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The Voice of the Industrial Base

June 20, 2002

Defense Acquisition Regulations Council
ATTN: Ms. Amy Williams
OUSD(AT&L)DP(DAR)
IMD 3C132
3062 Defense Pentagon
Washington, DC 20301-3062

REF: Case 2002-D005

Dear Ms. Williams:

Members of the National Defense Industrial Association (NDIA) thank you for the opportunity to comment on modifications to the Defense Federal Acquisition Regulation Supplement (DFARS) designed to provide Foreign Military Sales (FMS) customers more insight into the development and pricing of their contracts. The proposed rule was published in the *Federal Register* on April 26, 2002.

NDIA is a non-partisan, non-profit organization with a membership that includes more than 900 companies and over 24,000 individuals. NDIA has a specific interest in government policies and practices concerning the government's acquisition of goods and services, including research and development, procurement, and logistics support. Our members, who provide a wide variety of goods and services to the government, include some of the nation's largest defense contractors.

We have valued the opportunity to participate over the past two years in the effort to increase transparency in the FMS contracting process while still protecting information considered sensitive by our corporate members. We believe that the proposed rule is, on the whole, a reasonable compromise that accommodates the interests of all parties. We recommend, however, that the language at Part 225.7304 (c) be slightly revised regarding the release of proprietary data and that Part 225.7304 (d) also be revised to require consultations with a contractor prior to deciding on the degree of FMS customer participation in contract negotiations. These changes, together with a few editorial suggestions, are provided in the attached text and, we believe, are consistent with the Deputy Secretary's memorandum of January 9th.

"Publishers of National Defense Magazine"

Thank you again for giving NDIA members the opportunity to participate in the development of this policy. If you have any questions, please contact NDIA Procurement Director Ruth Franklin at (703) 247-2598 or at rfranklin@ndia.org.

Sincerely,

A handwritten signature in black ink that reads "L. P. Farrell, Jr." with a stylized initial "L" and "P".

Lawrence P. Farrell, Jr.
Lt. Gen., USAF (Ret)
President & CEO

Attachment

PART 225--FOREIGN ACQUISITION

2. Section 225.7304 is revised to read as follows:

225.7304 FMS customer involvement.

(a) FMS customers may request that a defense article or defense service be obtained from a particular contractor. In such cases, FAR 6.302-4 provides authority to contract without full and open competition. The FMS customer may also request that a subcontract be placed with a particular firm. The contracting officer shall honor such requests from the FMS customer only if the LOA or other written direction sufficiently fulfills the requirements of FAR subpart 6.3.

(b) FMS customers ~~should be encouraged to~~ may participate with U.S. Government acquisition personnel in discussions with industry to--

- (1) Develop technical specifications;
- (2) Establish delivery schedules;
- (3) Identify any special warranty provisions or other requirements unique to the FMS customer; and
- (4) Review prices ~~en-of~~ varying alternatives, quantities, and options needed to make price-performance tradeoffs.

(c) Do not disclose to the FMS customer any data, including cost or pricing data, that is contractor proprietary, unless except in limited circumstances where the contractor authorizes release of specific data. ~~authorizes its release.~~

(d) Except as provided in paragraph (e)(3) of this section, the degree of FMS customer participation in contract negotiations is left, after consultation with the contractor, to the discretion of the contracting officer. Factors that may limit FMS customer participation include situations where--

(1) The contract includes requirements for more than one FMS customer;

- (2) The contract includes unique U.S. requirements; or
- (3) Contractor proprietary data is a subject of negotiations.

(e) Do not allow representatives of the FMS customer to--

- (1) Direct the exclusion of certain firms from the solicitation process (They may suggest the inclusion of certain firms);
- (2) Interfere with a contractor's placement of subcontracts; or
- (3) Observe or participate in negotiations between the U.S.

Government and the contractor involving cost or pricing data, unless a deviation is granted in accordance with subpart 201.4.

(f) Do not accept directions from the FMS customer on source selection decisions or contract terms (except that, upon timely notice, the contracting officer may attempt to obtain any special contract provisions, warranties, or other unique requirements requested by the FMS customer).

(g) Do not honor any requests by the FMS customer to reject any bid or proposal.

(h) If an FMS customer requests additional information concerning FMS contract prices, the contracting officer shall, after consultation with the contractor, provide ~~sufficient~~ information to demonstrate the reasonableness of the price and reasonable responses to relevant questions concerning contract price. This information--

- (1) May include tailored responses, top-level pricing summaries, historical prices, or an explanation of any significant differences

between the actual contract price and the estimated contract price included in the initial LOA; and

(2) May be provided orally, in writing, or by any other method acceptable to the contracting officer.