April 29, 2014

VIA EMAIL

Defense Acquisition Regulations System
Attn: Mr. Michael Canales
Room 5E621, 3060
Defense Pentagon
Washington, DC 20301-3060


Dear Sir or Madam:

On behalf of the Section of Public Contract Law (“Section”) of the American Bar Association (“ABA”), I am submitting comments on the above-referenced DARS Case. The Section consists of attorneys and associated professionals in private practice, industry, and government service. The Section’s governing Council and substantive committees contain members representing these three segments to ensure that all points of view are considered. By presenting their consensus view, the Section seeks to improve the process of public contracting for needed supplies, services, and public works.1

The Section is authorized to submit comments on acquisition regulations under special authority granted by the ABA’s Board of Governors. The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the ABA and, therefore, should not be construed as representing the policy of the ABA.2

I. Introduction

By Notice dated February 12, 2014, the Director of Defense Procurement and Acquisition Policy (DPAP), requested input regarding the effect on industry of statute-based rulemakings, with particular reference to “why the identified impact does not

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1 Sharon L. Larkin, Section Chair, Mary Ellen Coster Williams, Section Delegate to the ABA House of Delegates, Jeri K. Somers, Budget and Finance Officer, and Candida Steel and Anthony Palladino, members of the Section’s Council, did not participate in the Section’s consideration of these comments and abstained from the voting to approve and send this letter.

2 This letter is available in pdf format under the topic "Acquisition Reform and Emerging Issues" at: http://apps.americanbar.org/contract/federal/regscomm/home.html.
achieve the intended benefit of the identified legislation, or why the intended benefit is not helpful to the Department” along with recommendations for alternative approaches that might better effectuate the intended benefit. The Section understands that this assessment is part of a larger initiative being undertaken by the Under Secretary of Defense, Acquisition, Technology and Logistics, under Better Buying Power 2.0.

DPAP’s effort, coupled with recent similar ventures undertaken by the Chief Acquisition Officers Council and the House and Senate Armed Services Committee, indicates an invigorated willingness to engage stakeholders in a collaborative process. The Section commends DPAP for its outreach, and for soliciting recommendations for alternative approaches to achieve the intended benefit of existing legislation. The Section supports DPAP’s assessment and looks forward to a continuing dialogue.

II. Adverse Consequences can be Avoided Through Better Use of the Rulemaking Process.

The Section’s review was conducted by attorneys representing both the government and private sector. As part of its review, the Section examined previous comments it submitted in other rulemaking processes. As the group examined those comments, one theme that emerged was that more effective use of the notice-and-comment rulemaking process would avoid many of the adverse and likely unintended consequences experienced by industry. We address this issue here, and then address specific regulatory provisions in the next part of this submission.

Section 22 of the Office of Federal Procurement Policy Act (Pub. L. No. 93-400, Aug 30, 1974 as amended by § 302, Pub. L. No. 98-577, Oct 30,1984), (41 U.S.C. § 1707) establishes a rulemaking process expressly for the implementation of acquisition statutory provisions. This rulemaking process is more structured than that provided for other rulemaking by the Administrative Procedure Act (5 U.S.C. § 553), and justifiably so. Congress’s intent in passing Section 22 was to ensure that Government and industry would share ideas and approaches when making regulatory changes to federal acquisition processes. The goal of Section 22 is often unmet in the acquisition regulatory process, and the process could be improved through a more robust dialogue between Government and the public prior to the issuance of rules, particularly those that have significant influence on costs (both to Government and industry) and access to the marketplace.

We found that, generally, agencies attempt to provide an adequate notice-and-comment period to allow interested parties sufficient time to prepare comments, and

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3 See 79 Fed. Reg. 8402. The Request originally sought comments by March 14, but the time for comments was extended to April 23, 2014. 79 Fed. Reg. 10461 (Feb. 25, 2014). The Section is commenting pursuant to its authority to issue comments on procurement regulations. As such, these comments do not address changes to specific procurement laws.

agencies do pay attention to the comments submitted. In some cases, however, we note that the allotted time was insufficient, particularly for complex rules. Of considerable concern is the issuance of interim rules without the opportunity for comments, which is not consistent with the statutory rulemaking requirements. Although the issuance of some interim rules may be the result of the agency’s perceived urgency to implement a particular rule, there have been situations (such as DAR Case 2012-DO50, Requirements Relating to Supply Chain Risk) when the statutory requirement originated a year or more prior to the interim rule, and the perceived urgency when the interim rule was issued reflects a failure to take full advantage of the extended period that was available for notice and comment.5 Once a rule is promulgated and implemented, either as an interim rule or otherwise on short notice, industry must begin the effort to comply with that rule. The use of processes that only allow for comment after-the-fact imposes implementation costs that later may be determined to be unnecessary. Further, the Government may not have a full appreciation for the cost of a particular method of implementation until that information is provided in public comments.

