panel. "But a statute that makes me liable for acts done negligently imposes on me a standard of conduct that is fundamentally unfair." Business owners must have the right to rely on the words and judgments of their employees, he stressed. "A standard of liability on the basis of some duty to investigate employees' actions creates a burden that no business owner can afford."

Cross, who is president of University Research Corp., cautioned that antifraud legislation must provide sufficient procedural safeguards. "A judgment of fraud has devastating effects on a small business; lines of credit disappear, and customers cease their patronage." The bills currently before Congress—S 1134, S 1562, and HR 3334—all provide government investigators with new unfettered subpoena and discovery powers without protections provided by current law, he maintained. "We believe this offends the standards of justice we take for granted in America."

AIA's Due Process Concerns

Martin Marietta Corp. Vice President Frank Menaker, representing the Aerospace Industries Association, also emphasized that contractors should not be penalized for false claims based on negligent conduct. "There should be no liability without a showing of actual knowledge of falsity, or... reckless disregard... for the falsity of a claim." He warned that adoption of a negligence standard for purposes of imposing liability would make it unreasonable for a businessman to rely on any of his employees.

In addition, the government should be required to prove its fraud cases by clear and convincing evidence, Menaker said. "This is generally the present standard under the civil False Claims Act; it should not be diluted at the same time as other elements of the government's job in proving civil fraud are being made easier and penalties are being made more severe."

The AIA spokesman also scored the proposal to grant testimonial subpoena powers to investigating officials, warning of the potential for abuse. "The subcommittee should closely examine the extent to which testimony taken in this pre-judicial context should be automatically shared with other government investigators." There is no evidence to show that government investigators—even the Inspectors General—need such independent subpoena authority to perform their jobs, he concluded.

In addition, the target of a testimonial subpoena would have very limited discovery rights, he cautioned. "The person would not have to be given any specific information on the nature of the allegations against him; [his] discovery rights... would be limited and left to the discretion of the hearing examiner." He conceded, though, that the Justice Department also opposes extending the agencies' subpoena powers.

Finally, Menaker pointed out that HR 3335 enables an agency victimized by fraudulent conduct to be investigator, prosecutor and judge. "In light of the stigma of the accusations [of fraud], at some point in the administrative process prior to prosecution... an independent assessment should be made of the merits." The current "program fraud" bills—S 1134 and HR 3335—pay "lip service" to this concept by providing for "passive approval" by DOJ, he added. "In AIA's view, this is not enough."

More Hearings Held

The subcommittee held a second day of hearings Feb. 6, focusing on proposals to strengthen the False Claims Act's "qui tam" provisions. The panel heard from Reps. Andy Ireland (R-Fla) and Berkley Bedell (D-Iowa), who are co-sponsoring a separate bill (HR 3828) that would expand the right of contractors' employees to file "qui tam" suits and protect them from employers' retaliation. "DOJ has not done an effective job in preventing contractor fraud," said HR 3828 cosponsor Howard Berman (D-Calif) at the Feb. 5 hearing. "Only those who cheat the government have something to fear from [this bill]."

Allowable Costs

DEFENSE INDUSTRY PROTESTS PROPOSED RULES ON ALLOWABLE COSTS

Proposed changes to the Federal Acquisition Regulation that would make costs that are specifically unallowable under one cost principle unallowable under all cost principles has drawn strong protest from a major group representing defense contractors.

In a recent letter to the FAR Secretariat, the Council of Defense and Space Industry Associations maintains that the proposed revision of FAR 31.201-2 "exceeds statutory authority" and is "fundamentally inconsistent" with the direction in Title IX of the FY 1986 defense authorization act to "define in detail or in specific terms" those costs which are unallowable.

CODSIA points out that the House version of the defense bill contained an identical provision to make costs unallowable under one cost principle unallowable under all cost principles, but that the conferees on the measure later deleted that provision as "unworkable," to quote the conference agreement.

CODSIA cites the conferees as stating: "Circumstances might exist that would warrant the recovery of costs that could possibly fall within these categories."

According to CODSIA, "The conferees have thus expressed the will of Congress on this matter. DOD should not thwart Congress's action by imposing this restriction on its own."

The proposed FAR change on determining cost allowability is one of several that were issued for comment on Dec. 19 (44 FCR 1083, 1115). Other draft changes regarding cost principles were issued for comment on Dec. 24 and 27 (45 FCR 7). All the proposed changes are intended to implement Title IX of the FY 1986 DOD act. Although the act is binding on DOD only, the FAR Councils proposed to make the changes apply governmentwide for the sake of uniformity.

In its letter to the FAR Secretariat, CODSIA also addresses the other proposed revisions to the cost principles, with the exception of the proposed change on selling costs. CODSIA expects to submit separate comments on selling costs by Feb. 10.

