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**THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA**

1957 E Street, N.W. • Washington, D.C. 20006 • (202) 393-2040 • FAX (202) 347-4004 • www.agc.org.

PETER K.W. WERT, President

TERRY DEENY, Senior Vice President

RALPH W. JOHNSON, Vice President

HAROLD KVAAS, Treasurer

STEPHEN E. SANDHERR, Executive Vice President & CEO.

DAVID R. LUKENS, Chief Operating Officer

November 17, 1998

U.S. Department of Transportation Dockets  
Docket No. FAA-980293 10  
400 7<sup>th</sup> Street, N-W.  
Room 401  
Washington, D.C. 20590

OFFICE OF DISPUTE  
RESOLUTION  
FOR ACQUISITION  
1998 NOV 17 P 5: 10

Re: **Proposed Rule: Request for Comments**  
**63 Federal Register 45371 (August 25, 1998)**  
**Procedures for Protest and Contracts Disputes**

Dear Sir or Madam:

On behalf of the Associated General Contractors of America ("AGC"), I am submitting comments on the above referenced matter. AGC is the largest and most diverse trade association in the commercial construction industry. The association's 33,000 members include nearly 7,500 general contractors engaged in the construction of buildings, highways, bridges, tunnels, airports, factories, warehouses, shopping centers, and both water and waste treatment facilities. The overwhelming majority of AGC members are small businesses. AGC members regularly work for many public owners, including the Federal Aviation Administration ("FAA"), General Services Administration, Department of Veterans' Affairs, Corps of Engineers, Naval Facilities Engineering Command, and many other federal departments and agencies.

AGC appreciates the FAA's efforts to make its procurement management system more efficient. The proposed rule referenced above is a step in that direction; however, before promulgation of the rule, AGC wishes to highlight a few reservations.

I. OVERVIEW

AGC is in general agreement with the comments on this matter filed on behalf of the Section of Public Contract Law of the American Bar Association ("the Section").

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AGC commends these comments to the FAA for its review and consideration. Rather than repeat the comments ably drafted by the Section, I highlight below the two provisions most concerning to AGC.

## II. CONTINUED PERFORMANCE OF CONTRACTS PENDING RESOLUTION OF CONTRACT DISPUTES

Proposed §17.23(f) would require contractors to continue performance of their contracts pending resolution of any disputes:

(f) The FAA will require continued performance in accordance with the provisions of a contract, pending resolution of a contract dispute, arising under or related to that contract.

While this provision is consistent with current regulation under the Contract Disputes Act ("CDA"), AGC believes this policy has proven the source of many needless protests in the past. AGC supports the following changes to improve the process.

### a. FAA Should Clarify What Performance Must Be Continued Pending Resolution Of The Dispute

Contractors, to make appropriate decisions, must understand what performance is requested of them. In fact, disputes or changes often occur as a result of uncertainties over what performance is specifically desired by the owner. This proposed rule would continue the confusion by extending the ability of a contracting officer ("CO") to direct continued performance under a disputed contract provision without formal, written direction from the CO. To provide maximum clarity, AGC believes written instructions must be provided by the CO to the contractor. The language in §17.23(f) should be amended to read:

(f) The FAA will require continued performance in accordance with the provisions of a contract and the contracting officer's written directions, pending resolution of a contract dispute, arising under or related to that contract.

### b. FAA Should Consider **Financing The Continued** Performance Pending Resolution Of The Dispute .

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**AGC agrees completely with the Section 3 analysis of financing performance under § 17.23(f). Where the government requires continued performance and where there is a breach by the government, reasonable policy would facilitate government financing of continued performance, provided that the government's interest is secured.**

### **III. INTEREST DUE CONTRACTORS**

**Section 17.39(m) provide3 in pertinent part:**

**. . . If required by contract or applicable law, the FAA will pay interest on the amount found due the contractor, if any.**

**Currently, the standard FAA "Disputes" clause (§ 3.9.1-1) provides for the payment of interest on contractor claims, although different from the CDA.**

**For reasons consistent with the Section's analysis, AGC does not believe the FAA is exempt from the CDA. Under the CDA interest runs from the date the certified claim is submitted to the CO regardless of when the costs are actually incurred. See *Caldera v. J.S. Alberici Construction Co.*, 153 F.3d 1381 (Fed. Cir. 1998). Under the FAA clause, interest is payable from the later of "(1) the date the Contracting Officer receives the contract dispute, or (2) the date payment otherwise would be due . . ." Clause 3.9.1-1 (1).**

**AGC recommends that, at a minimum, the FAA provide, by regulation, entitlement to interest from the date the claim is submitted to the CO. Even if the FAA is correct that its procurements are not subject to the CDA, the ability to obtain interest on claims should not be a matter of negotiation on individual contracts.**

### **IV. CONCLUSION**

**AGC appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.**

Sincerely,



**Dirk Haire, Esq.**

**Staff Professional, FAR Committee**