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RE: **Petition to the Federal Acquisition Regulation (FAR) Council for Amendment to FAR 15.404-4(4)(i)(B)**

Dear Members of the FAR Council:

I write to you today on behalf of the American Institute of Architects (AIA) to formally petition the FAR Council to amend FAR 15.404-4(4)(i)(B) to clearly state that the 6% fee limitation on architect and engineering services (production and delivery of designs, plans, drawings and specifications) for public works or utilities applies *only* to “cost-plus-fixed-fee” contracts, and not to “firm fixed fee” or other types of contracts.

The current language in FAR 15.404-4(4)(i)(B) does not restrict the 6% fee limitation to cost-plus-fixed-fee contracts which is inconsistent with the statutory provisions under which the regulation was promulgated (10 U.S.C. 3322(b)) and 41 U.S.C. 3905(b)). The current language in the FAR eliminated the language “*cost-plus-fixed-fee contract*” which in effect, directs federal agencies and contracting officers to apply the 6% fee limitation to other types of procurement contracts, including the much more commonly used “firm fixed fee” contracts. This is contrary to congressional intent in enacting the Brooks Act of 1972, which establishes Qualification Based



Selection (QBS) for architectural and engineering services. In Section 902 of the Act, congressional intent is stated clearly: “The Congress hereby declares it to be the policy of the Federal Government to publicly announce all requirements for architectural and engineering services, and to negotiate contracts for architectural and engineering services on the basis of demonstrated competence and qualification for the type of professional services required and at fair and reasonable prices.” (40 U.S.C. 1101)

When enacting the Brooks Act in 1972 and in subsequent clarifying amendments, Congress chose to leave intact the statutory provisions contained in 10 U.S.C. 3322(b) applying to military procurement and 41 U.S.C. 3905(3) for civil procurement limiting the fee for architectural and engineering services *under cost-plus-a-fixed-fee contracts* to 6% to the estimated cost of the project. These are the same two code sections cited in FAR 15-404(4)(i). The relevant statutory provisions are as follows:

41 U.S.C. 3905(b):

(b) COST-PLUS-A-FIXED-FEE CONTRACTS. –

(1) IN GENERAL. –

Except as provided in paragraphs (2) and (3), the fee in a cost-plus-a-fixed-fee contract shall not exceed 10 percent of the estimated cost of the contract, not including the fee, as determined by the agency head at the time of entering into the contract.

(2) EXPERIMENTAL, DEVELOPMENTAL, OR RESEARCH WORK. –

The fee in a cost-plus-a-fixed-fee contract for experimental, developmental, or research work shall not exceed 15 percent of the estimated cost of the contract, not including the fee.

(3) ARCHITECTURAL OR ENGINEERING SERVICES. –

The fee in a cost-plus-a-fixed-fee contract for architectural or engineering services relating to any public works or utility project may include the contractor’s costs and shall not exceed 6 percent of the estimated cost, not including the fee, as determined by the agency head at the time of entering into the contract, of the project to which the fee applies.

10 U.S.C. 3322(b):

(b) Cost-plus-a-fixed-fee Contracts. – The fee for performing a cost-plus-a-fixed-fee contract for experimental, developmental, or research work may not be more than 15 percent of the estimated cost of the contract, not including the fee. The fee for performing a cost-plus-a-fixed-fee contract for architectural or engineering services for a public work or utility plus the cost of those services to the contractor may not be more than 6 percent of the estimated cost of that work or project, not including fees. The fee for performing any other cost-plus-a-fixed-fee contract may not be more than 10 percent of the estimated cost of the contract, not including the fee. Determinations under



this subsection of the estimated costs of a contract or project shall be made by the head of the agency at the time the contract is made.

Although these statutory provisions under which FAR 15-404(4)(i) was promulgated clearly restrict the fee limitation to cost-plus-a-fixed-fee contracts, the language in subsection (B) of the FAR does not limit the fee limitation to cost-plus-a-fixed-fee contracts and is thereby inconsistent with the statutory authority under which it was promulgated. The current language of FAR 15-404(4)(i) reads as follows:

FAR 15-404(4)(i):

(4) (i) The contracting officer shall not negotiate a price or fee that exceeds the following statutory limitations, imposed by [10 U.S.C. 3322\(b\)](#) and [41 U.S.C. 3905](#):

(A) For experimental, developmental, or research work performed under a cost-plus-fixed-fee contract, the fee shall not exceed 15 percent of the contract's estimated cost, excluding fee.

(B) For architect-engineer services for public works or utilities, the contract price or the estimated cost and fee for production and delivery of designs, plans, drawings, and specifications shall not exceed 6 percent of the estimated cost of construction of the public work or utility, excluding fees.

(C) For other cost-plus-fixed-fee contracts, the fee shall not exceed 10 percent of the contract's estimated cost, excluding fee.

While subsections (4)(i)(A) and (4)(i)(C) of the regulation have language restricting the application of the 6% fee limitation on architectural and engineering services to cost-plus-fixed-fee contracts, subsection (4)(i)(B) does not contain the same restricting language. It is unclear whether this was an intentional decision by the FAR Council in promulgating this regulation, a drafting error, or some other reason. Regardless, the current language is inconsistent with both enabling statutes under which the regulation was promulgated. Since federal agencies are required to follow the FAR, they have enforced this fee limitation on contract types other than what Congress intended, such as the prevalently used firm fixed fee type of contract. This has been a significant problem and has limited the federal government's ability to effectively procure qualified Architectural and Engineering firms and negotiate fair and reasonable fees, especially impacting smaller firms as well as small projects with limited budgets. The inconsistency of the FAR as compared to statutes including the Brooks Act has also caused inconsistencies in contracting practices from agency to agency and from contracting officer to contracting officer in application



of the fee limitation and as to which services are to be included and excluded as design service to be subject to the 6% fee limitation.

Further, this has eroded and diminished application of the Brooks Act of 1972 to federal procurement of architectural and engineering services, which Congress clearly intended to be based on Qualifications Based Selection with negotiation for a fair and reasonable fee, not the misapplication of an arbitrary fee limitation that was intended to only apply to the very rarely used cost-plus-a-fixed fee contracts. The fee limitation was never intended to apply to firm fixed fee and other types of contracts which Congress clearly intended to be subject to the provisions of the Brooks Act. For these reasons, AIA hereby respectfully petitions the FAR Council to amend FAR 15-404(4)(i) to read as follows:

Proposed Amendment to FAR 15-404(4)(i):

(4) (i) The contracting officer shall not negotiate a price or fee that exceeds the following statutory limitations, imposed by [10 U.S.C. 3322\(b\)](#) and [41 U.S.C. 3905](#):

(A) For experimental, developmental, or research work performed under a cost-plus-fixed-fee contract, the fee shall not exceed 15 percent of the contract's estimated cost, excluding fee.

*(B) For architect-engineer services for public works or utilities **performed under a cost-plus-fixed-fee contract**, the contract price or the estimated cost and fee for production and delivery of designs, plans, drawings, and specifications shall not exceed 6 percent of the estimated cost of construction of the public work or utility, excluding fees.*

(C) For other cost-plus-fixed-fee contracts, the fee shall not exceed 10 percent of the contract's estimated cost, excluding fee.

Thank you in advance for your consideration of AIA's formal petition to amend the FAR. Should you have any questions or would like to discuss this petition please feel free to contact Anne Law at annelaw@aia.org.

Sincerely,

Kimberly N. Dowdell, AIA, NOMAC
2024 AIA President