In other instances, failure to proceed with the rulemaking process also has a negative effect on contractors at multiple levels. For instance, the failure to issue a rule to implement Section 815 of the Fiscal Year (FY) 2012 National Defense Authorization Act (NDAA) (guidance relating to rights in technical data under contracts for the production and sustainment of systems or subsystems) has resulted in uncertainty, which in turn results in increased costs.6 It has also resulted in inconsistent agency actions, which again increase uncertainty and costs.

Effective rulemaking sufficiently informs the government procurement community stakeholders — Government, industry, and the public — of the rules, how they will be enforced, how they will be flowed down, and how they will ensure fair treatment across various types of bidders, contractors, subcontractors, and suppliers. These goals can be achieved by a fulsome rulemaking process that includes adequate time for public review, notice and comment, public testimony, analysis of the comments and other public input, and, where significant changes to the proposed rule are made as a result of such process, further opportunity for notice and comment during rulemaking processes prior to issuance and implementation of a rule. Issuance of rules without going through appropriate rulemaking processes not only deprives stakeholders of the opportunity to provide input, the rule-makers also are deprived of the opportunity to learn where areas of concern in the statute and proposed regulation exist, and what can be done to avoid, address or ameliorate these concerns and advance an effective and workable.

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5 DAR Case 2012-DO50 was issued without prior opportunity for notice and comment as an interim regulation to implement a section of the FY 2011 NDAA, as amended by the NDAA for FY 2013. See 78 Fed. Reg. 69268 (Nov. 18, 2013).

6 See DARS Case 2012-DO22 Rights in Technical Data and Validation of Proprietary Data Restrictions and DARS Case 2010-DO01 Patents Data and Copyrights.
The procurement rulemaking process needs the notice and flexibility authorized by Section 22. Thus we recommend that the Government, including but not limited to DoD, redouble efforts to engage in a robust conversation with the public before implementing statutory acquisition provisions in regulations, with a special focus on accurately identifying and fully assessing likely cost effects. DoD should forego such interaction only in truly unusual and compelling circumstances.

A. Need for Accurate Analysis of the Costs of Implementation of Rules

The rulemaking process could be improved by more accurately taking into account the costs of implementation. Frequently, the analysis of the costs of implementation required by the Regulatory Flexibility Act (5 U.S.C. 601, et seq.) in a proposed rulemaking is unrealistically low, often limited to the costs of the person who enters the data required on the Government’s proposed new form or system. To assess the true cost significance of proposed regulations, the estimated costs of gathering the data required, not just reporting it, and the costs of the process changes required by proposed rules, both within the Government and industry, should be identified and reported.

The rulemaking process should also more fully consider the cost-benefit balance of the rules themselves. We fully recognize that there are rules that are necessary as a matter of principle to avoid corruption and to maintain the public trust and should be adopted no matter what the cost. Nonetheless, the public should know what the cost of all rules are -- not just the administrative costs, but the costs to the system, the impact on price to the Government, and the lost opportunity costs for both the Government and industry in complying with them.

B. Better Coordination Between Procurement Rulemaking Entities

There are multiple procurement rulemaking entities, such as DAR Council, FAR Council and the OFPP, and coordination between and among these entities would also help in mitigating unintended consequences. For example, these entities should jointly assess whether the regulation is broader than one agency and then proceed with either a single unified rule applicable to all agencies, or a specific consistent rule applicable to the affected agency or agencies. Another consideration is whether a rule or rules that currently exist might be modified to address the new statutory requirements. Such changes also would need to go through the appropriate notice and comment period and rulemaking processes, but might reduce the need for issuance of an entirely new rule or set of rules that may or may not be consistent with existing rules.

Another issue that arguably increases cost without an added benefit is the issuance of a policy or a directive by one or more agencies, in lieu of a uniform rule, or the issuance of class deviations in lieu of engaging in the rulemaking process. Also, we noted the situation where the rulemaking only covered a piece of the statutorily required rule. This was seen particularly with regard to the DAR and FAR Councils actions to date to implement the statutory requirements of FY 2012 NDAA, Section 818 Detection
and Avoidance of Counterfeit Electronics Parts. At the public meeting on that statutory implementation, the DAR Council representative advised that the Council would issue a triumvirate of rules to address these requirements – some through DFARS and some through FAR, but issuance of these three sets of rules in draft form for public comment has been delayed. Accordingly, the rulemaking process would be improved by a more coordinated approach to rule development.

