most PALTs.

I. BACKGROUND

The current Defense Federal Acquisition Regulation Supplement (“DFARS”) Part 215 presents two opportunities for shortening PALTs. First, the policies enforcing the Weighted Guidelines (“WGL”) method of establishing a profit objective should be revised to reduce burdens on both contractors and the Government during negotiations—which will enable the parties to reach agreements more quickly. Second, the regulations should be modified to provide contracting officers authority to request profit history from contractors on other, similar contracts, and for the concern as a whole (when public information is unavailable).

An appendix to this letter quotes parts of the DFARS Profit analysis regulation (DFARS 215.404-4) and the general WGL instructions (DFARS 215.404-71-1). Sections 215.404-71-2 through -5 in turn address the four profit factors to be considered as part of this determination and require contracting officers to assign values related to technical risk; management/cost control risk; technology incentive (if applicable); contract type risk (with some latitude to vary the risk value for each contract type); working capital adjustments; facilities capital employed (related to Facilities Capital Cost of Money); and any identified cost efficiency initiatives employed by the contractor.
II. COMMENTS ON DFARS 215.404-4 AND 215.404-71

A. The Section has identified areas for improvement.

Compliance with this regulation often results in an impasse in contract or contract modification negotiations, typically in the later stages of the negotiation. Disagreements between the Government and contractors over profit have delayed finalizing negotiations, as the issues are frequently debated at the action officer level and then gradually escalated up the chain. Few contracting officers request (and even fewer Heads of Contracting Activities (“HCAs”) approve) using the alternate structured approach. The contracting officers and HCAs appear to be following a Defense Procurement and Acquisition Policy practice or policy to use the WGLs whenever possible.

Often, to reach handshake agreement, contracting officers must adjust risk values against their better judgment and argue positions with which they do not agree when requesting approval from the cognizant clearance official to start negotiations and then later to settle the negotiations before award. Contracting officers report anecdotally that these steps can sometimes be necessary to obtain clearance for a profit objective that they find reasonable and that is also acceptable to the contractor.

Using WGL to establish a profit objective is required in all negotiated settlements over the threshold for obtaining certified cost or pricing data (currently $750,000). Some exceptions allow modified WGLs or alternate structured profit approaches, but those exceptions are limited and rarely sought and granted. As a result, most negotiated settlements by acquisition centers managing major defense weapon systems (e.g., U.S. Air Force Space and Missile Systems Center and Joint Strike Fighter Joint Program Office) are subject to the requirements of DFARS 215.404-71.

One challenge with this requirement is that it expressly prohibits a contracting officer’s seeking “specific agreement on the applied weights or values for individual profit factors” with the contractor. Instead, the provisions allow a contracting activity to “[p]resent the details of its proposed profit amounts in the weighted guidelines format or similar structured approach” and then “[u]se the weighted guidelines method in developing profit objectives for negotiated subcontracts.” Because technical and management risk values are by their nature subjective (as are, to a lesser extent, the technology incentive and cost efficiency values), contracting officers and contractors often find themselves at odds late in negotiations over which values should apply. Since the contracting officer cannot simply undertake a business decision to “settle” on the values with the contractor, the contracting officer must request substantiating data from the contractor that the contracting officer can use to support above-normal values for these WGL inputs. This process can often prove both contentious and time-consuming.

In summary, by removing the contracting officer’s negotiating latitude to agree on the WGL factors early in the negotiation and also by not requiring the contractor to use the same

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3 Authorization above the contracting officer is almost always required on large weapons programs.
WGL system that contracting officers must use, this regulation sets the stage for friction over the terms to be used in negotiation and, ultimately, the resulting impasse on this negotiation item.

B. Revision of the regulation to minimize the burden on contractors and the Government.

The Section believes that there may be a solution to resolve the concerns posed by the current WGL regulation. First, the prohibition on specific agreement to the applied weights or values for individual profit factors should be deleted and replaced with language encouraging the contracting officer to seek agreement on these terms and to do so as early as possible in the proposal evaluation so that the technical evaluators can assess the contractors’ proposed WGL terms as part of their review.

In addition, the regulation should provide for contractors to use, as part of their proposal preparation, the same WGL system used by contracting officers so that both parties are comparing data sets based on the same algorithms. DoD could do so through introducing a new DFARS provision establishing a common WGL baseline for the expected evaluation. If using the WGLs does not provide a result the contractor finds acceptable, then contracting officers should be able to request profit information on other similar contracts to assess what the contractor has agreed to previously as a reasonable profit. If contractors are privately held companies, then the contracting officer should have the ability to request submission of annual profit rates for the concern as a whole. Contractors should not be required to provide the profit information if requested, but should be allowed to determine for themselves whether it is in their best interest to do so.

