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The Voice of the Industrial Base

September 30, 2005

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

REF: DFARS Case 2004-D008: Notification Requirements for Critical Safety Items

Dear Ms. Peterson:

The National Defense Industrial Association (NDIA) is pleased to submit comments on the proposed Defense Federal Acquisition Regulation Supplement (DFARS) rule that adds policy regarding notification of potential safety issues under DoD contracts.

NDIA is a non-partisan, non-profit organization with a membership that includes 1,150 companies and over 38,000 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 contractors.

Our specific comments on the proposed rule are as follows:

1. The treatment of "Critical Safety Item" is unclear. That term is defined in proposed 252.246-7XXX:

Critical safety item means a part, subassembly, assembly, subsystem, installation equipment, or support equipment for a system that contains a characteristic, any failure, malfunction, or absence of which could cause a catastrophic or critical failure resulting in the loss of or serious damage to the system or an unacceptable risk of personal injury or loss of life.

This definition does not indicate what level of damage is sufficient to constitute "serious" damage, nor is it clear what level of risk of personal injury would be "unacceptable". We recommend the same language established for "safety impact" be used in the definition of the impact arising from a failure in a "Critical Safety Item" i.e. delete "could cause catastrophic or critical failure resulting in the loss of or serious damage to the system or an unacceptable risk of

personal injury or loss of life” and substitute “have a Safety Impact” so the definition of “critical safety item” would read:

Critical safety item means a part, subassembly, assembly, subsystem, installation equipment, or support equipment for a system that contains a characteristic, any failure, malfunction, or absence of which could have a Safety Impact.

2. Proposed DFARS 252.246-7XXX (b)(1) states that all technical nonconformances for replenishment parts identified as critical safety items would be subject to reporting. The reporting should be limited to the technical nonconformances that would have a Safety Impact. Accordingly, we recommend DFARS 252.246-7XXX(b)(1) be changed to read:

Technical nonconformances for replenishment parts, identified as critical safety items acquired by the Government under this contract, that may result in a safety impact for systems, or subsystems, assemblies, subassemblies, or parts integral to a system.

3. The definition of "Safety Impact" would appear to be overly expansive in terms of including a property damage component. We believe the focus of “Safety Impact” should be on those risks that present a risk of injury or loss of life. Accordingly, we recommend deleting “loss of a weapon system; or property damage exceeding \$200,000.” Alternatively, “\$200,000” should be replaced with at least “\$1,000,000” as the \$200,000 threshold is much too low and will result in reports being made on nonconformances that are really not critical.

4. Proposed DFARS 252.246-7XXX(c) provides that: “The Contractor shall notify the Administrative Contracting Officer (ACO) and the Procuring Contracting Officer (PCO) within 72 hours after discovering or acquiring credible information concerning nonconformances and deficiencies.” We think this notice period is too short, especially in light of the fact there is no definition of “credible information.” We suggest increasing the notice period to “five business days” and adding the following definition of “credible evidence”

“Credible information” exists where the information, considering its source and the surrounding circumstances, supports a reasonable belief that an event has occurred, or will occur, that will result in a Safety Impact. In order for information to be “credible” it must be based on articulable facts and not just a belief or suspicion.

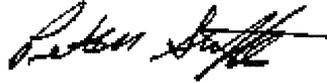
5. Finally, proposed DFARS 252.246-7XXX(e) states that “notification of safety issues...shall be considered neither an admission of responsibility nor a release of liability for the defect or its consequences.” While the Government may be able to agree that it will not consider the notifications contemplated by this clause to be admissions, such an agreement would not be binding on third parties, such as those suffering injury, death or property damage. In point of fact, such notifications would provide a roadmap to a plaintiff’s counsel as to all of the events,

decisions and potential errors or omissions made by the contractor that resulted in the injury or damage. Although some limited protection may be afforded the contractor by the Government Contractor Defense or FAR 52.228-7, "Insurance-Liability to Third Persons" in the event the nonconforming item was produced under an open cost reimbursement contract, there will be instances where such protection will be wanting. Consequently, to encourage open, honest and timely disclosures we suggest adding the following language to the end of paragraph (e):

The Government shall reimburse the contractor for certain liabilities (and expenses incidental to such liabilities) to third persons not compensated by insurance or otherwise without regard to and as an exception to any limitation of cost or the limitation of funds clause of that may be applicable to this contract. These liabilities must arise out the notice requirements of this clause, without regard to the negligence of the Contractor or of the Contractor's agents, servants, or employees and include (i) loss of or damage to property (other than property owned, occupied, or used by the Contractor, rented to the Contractor, or in the care, custody, or control of the Contractor); or (ii) death or bodily injury. Provided, however, that the Government's liability in this regard is subject to the availability of appropriated funds at the time a contingency occurs and nothing in this provision shall be construed as implying that the Congress will, at a later date, appropriate funds sufficient to meet deficiencies.

We appreciate the opportunity to comment on the proposed rule. If additional information is needed, please contact NDIA Procurement Division Director Ruth Franklin at (703) 247-2598 or at rfranklin@ndia.org.

Sincerely,



Peter M. Steffes
Vice President, Government Policy