C. Addressing Flow Down Requirements

With respect to how rulemaking affects subcontractors, several additional improvements can be made in DoD’s processes. First, rules should clearly indicate whether they apply to subcontractors and define those entities considered to be subcontractors. Presently there are a number of rules and implementing clauses that include mandatory flow down language and other rules that do not expressly require flow down, but which cannot be effectively implemented unless the prime contractor includes the clause in subcontracts. This often leads to contentious negotiations between subcontractors and higher tier contractors as to what should/must be included in the subcontract. The rulemaking process would be improved by clarification of the flow down of a rule. For example, when a rule does not apply to subcontractors, the preamble of the rule should state this fact explicitly. When a rule does apply to subcontractors, then it should clearly define those entities that would be considered subcontractors for flow down purposes.

Clarifying when and to whom provisions must be flowed down can result in time and cost savings and efficiencies for all stakeholders. Moreover, while it must maintain consistency with statutory objectives, DoD should attempt to implement requirements in a manner that narrows flow down requirements. If the objectives of a rule can be satisfied without multiple tiers of flow downs, that would relieve burdens and potential compliance issues on sub tier subcontractors, many of whom are small business concerns. Lastly, where it is possible to exempt certain classes of subcontracts, such as subcontracts for commercial items or subcontracts with small business concerns, or entities outside of the United States, we recommend that DoD consider doing so.

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7 DARS Case 2012-DO55 Detection and Avoidance of Counterfeit Electronic Parts (issued in draft for notice and comment, comments in and public awaiting further draft or final rule); DARS Case 2014-DO05 Detection and Avoidance of Counterfeit Electronic Parts – Further Implementation (Case opened and opportunity for public comment in advance of any publication of further implementing rule); FAR Case 2013-002 Expanded Reporting of Non-Conforming Parts (Case opened; awaiting proposed rule); FAR Case 2012-032 Higher-Level Contract Quality Requirements (Awaiting word on drafting of final rule).

8 See, e.g., III.B and H., infra.
D. Commercial Items

Congress was specific in its desire to promote, where appropriate, the use of commercial items to reduce the cost to the Government of conducting its own research and development and to take advantage of commercial technology. This effort was supported by years of studies and hearings on the issue, including work by the Section 800 Panel, chartered by Section 800 of the FY 1991 NDAA (Pub. L. No. 101-510, § 800, 104 Stat. 1485, 1587 (1990). To ensure that subsequent laws and regulations did not thwart previous work directed at removing barriers to commercial buying, Congress created the requirement that all subsequent statutes specifically refer to the Federal Acquisition and Streamlining Act (FASA) § 8000 et seq., in order to apply requirements to commercial items. It also required the Administrator of OFPP to make an express determination of the applicability of the new statutory provision to commercial items, 41 U.S.C. § 1907. The intent of the Section 800 Panel, the drafters of FASA, and the team that implemented FASA in the FAR, was that it should be the exception, not the rule, that an after-enacted statute apply to commercial items.

Nonetheless, over the past decade, we note that application of after-enacted statutes to commercial items has increased and is no longer the exception. Further, while FASA clearly requires the OFPP Administrator to make a determination of whether an after-enacted statute applies to commercial items, OFPP has concluded that the determination need not be made through the rulemaking process or through publication of underlying considerations. The impact of this change in direction is driving new companies away from the federal marketplace and causing companies already within the marketplace to rethink their relationship to the Government. The end result is that it is becoming more difficult and more expensive for the Government to access the commercial marketplace.

III. Specific Regulatory Provisions

As DPAP noted in its request for comments, there are approximately 400 DFARS requirements that are based solely on statute. By necessity, we are not able to address the impact of each of those 400 requirements; this initial submission discusses several DFARS requirements of note. We look forward to a continuing dialogue regarding these and other DFARS provisions.