Such information would be protected, along with the cost and pricing data obtained in the proposal, as proprietary information in accordance with the Trade Secrets Act and Procurement Integrity Act. If the contractor is a publicly held company, then the contracting officer should be required to review quarterly and annual profit results filed on the Securities and Exchange Commission’s EDGAR service to see whether the profit objective the contracting officer is seeking would appear unreasonably low for the company’s management to accept and report to shareholders.

The revised regulation should invoke FAR 1.102(d) and FAR 15.404–4(a) and encourage the contracting officer to consider any other relevant data and information at his or her discretion that might help the contracting officer make a determination about what profit objective is reasonable and would help maintain a viable industrial base. If, after reviewing all this information, the contracting officer determines the profit rate recommended in the WGL is unreasonable, then the contracting officer should be encouraged to request use of an alternate structured approach. The approval threshold for that request should be lowered to the Chief of Contracting Office (“COCO”) level for all contract actions under $1 billion and COCOs should be encouraged to approve use of an alternate structured approach if the contracting officer provides compelling data indicating the WGL would result in recommending a profit that is lower than what a reasonable business owner or shareholder would find acceptable.
III. CONCLUSION

The Section appreciates the opportunity to provide feedback to the DAR council to inform the council’s efforts to streamline the contracting process. The Section is available to provide additional information or assistance as you may require.

Sincerely,

Aaron Silberman
Chair, Section of Public Contract Law

cc:
Kara M. Sacilotto
Linda Maramba
Susan Warshaw Ebner
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Council Members, Section of Public Contract Law
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Chairs and Vice Chairs, Acquisition Reform and Emerging Issues Committee
Chairs and Vice Chairs, Commercial Products and Services Committee
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Appendix follows
Appendix

DFARS 215.404-4 Profit.

(b) Policy.

(1) Contracting officers shall use a structured approach for developing a prenegotiation profit or fee objective on any negotiated contract action when certified cost or pricing data is obtained, except for cost-plus-award-fee contracts (see 215.404-74, 216.405-2, and FAR 16.405-2) or contracts with Federally Funded Research and Development Centers (FFRDCs) (see 215.404-75). There are three structured approaches -

(A) The weighted guidelines method;
(B) The modified weighted guidelines method; and
(C) An alternate structured approach.

(c) Contracting officer responsibilities.

(1) Also, do not perform a profit analysis when assessing cost realism in competitive acquisitions.

(2) When using a structured approach, the contracting officer-

(A) Shall use the weighted guidelines method (see 215.404-71), except as provided in paragraphs (c)(2)(B) and (c)(2)(C) of this subsection.
(B) Shall use the modified weighted guidelines method (see 215.404-72) on contract actions with nonprofit organizations other than FFRDCs.
(C) May use an alternate structured approach (see 215.404-73) when-

(1) The contract action is -

(i) At or below the certified cost or pricing data threshold (see FAR 15.403-4(a)(1));
(ii) For architect-engineer or construction work;
(iii) Primarily for delivery of material from subcontractors; or
(iv) A termination settlement; or

(2) The weighted guidelines method does not produce a reasonable overall profit objective and the head of the contracting activity approves use of the alternate approach in writing.

(D) Shall use the weighted guidelines method to establish a basic profit rate under a formula-type pricing agreement, and may then use the basic rate on all actions under the agreement, provided that conditions affecting profit do not change.
(E) Shall document the profit analysis in the contract file.

(5) Although specific agreement on the applied weights or values for individual profit factors shall not be attempted, the contracting officer may encourage the contractor to -

(A) Present the details of its proposed profit amounts in the weighted guidelines format or similar structured approached; and
(B) Use the weighted guidelines method in developing profit objectives for negotiated subcontracts.

(6) The contracting officer must also verify that relevant variables have not materially changed (e.g., performance risk, interest rates, progress payment rates, distribution of facilities capital).

(d) Profit-analysis factors -
(1) Common factors. The common factors are embodied in the DoD structured approaches and need not be further considered by the contracting officer.

**DFARS 215.404-71 Weighted guidelines method.**

215.404-71-1 General.

(a) The weighted guidelines method focuses on four profit factors—

   (1) Performance risk;
   (2) Contract type risk;
   (3) Facilities capital employed; and
   (4) Cost efficiency.