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The Honorable Deidre A. Lee
Director, Defense Procurement and Acquisition Policy
Office of the Undersecretary of Defense (AT&L)
3000 Defense Pentagon
Washington. DC 20301-3000

Dear Ms. Lee:

The purpose of this letter is to cell attention to what we believe to be a lack of clarity in the language of FAR 52.216-7, Allowable Cost ond Peyrnent. which may result in the application of the clause in an inequitable manner. And, by way of disclaimer, we wish lo point out that Harris and the cognizant CACO have a disagreement over this matter. Our intent is not Ia ask your office's intervention in the disagreement but, rather, to draw attention to the language of the clause for possible review and reviston.

The sections of the clause we refer to are paragraphs (b)(1) and (b)(2) with respect to 'pension plans', 'deferred profit sharing plans', and 'retirement plans'. These words seem to be used interchangeably and casually and have been changed over the years without explanation. We believe the intent of this language is to protect tne Government from over billing resulting from accruals that are subsequently not funded or partially funded. Lumping all "retirement" plans under the same umbrella results In inequitable results because not all retirement plan accruals carry that risk.

As an example. Harris Corporation does not have a pension plan. Harris has a defmed contribution profit shanng plan that supplements a qualified 401K plan. The Harris contribution to the profit sharing plan is calculated on an annual basis and paid to the 401K plans trustee within 120 days of fiscal year end dose. The payment is calculated as 11.5% of corporation profit and allocated to employees based on their individual actual compensation. The payment is irrevocable not subject to future events or changed in any way. The sole risk to h e Government of over billing a in the determination of the accrual during the fiscal year, the same risk that is associated with any accrued cost such as for bonuses and incentive plans. The risk to the Government with this plan is clearly Insignificant at least as compared to a defined benefit pension plan. Thus, lumping all retirement plans under the same umbrella yields inequitable results.

We believe the language of 52.216-7 can also be interpreted to conflict with the language of 31.203(c), which prohibits the fragmentation of an allocation base. Where –7 requires the exclusion of accrued pension costs for h e purpose of determining billing rates 31.203(c) would require the inclusion of the accrued pension cost in the G&A base. That results in withholding the accrued pension cost and an allocable share of otherwise allowable and billable G&A Expense as well. Our interpretation, not shared by the CACO, is that exclusion means the cost is removed in it's entirety from the calculation of billing rates thereby permitting the billing of all allowable and allocable costs.

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This may be a problem unique to Harris Corporation, or at least the application of the clauses may be unique. However, we feel that the language is conflicting and confusing and the references to pension and retirement plans should be refined to focus on only those situations where the interests of the Government are truly at risk and need to be protected

Attached is a list of talking points, again unique to the Harris situation that may shed more light on this issue

Thank you for your consideration and please feel free to contact me at 321-729-2930if you believe this matter deserves attention or if we can provide more insight

Sincerely,

Richard P. Haney
Director - Government Contract Compliance

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Attachment

PROFIT SHARING EXCLUSION
FAR 52.216-7

Since 1984 Harris has excluded the cost of the Hams Profit Sharing Retirement Plan from the interim billing rates in agreement with DCMA and in accordance with the wording at FAR 52.216-7(b) Reimhursinp Cost. The mechanics for determining the interim billing rates has been to first develop allowable rates either based on (1) the agreed to FPRA or (2) at fiscal year end the agreed to Minor Activity rates. These rates are then adjusted to billing rates by removing (excluding) the profit sharing accrual from all calculations until such time as the Profit Sharing is paid on September 30 of each year, within 120 days of fiscal year end close. For the purposes of calculating Billing Rates, Profit Sharing does not exist as a cost. The rationale for this previously agreed to process is as follows..

1. The logic followed that of the "paid ccst" rule whereby a cost may be accrued but not recognized as a cost until paid. Costs of materials or services covered by the paid cost rule did not go into the base until paid, they were treated as if they did not exist even though the material may have already been stocked or even incorporated into a product.
2. The results were fair and equitable and posed no risk to the Government of overpayment. Excluding the Profit Sharing cost permitted the full reimbursement of all allowable and allocable cost as stated in the clause. Including Profit Sharing in the allocation base results in the contractor's inability to fully recover all allowable G&A cost, in violation of the clause and also producing inequitable results.
3. The treatment of Profit Sharing cost is created hy the application of the contract clause, which overrides the language at FAR 31.203(c). But for the clause, the construction of FPRA and Billing Rates would be identical.
4. The plain definitional language of the clause requires that Profit Sharing cost be fully removed. Paragraph (b)(1) states that the term "cost" used for the application of the clause includes only costs as specified in the clause. Thus the definition of "cost" for billing rates may be different than the definition of "cost" in 31.203. Further, Paragraph (b)(2) states that accrued contributions to employee pension plans shall be "excluded". The plain definition of the word exclusion is (a) to shut out, (b) to bar- Gum participation, consideration, or inclusion, <u>Webster's New Collegiate Dictionarv.</u>
5. Including Profit Sharing in the G&A base leads to illogical results. The Profit Sharing contribution is paid to the employee's 401K retirement plan account. If the payment was made, instead. to the employee's direct deposit bank account there would be no need to exclude the accrual from the Billing Rates as the cost would qualify as a billable year-end bonus. Therefore, the only distinction between a billable cost and an Unbillable cost is the account distribution coding on the electronic funds transfer.