A. DARS Case 2011-D039 Safeguarding Unclassified Information

**Purpose of Rule:** DoD issued this regulation to implement adequate security measures to safeguard unclassified controlled technical information within contractor information systems from unauthorized access and disclosure, and to prescribe reporting to DoD the compromise of unclassified controlled technical information. 78 Fed. Reg. 69273 (Nov. 18, 2013).
**Issues:** Implementation of this regulation, which is intended to implement Executive Order 13556\(^9\) illustrates some of the potential pitfalls in DoD’s rulemaking process. Despite significant changes to the scope of the rule during the rulemaking process, DoD did not provide a notice and comment opportunity (either by issuing a revised proposed rule or an interim rule) to solicit feedback on the final rule that DoD issued on November 18, 2013 (78 Fed. Reg. 29273).\(^10\) As a consequence of this process, the final rule does not address a number of salient industry concerns and features potentially ambiguous provisions, all of which could have been addressed and resolved through a more robust notice and comment process:

- The final rule scaled back the scope of the rule to focus on the “enhanced controls” set forth in the proposed rule, and restricted the rule to cover only unclassified “controlled technical information.” The definition of this new term is potentially ambiguous and does not address how, if at all, the rule applies to technical information that may be subject to controls on its access, use, reproduction, modification, performance, display, release, disclosure or dissemination, but that is not marked with one of the applicable distribution statements (B through F). Given the number of changes in approach and terminology between the proposed and final rules noted below, the final rule would have been improved by providing another opportunity for notice and comment to clarify or resolve potential gaps or ambiguities in advance of making the rule effective in final form.

- The rule requires prime contractors to include DFARS Clause 252.204-7012 in all subcontracts, including subcontracts for commercial items. Although the preamble suggests that the definition of “subcontractor” may be broad, the rule itself does not address the issue, describe what entities should be considered “subcontractors” for flow down purposes, or address expressly whether a subcontractor is obligated to report to its prime contractor(s) or directly to the Government. The rule would benefit from clarifying these issues.

- The rule would have been improved by more clearly addressing the likely impact of burdens on small businesses or foreign suppliers, including companies that may not be familiar with the referenced NIST standards.


\(^10\) DoD issued an advanced notice of proposed rulemaking in 2010 (75 Fed. Reg. 9563 (Mar. 3, 2010)) followed by a proposed rule on June 29, 2011 DoD issued a proposed rule (76 Fed. Reg. 38089). DoD received numerous comments in response to both the proposed rule and the ANPRM, including from the Section of Public Contract Law. Recognizing the significant impact of the proposed rule, DoD scheduled a follow-up open meeting with industry on November 15, 2011, to discuss comments, but subsequently postponed that meeting indefinitely.
Although “controlled technical information” includes certain information that is independently subject to U.S. export control laws and regulations, the rule should have more fully considered its likely interplay with these and other such laws. For example, the rule does not explain how DoD accounted for potential difficulties contractors may face being required to self-report to DoD within 72 hours, which may be before the contractor has reasonably been able to assess whether other laws and regulations may have been violated and whether the DoD disclosures affect the ability to obtain disclosure credit with other agencies.

Because the rule is applied prospectively on a contract-by-contract basis via incorporation of DFARS 252.204-7012, it is unclear how the rule will apply to information received in connection with contracts that pre-date the rule and do not include DFARS 252.204-7012.

The consequences, if any, of noncompliance either with the safeguarding or mandatory disclosure obligations under the new rule could be more clear. Similarly, the rule could be clarified with respect to when a contractor is required to furnish notices of “alternative control or protective measure” to the Contracting Officer pursuant to DFARS 252.204-7012(b)(1)(ii) in lieu of adhering to the NIST standards identified in the final rule or standards to be applied by a Contracting Officer.

Although an iterative notice and comment rulemaking process is not necessary in cases where only modest rule changes are made between issuance of a proposed and final rule, such is not the case with regard to the rule on safeguarding nonpublic controlled technical information. Accordingly, this rulemaking, and future rulemakings that undergo substantial revision during the rulemaking process, would benefit from additional options to review and comment upon the revisions being made.

B. DARS Case 2012-DO55 Detection and Avoidance of Counterfeit Electronic Parts

Purpose of Rule: The DAR Council identified the purpose of the proposed rule to be to implement portions of Section 818 of the NDAA for FY 2012 by adding definitions specific to counterfeit parts, defining contractors’ responsibilities, clarifying the Government’s role, implementing Section 833 of the NDAA for FY 2013 regarding allowability. 11 The proposed implementation is to involve DARS cases and FAR cases that have been opened but through which no proposed rules have yet to be issued for notice and comment.

