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General Services Administration
Regulatory Secretariat Division (MVCB)
Attn: Ms. Hada Flowers
1800 F Street, NW, 2nd Floor
Washington, D.C. 20405-0001

Re: FAR Case 2015-012; Federal Acquisition Regulation: Contractor Employee Internal Confidentiality Agreements, 81 Fed. Reg. 3763 (January 22, 2016)

Dear Ms. Flowers:

On behalf of the American Bar Association (“ABA”) Section of Public Contract Law (“Section”), I am submitting comments on the proposed rule cited above.1 The Section consists of attorneys and associated professionals in private practice, industry, and government service. The Section’s governing Council and substantive committees include 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.

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

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1 Mary Ellen Coster Williams, Section Delegate to the ABA House of Delegates, and Heather K. Weiner, member 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 at http://www.americanbar.org/groups/public_contract_law/resources/prior_section_comments.html under the topic “Acquisition Reform and Emerging Issues.”
I. INTRODUCTION

The amendments to the Federal Acquisition Regulation (“FAR”) proposed in FAR Case 2015-012 are intended to implement section 743 of Division E, Title VII, of the 2015 Consolidated and Further Continuing Appropriations Act, Pub. L. No. 113-235. Section 743(a) provides, in pertinent part, that:

None of the funds appropriated or otherwise made available by this or any other Act may be available for a contract, grant, or cooperative agreement with an entity that requires employees or contractors of such entity seeking to report fraud, waste, or abuse to sign internal confidentiality agreements or statements prohibiting or otherwise restricting such employees or contractors from lawfully reporting such waste, fraud, or abuse to a designated investigative or law enforcement representative of a Federal department or agency authorized to receive such information.

Section 743(b), however, provides that “[t]he limitation in subsection (a) shall not contravene requirements applicable to [various forms] issued by a Federal department or agency governing the nondisclosure of classified information.”

As part of implementing Section 743’s requirements, the proposed rule would require any offeror to represent compliance with the statutory prohibition:

[The offeror shall] represent that it does not require employees or subcontractors of such entity seeking to report waste, fraud, or abuse to sign internal confidentiality agreements or statements prohibiting or otherwise restricting such employees or subcontractors from lawfully reporting such waste, fraud, or abuse to a designated investigative or law enforcement representative of a Federal department or agency authorized to receive such information.

The proposed rule also would establish (1) a procurement clause requiring an offeror to certify that it does not require the signing of such agreements by its employees or subcontractors, and (2) a contract clause that expressly prohibits such agreements and directs that “the Contractor shall notify employees that the prohibitions and restrictions of any internal confidentiality agreements covered by this clause are no longer in effect.” The proposed rule would apply to all offerors and contractors, including those that sell commercial items.

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3 The Civilian Agency Acquisition Council issued an interim FAR Deviation to implement the requirements of Section 743. CAAC Letter 2015-002 (February 27, 2015). The Defense Acquisition Council also issued a DFARS Deviation to implement the requirements of Section 743 for the Department of Defense. DAC Letter 2015-O0010 (February 5, 2015), amended by DAC Letter 2016-O0003 (October 29, 2015).
4 81 Fed. Reg. at 3765-66 (proposed FAR 3.909-2(a)).
5 Id. at 3766-67 (proposed new clauses FAR 52.203-XX and FAR 52.203-YY and amendments to FAR 52.212-3 and FAR 52.212-5).
6 Id. at 3764.
It is not uncommon for companies to request that their personnel enter into proprietary information exchange agreements to ensure that the company’s privileged, confidential, proprietary and trade secret information is protected appropriately. A number of laws and regulations exist to expressly provide for the protection of such company information through the use of confidentiality or other agreements. The number of laws and regulations exist to expressly provide for the protection of such company information through the use of confidentiality or other agreements. In addition, certain laws and regulations provide for the reporting of waste, fraud and abuse.

The Section recognizes the need to align the Government’s interest in ensuring appropriate disclosure of waste, fraud and abuse in federal procurements with a private company’s interest in protecting privileged, confidential, proprietary, and trade secret information from inappropriate disclosure.

The Section endorses the sentiment in the proposed rule that a contractor should not place contractual or other restrictions on an employee or subcontractor’s ability to report fraud, waste and abuse to the Government. To accomplish this objective, the Section recommends improvements to the rule. Specifically, the Section recommends that the FAR Council revise the proposed rule to define key terms and to further clarify and refine when and how to apply the proposed rule.

II. COMMENTS

A. The Section Recommends Defining Key Terms.

The Section recommends that the FAR Council define key terms in the proposed rule. The proposed rule would require an offeror to make in its proposal a broad representation that the offeror does not require employees or subcontractors of such entity seeking to report fraud, waste or abuse to sign or comply with internal confidentiality agreements or statements prohibiting or otherwise restricting such employees or subcontractors from lawfully reporting such waste, fraud or abuse to a designated investigative or law enforcement representative of a Federal department or agency authorized to receive such information. The Section suggests definitions that would provide clarity and avoid overly broad coverage that could have a detrimental impact on the ability of contractors to formulate and protect proprietary technology or to engage non-traditional contractors as subcontractors.