Following are the highlights of CODSIA's comments regarding the proposed cost principle changes:

Company-furnished Cars

The proposed change to FAR 31.205-46 regarding company-furnished cars would make unallowable that

portion of the cost of a company-furnished car that relates to personal use by employees.

According to CODSIA, providing company cars for personal use is no different from any other form of compensation and should be governed by existing reasonableness criteria. CODSIA points out that the existing compensation cost principle recognizes that compensation elements vary from contractor to contractor.

Litigation Costs

CODSIA argues that the proposed change to FAR 31.205-33 which would make unallowable certain legal costs, including the legal costs incurred in defending or prosecuting lawsuits or appeals between two contractors arising from disputes involving teaming arrangements, joint ventures, and co-production "substantially overreaches congressional intent to clarify the allowability of 'professional and consulting services, including legal services.' "

CODSIA asserts that "the cost of litigation, particularly when it is commenced by a government claim, is a proper cost of doing business for any company."

CODSIA also notes that the proposed unallowability of such costs "will have a disproportionately greater effect on smaller businesses who do not have the financial resources to defend themselves unless they can recover these costs as normal costs of doing business."

Regarding the provisions on legal costs involving teaming arrangements and dual sourcing, CODSIA maintains that such costs should be allowed because "it is in the government's interest to encourage contractor support" of these arrangements.

Executive Lobbying

The proposed change to FAR 31.205-52 relating to executive lobbying costs "creates an entirely new test for allowability which conflicts with the existing carefully-drafted standard" in OMB Circular A-122, CODSIA argues.

"The approach taken in the FAR proposal establishes an undefined 'merits' test for Executive Branch lobbying on contractual or regulatory matters," the CODSIA letter points out. "This test is entirely subjective and would require a judgment by the government and industry participants in every meeting or conversation on the allowability of the costs expended in it. The recordkeeping requirements of such an effort would be extremely burdensome and expensive for contractors, and would be a reversal of the President's stated intention to reduce paperwork and reports."

Contributions or Donations

Regarding the proposed change to FAR 31.205-8 that would make unallowable contributions or donations, including cash, property, and services, regardless of the recipient, CODSIA recommends that "materiality be considered" in determining the value of cash, property, and services.

Defense of Fraud Proceedings

Regarding the proposed change to FAR 31.205-47 to make unallowable the costs associated with "similar proceedings (including those associated with the filing of any false certification)," CODSIA recommends that it be deleted because it is "vague and redundant."

"[T]he proceedings in which these disallowed costs are incurred should only be those in court or administrative proceedings structured to ensure due process," CODSIA states. "The inclusion of 'similar proceedings' clouds the limitation to due process forums."

Additionally, CODSIA notes that the proposed regulation overreaches the statutory mandate by disallowing costs of defense where cases do not result in any finding of liability, but are merely "resolved by consent or compromise." CODSIA recommends that those words be deleted.

Alcoholic Beverages

Regarding alcoholic beverage costs (FAR 31.205-51) and the costs of membership in social, dining, and country clubs (FAR 31.205-14), CODSIA suggests that they would be more appropriately placed in other sections of the FAR. CODSIA suggests that the coverage on alcoholic beverages be placed in FAR 31.205-14, "Entertainment costs"; and that the coverage on club memberships be included in FAR 31.205-43, "Trade, business, technical and professional activity costs."

In addition, CODSIA recommends that additional language be incorporated into the alcoholic beverage costs coverage to stipulate that contractors not be required to maintain receipts for meals which are not otherwise required to be maintained.

CODSIA does not comment on the proposed change regarding unallowability of fines and penalties for violations of foreign laws and regulations (FAR 31.205-15).

Paperwork Burden

Regarding the proposed cost principle revisions generally, CODSIA expresses concern about the cost and paperwork burden of implementing the changes, particularly for contractors that do only a small amount of government business.

CODSIA warns that the burdensome administrative requirements may drive more and more firms from government business, thereby reducing the industrial base and the level of competition.

The FAR Councils are currently weighing the CODSIA and other comments on the proposed cost principle changes.

Per Diem Costs

On a separate cost principle issue, CODSIA has written to the Defense Acquisition Regulatory Council to complain about the Council's proposed change to DOD FAR Supplement 31.205-46 that would limit contractors' reimbursable per diem expenses to predetermined rates for given localities (44 FCR 886). In its Dec. 20 letter, CODSIA questions the legality of replacing the longstanding reasonableness standard with "multiple invariable ceilings based upon an arbitrary use of 'average' or corporate rates identified by a study conducted for the purpose of another agency, General Services Administration, to report to Congress."

However, CODSIA's comments do not take into account the passage of a law Dec. 19 that mandates use of that locality-based rate determination for all federal employees and contractors alike (45 FCR 3). In light of that law, the DAR case is being folded into a FAR case.