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Issues: The Section provided comments on this proposed rule in July 2013, but the rule is still pending. The proposed rule included an incomplete implementation of the statute; a more coordinated rulemaking process would permit the procurement community to assess the workability and completeness of the framework for addressing the problem of counterfeit electronic parts. The rulemaking process would also be improved by providing stakeholders the opportunity to review and comment on the complete regulatory scheme to implement the statutory requirements. For instance, the DAR Council recently held a public meeting on further implementation of Section 818, but that meeting was held without the benefit of publication of a revised proposed rule, despite the submission of numerous comments. At the meeting, the DAR Council announced the likelihood that a final rule comprised of 118 pages will be issued shortly and will be effective immediately -- before any further opportunity for public review and comment. The rulemaking process would benefit from an opportunity for further comment before the rules are finalized. Significant issues include:

- Counterfeit parts pose a significant risk to the defense supply chain and all sectors. Addressing the issue of counterfeit parts is a complex matter and will necessitate the establishment of rules that affect contractor, subcontractor and Government activities and that require the expenditure of considerable time, money and manpower by each of these groups. Regulations to implement the statutes’ requirements may have significant influences throughout a government contractor’s total supply chain. Congress tasked the DAR Council to define key terms, such as “counterfeit parts” and “trusted suppliers,” to define requirements for review and approval of trusted supplier programs, to establish clear paths for the contractor’s timely reporting of suspected or actual counterfeit parts, and to thereby afford contractors a form of safe harbor if they complied with the statute’s requirements. We recommend further engagement with the public to clarify these issues.

- The proposed rule was identified as covering only CAS-covered contractors. The proposed rule’s stated significance for small businesses was that it would only affect them to the extent that they provided actual or suspect counterfeit parts. The DAR Council’s regulatory analysis would be improved by considering more fully the significance and requirements that the statutes and rule require of non-CAS-covered contractors and subcontractors at all tiers.

- Finally, the rule would benefit from additional consideration of the paths for keeping within the statute’s safe harbor provisions.

The Section recommends that in light of these issues, the DAR Council allow for additional public comment before finalization of the counterfeit parts rule. A more
complete rulemaking process and public engagement on the issue would better assure that the ultimate regulatory framework needed to address this issue is developed.

C. DARS Case 2012-DO50 Requirements Relating to Supply Chain Risk

Purpose of Rule: The interim rule was issued to implement Section 806 of the FY 2011 NDAA. The DAR Council stated that Section 806 requires “the evaluation of offerors’ supply chain risks on information technology purchases relating to National Security Systems (NSS). Section 806 enables agencies to exclude sources that are identified as having a supply chain risk.”

Issues: This is another example of an interim rule being published and implemented without prior opportunity for public comment. The Section provided comments on this proposed rule, identifying a number of problematic issues:

- Implementation of the statute appears broader than the intended scope in the statute. Although the statute called for imposing the identified supply chain risk requirements and provisions on procurements involving covered NSS, the rule’s clauses apply to all of the DoD’s Information Technology procurements and contracts, imposing considerable requirements on parts of the supply chain that may not be involved in the NSS procurements and contracts of concern.

- The interim rule raises definitional concerns; these concerns remained unaddressed after the effective date for the rule.

- The rule would be improved by providing for neutral and objective review of the agency’s determinations to reject contractors or proposed subcontractors on supply chain risk grounds. A lack of review of the decision-maker may expose the system to abuse and effectively deny contractors or subcontractors the opportunity to challenge improper decisions.

D. Organizational and Personal Conflict of Interest Rules

Purpose of Rule: In 2010, acting on the mandate of section 207 of the Weapons Systems Acquisition Reform Act (WSARA), DoD issued new regulations relating to OCIs in MDAPs. DoD’s proposal, however, extended beyond that mandate and would have comprehensively revised the OCI regulations applicable to all DoD

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14 See letter from Section Chair-Elect Stuart B. Nibley to Ms. Annette Gray, DAR Secretariat, dated December 30, 2013.
procurements (subject to limited exceptions). Before DoD finalized its rulemaking, the FAR Council opened a FAR rulemaking intended to substantially revise the government-wide OCI rules in FAR Subpart 9.5. In light of the FAR rulemaking, DoD ultimately decided to limit the scope of its final rule. The FAR Council, however, still has not issued an interim or final rule to revise the applicable government-wide FAR rules.

**Issues:** It is important for the FAR and DAR Councils to clarify the OCI rules. The April 2011 proposed FAR rule suggested that the FAR Council was prepared to revise the rules substantially in a way that would provide clarity to the standards that agencies would apply and the processes that they would follow. Among other significant proposed changes, the new rule would remove the rules governing contractor access to non-public information from Part 9 and create new regulations integrated into the Part 4 regulations relating to safeguarding information. Yet almost three years after the DAR Council deferred to the FAR Council and the FAR Council issued its proposal, it still has not promulgated new rules. The uncertainty inherent in the current environment, in which the standards must be gleaned from bid protest litigation, is problematic.

Contracting Officers often struggle to apply the general standards in FAR Subpart 9.5 as interpreted through the GAO and COFC decisions. The ambiguous standards and inconsistent applications of the FAR rules can adversely affect the operations of contractors and can hinder corporate transactions within the defense industrial base, even forcing companies to divest businesses deemed to pose potential OCI risk. Although the proposed rule signaled an intention on the part of the Councils to provide greater flexibility in handling at least certain types of OCIs, the current inaction undermines that intention because risk averse Contracting Officers may default to an approach that is less flexible and more prone to exclude contractors and subcontractors that might be eligible to meet the Government’s needs under the proposed rule.

The Section recommends that DoD should exert its influence on the FAR Council to hasten the Subpart 9.5 revisions. In addition, for DoD’s use in any future rulemaking relating to personal conflicts of interest (PCIs), the Section notes that the existing FAR Subpart 3.11 rules could be improved in the following ways:

- Further amplification of the definition of “personal conflict of interest” by clarifying the situations that create a PCI by impairing the contractor

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16 DFARS Case 2009-D015, Proposed Rule, “Organizational Conflicts of Interest in Major Defense Acquisition Programs,” 75 Fed. Reg. 20,954 (Apr. 22, 2010). In the commentary accompanying the proposed rule, DoD stated that DoD agencies would utilize the DoD regulations, once effective, in lieu of FAR Subpart 9.5 until the FAR regulations are revised.


18 The PCI rules were codified in FAR Part 3, but would be better suited in another part of the FAR, such as Part 4, Administrative Matters, or Part 37, Service Contracting.
employee’s ability to act impartially. For instance, the rule would be improved by identifying the types of relationships, including business and familial relationships, that give rise to PCIs.

- The Section recommends revising FAR 52.203-16 to allow contractors and subcontractors, under the appropriate circumstances, to obtain certifications from covered employees rather than requesting, analyzing, and maintaining potentially voluminous financial disclosures from the covered employees.

- FAR 52.203-16 requires contractors to obtain a nondisclosure agreement from covered employees preventing disclosure of “non-public information” obtained in performing the contract and precluding the use of such information for personal gain. The rule defines “non-public information” as information that is exempt from disclosure under the Freedom of Information Act (FOIA) and has not been made available to the public. This standard may be difficult to apply in practice, as Contractor employees are often not in a position to analyze whether information is FOIA-exempt or whether it has been disclosed to the public. We recommend that DoD, through the FAR Council, should seek to provide more definitive and practical guidelines for identifying the type of information that is subject to the rule. One approach would be to limit the definition of “non-public information” to information identified as non-public by the Government. We submit that if DoD and civilian agencies anticipate contractors and their employees identifying such information, federal agencies should be able to identify the relevant information, and in fact, appear to be better positioned to do so.

E. DFARS Case 2009-D038 Contractor Business Systems Rule

**Purpose of Rule:** The contractor business systems rule (DFARS 242.7000 et seq.) implements § 806 of the FY 2011 NDAA and requires the evaluation of offerors’ supply chain risks on information technology purchases relating to national security systems, and enables agencies to exclude sources that are identified as having a supply chain risk.

**Issues:** The Section submitted comments on the proposed business systems rule.19 Following finalization of the rule, we note the following lingering issues:

- The lack of specific guidance on what constitutes an acceptable or compliant business system has caused difficulty, and the rule would be improved by additional clarification. The rule also expands the scope of “significant deficiency” by applying a broad definition – “a shortcoming in the system that materially affects the ability of officials of the Department of Defense to

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rely upon information produced by the system that is needed for management purposes” – but does not clarify the term “materially” in the context of whether a contractor’s business systems are likely to prevent unallowable or unreasonable costs from being charged to government contracts.

- DCAA and DCMA have performed only a limited number of business systems specific audits. DCMA does not appear to be waiting for DCAA audits to be performed and has directed ACOs to evaluate business systems based on available information (rather than performing system-wide audits). We are concerned that DCMA may be using the contractor business systems rule as a tool to address contract-specific problems in which previous discrete audit findings have formed the basis for contractor withholds.

- We observe that DCAA and DCMA have struggled to implement a consistent and structured business systems audit approach supported by formal audit guidance and work plans. Anecdotal evidence suggests that systems have been found to be deficient based upon a low number of representative transactions, which has raised concerns over audit accuracy and fairness.

- After withholds are applied, contractors are having difficulty getting withholds lifted because the Government has had difficulty performing audits in a timely manner.

- The rule would be improved by striking a balance between reasonable assurance and absolute assurance. The purpose of internal controls, if designed and operating effectively, is to provide reasonable assurance that control objectives are achieved. We submit that absolute assurance may not be practical or consistent with the goals of internal controls or previous compliance standards.

- Compliance with the business systems rule appears to have had the effect of requiring contractors to increase resources thereby increasing their overall cost of compliance. By performing more detailed testing, and requiring contractors to perform system demonstrations, walkthroughs, and monitoring activities, contractors’ cost of compliance may have increased dramatically.

F. Other than Cost and Pricing Data Requirements

**Purpose of Rule:** The Truth in Negotiations Act (TINA) establishes a level playing field during price negotiations between the Government and its contractors by requiring that in specific limited circumstances, contractors and subcontractors must provide cost or pricing data. It further provides that in other circumstances, the Contracting Officer
may require submission of other than certified cost or pricing data “to the extent necessary to determine the reasonableness of the price….“ 10 U.S.C § 2306a(d). We focus on the regulatory provisions addressing submission of other than cost and pricing data.

**Issues:** As an overall matter, application of the FAR 15.403 TINA exemptions is inconsistent:

- Contractors have reported numerous instances in which Contracting Officers and their delegates require submission of certified cost or pricing data despite the prohibition in FAR 15.403-1. These examples include requesting or demanding submission of certified cost or pricing data when a contractor has asserted an item is defined as a commercial item, when the procurement is beneath the TINA threshold, or when the procurement has achieved adequate price competition. While the procuring agency may have a legitimate purpose (protection from overpayment, better information for negotiation, etc.), these purposes are beyond the statute.

- Contractors have reported instances where the claimed exemption from TINA, which invokes the FAR 15.403-1 prohibition, is itself challenged, including:
  - Disputing the basis for a company’s commercial item assertion when the Government previously has agreed that the item is a commercial item;
  - Determining that adequate competition does not exist when, despite a low number of respondents, the responsive party(ies) clearly responded in the full expectation of competition;
  - Competitive down-select at an early stage to engage in unilateral negotiations with multiple parties for the purpose of a strong negotiating position when a competitive price has been offered.

Not recognizing or adhering to the enumerated TINA exemptions may result in higher prices as well as increased administrative burden for both the Government and contractor in procurements where the contractor could justify its decision not to submit certified cost or pricing data. Additionally, this lack of consistency leads to confusion, could negatively affect the ability to timely complete negotiations and execute a contract, and may increase animosity between the parties.

- We recommend that clarification of FAR 15.402 and 15.403 may help generate greater compliance with the rules as well as greater consistency in application. For example, we suggest that additional guidance and clarity regarding 1) the basis for determining whether items and services meet the commercial item/service definitions, 2) when adequate price competition exists and 2) the
time frame for making determinations regarding exemptions to TINA’s requirement for submission of cost or pricing data, could streamline the process.

G. DFARS Case 2013-D007 Anti-Trafficking

**Purpose of Rule:** Executive Order 13627 and Title XVII of the NDAA for FY 2013 are intended to strengthen protections against trafficking in persons in federal contracts. A proposed FAR provision has been issued (FAR Case 2013-001), along with DFARS “supplementary actions to help eradicate trafficking in its own supply chain.”

**Issues:** Both the FAR and DFARS provisions are still in the rulemaking process, with numerous comments under consideration. The DFARS provisions are narrowly tailored to ensuring that employees of DoD contractors are aware of their labor rights and have a means of reporting violations of such rights. As part of its role in crafting the FAR provisions, it would be helpful for DoD to pursue the following changes for the FAR provisions:

- Additional guidance for contractors in the development of their compliance plans. The proposed regulation’s requirement for a plan “appropriate to the size and complexity of the contract and to the nature and scope of the activities performed” is flexible but does not provide much guidance to contractors or to Contracting Officers. The inclusion of guidance in the final rule, which is preferable, or, alternatively, in the “Discussion and Analysis” that accompanies the final rule would aid in the implementation of the rule.

- The trafficking rule is an example of a rule with ambiguities that could adversely affect its implementation and, at the same time, may prove unduly burdensome to contractors and subcontractors. For example, it is unclear how far down a contractor’s supply chain the rule applies. The rule provides that the compliance plan should include “[p]rocedures to prevent agents and subcontractors at any tier and at any dollar value from engaging in trafficking . . . and to monitor, detect, and terminate any agents, subcontracts, or subcontractor employees that have engaged in such activities.” The contractor, upon contract award and at least annually, must certify compliance with these requirements and, based on due diligence, certify “neither it nor any of its agents, subcontractors, or their agents is engaged in any such activities.” These requirements are broad and could be interpreted to apply across a large company’s entire supply chain. Moreover, commercial suppliers of goods and services may refuse to establish compliance programs or refuse to certify as there is no comparable requirement for their commercial contracts. The Section advocates a risk-based approach to limit the compliance burden on subcontractors to areas where risk exists.

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The rule is unclear on its application to commercial items. The proposed rule would amend FAR 12.301 to add a requirement for inserting the certification regarding the Trafficking In Persons Compliance Plan in all solicitations prescribed in FAR 22.1705(b), including those for commercial items and for commercial off-the-shelf items (COTS). There are additional provisions relating to commercial items for work to be performed outside the United States in excess of $500,000 but from which COTS items are exempt. While we recognize and share the Government’s zero tolerance policies, blanket application of these requirements, particularly the certification requirements, to all commercial items as well as COTS items domestically, may lead commercial item contractors to forego the federal marketplace.

The “full cooperation” requirement should neither infringe individual rights against self-incrimination nor impede a contractor’s ability to conduct internal investigations. The rule’s discussion of “full cooperation” should expressly consider the need to protect individual rights, as well as the company’s ability to conduct a thorough investigation; the rule would benefit from guidance that recognizes that cooperation cannot violate individual rights.

H. DFARS Subparts 225.1, 225.2, 225.2, 225.7 and 225-11, Buy American, Trade Agreements, Domestic and Prohibited Sourcing Requirements

Purpose of Rule. DFARS Part 225 and its implementing clauses address compliance with a number of statutes that implement the Buy American Act, Trade Agreements Act and numerous statutes that require use of domestic sources or prohibit acquiring goods and services from certain sources.

Issues: The regulatory scheme in this area is quite complex and has led to confusion in the interpretation by contractors and the Government alike. Because these requirements may affect subcontracts at various tiers, the possibility of confusion becomes even more challenging, particularly when the requirements are applied to small business concerns and commercial entities that do not have the same level of expertise in managing acquisition regulations as larger companies.

The specialty metals provision has proved particularly challenging. 10 U.S.C. § 2533b requires the use of specialty metals melted or produced in the United States in the items or components for DoD aircraft, missile or space systems, ships, tank or automotive items, weapon systems and ammunition, to be melted or produced in the U.S., unless an exception applies. The rule as issued has been subject to numerous revisions since its initial issuance. In addition, numerous deviations and memoranda issued to address evolving requirements and potential workarounds have led to the imposition of potentially confusing and divergent requirements on contractors and subcontractors depending on the
The provision included in their contracts as well as the variety of specific requirements imposed on the funding used in the relevant procurement.

- Buy American and Trade Agreements requirements also pose challenges, particularly insofar as they affect subcontracts. The regulations and clauses do not address subcontracts, and for the most part these requirements do not directly apply to subcontracts, but concerns regarding potential False Claims Act liability are driving increased compliance concerns. Contractors are often expected to include domestic preference clauses in subcontracts, and these provisions are sometimes interpreted as prohibiting the sourcing of goods and sources from foreign sources in ways that may not be consistent with the statutes.

- DoD’s implementation of Section 1211 of the NDAA for FY 2006 (Pub. L. No. 109-163) has also created confusion. Section 1211 prohibits DoD from acquiring goods or services, through a contract or a subcontract with a Communist Chinese military company, if the goods or services being acquired are on the munitions list of the International Trafficking in Arms Regulations (the United States Munitions List at 22 CFR Part 121). Because of a subtle change in the language used in the DFARS versus the underlying statute, the clause as written applies not only to a Communist Chinese military company, but also to any entity that is part of the commercial or defense industrial base of the People’s Republic of China. As implemented, DFARS 252.225-7007 Prohibition On Acquisition of United States Munitions List Items From Communist Chinese Military Companies extends the prohibition and is broader than the statutory requirement.

- Other domestic sourcing and prohibited sourcing requirements are unclear as to when and whether they apply to subcontracts. Some clauses have express mandatory flow down language, and others prohibit the delivery of items without specifying whether the provision applies to subcontracts.

IV. Conclusion

The Section appreciates the opportunity to provide these comments on the proposed rule. The Section is available to provide additional information and assistance as you may require.
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April 29, 2014
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Sincerely,

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