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8 See, e.g., 48 CFR 52.203-13 SEC 21F-17 (prohibiting actions that would “impede an individual from communicating directly with the Commission staff about a possible securities law violation including enforcing, or threatening to enforce, a confidentiality agreement (other than [certain agreements relating to the protection of privileged communications]).”). In a recent matter involving Security & Exchange Commission (“SEC”) allegations that KBR Inc. violated this rule, KBR entered into a cease and desist order with the SEC that required the payment of a civil penalty and further provided that KBR would modify its confidentiality agreements to include language approved by the SEC.

9 81 Fed. Reg. at 3766-67 (proposed FAR 52.204-8 and 52.212-3).
1. **“Entity”**

   The proposed rule applies to the “entity” to which the Government funds a contract as well as the “employees” or “subcontractors” of such entity.\(^{10}\) The proposed rule does not define “entity.” Further, in some places the proposed rule refers to “contractor” or “offeror” in a manner that appears to be intended to mean the “entity.”\(^{11}\) Because the proposed rule would be created as an addition to FAR Part 3, the Section recommends revising the term “entity” to read “Prime Contractor” or “Offeror,” and adding a cross-reference to the definition of “Prime Contractor” contained in FAR 3.502-1, Definitions (under Subcontractor Kickbacks) and “Offeror” contained in FAR 2.101. Under these provisions, a “Prime Contractor” means “a person who has entered into a prime contract with the United States” and an “Offeror” means an “offeror or bidder.”

2. **“Employees” and “Subcontractors”**

   The Section recommends defining the key terms “employees,” “contractors,” and “subcontractors.” Consistent with the placement of the proposed rule in FAR Part 3, the Section suggests that the term “employees” be defined to mean “any officer, partner, employee, or agent of a prime contractor.” This definition aligns with the current FAR definition of the term “Prime Contractor employee,” found at FAR 3.502-1, Definitions (under Subcontractor Kickbacks). The Section submits that this definition would clarify that the term encompasses only current employees, reducing the burden of determining who would be covered for purposes of implementing the rule.

   The Section also recommends that the proposed rule include a definition of “subcontractors” that makes clear that its coverage is limited to current subcontractors that have fully executed subcontracts under which work is currently being performed directly in support of a government prime contract. This definition would exclude coverage for confidentiality agreements with entities that are merely potential subcontractors or an entity’s vendors or suppliers that are not involved in performance of a government contract. By defining certain key terms in the proposed rule, the Section believes that the Government will reduce some of the significant burdens to implement the proposed rule.

3. **“Internal Confidentiality Agreements or Statements”**

   The Section further recommends that the rule include a definition of the key term “internal confidentiality agreement or statement.” For the reasons noted below, the Section submits that the term poses a number of potential ambiguities that could lead to difficulty in implementation and enforcement if not addressed.

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\(^{10}\) *Id.* at 3765.

\(^{11}\) *See, e.g., id.* at 3765 (Part 3 at 3).
i. Intent of the Word “Internal”

The proposed rule requires a contractor or offeror to represent it has not required employees or subcontractors to sign “internal confidentiality agreements or statements.” The word “internal” in the context of a confidentiality agreement or statement typically is used to describe how an organization can use confidential information, such as a restriction on information allowed to be used for only internal purposes. When the word “internal” modifies the term “confidentiality agreement” or “confidential statement,” it implies an agreement or statement that is, for example, between a contractor and its employees. An internal confidentiality agreement or statement therefore generally would not apply to a subcontractor, which would be an external agreement or statement.

The Section therefore recommends clarifying what is meant by an “internal confidentiality agreement or statement” by adding simply adding the words “between the entity and its employees.”

ii. Scope of the Confidentiality Agreement or Statement

As drafted, the proposed regulation would require an offeror to represent that it “does not require employees or subcontractors of such entity seeking to report waste, fraud, or abuse to sign internal confidentiality agreements or statements prohibiting or otherwise restricting such employees or subcontractors from lawfully reporting such waste, fraud, or abuse to a designated investigative or law enforcement representative of a Federal department or agency authorized to receive such information.” It is unclear how the proposed rule is intended to apply to agreements between the offeror and its proposed subcontractors. The Section requests that the final rule be revised to clarify the obligations imposed on an offeror with regard to proposed subcontractors as follows:

(1) does not require employees of such entity seeking to report waste, fraud, or abuse to sign internal confidentiality agreements or statements prohibiting or otherwise restricting such employees from lawfully reporting such waste, fraud, or abuse to a designated investigative or law enforcement representative of a Federal department or agency authorized to receive such information and (2) upon award will flow this obligation to its proposed subcontractors that are not exempt from this regulation.

The Section therefore recommends that the proposed rule be revised to clarify what constitutes a confidentiality agreement or statement for purposes of the proposed rule. Including examples of or guidance about confidentiality agreements or statements would help contractors comply with the proposed rule and to flow down the requirements to their subcontractors.

12 Id. at 3765-66 (proposed FAR 3.909-2 and FAR 52.203-XX).
4. “Designated Investigative or Law Enforcement Representative of a Federal Department or Agency Authorized to Receive Such Information”

The purpose of the proposed rule is to ensure that contractors do not create barriers to their employees’ and subcontractors’ ability to report fraud, waste or abuse to “a designated investigative or law enforcement representative of a Federal department or agency authorized to receive such information.”13 Given that there are myriad laws, rules and regulations that potentially provide vehicles for reporting, the proposed language lacks a precise identification of the designated representative for reporting purposes. The phrase likewise uses certain terms that may be subject to different meanings based on the context, including “designated” and “authorized.” To provide meaningful protection for an employee or subcontractor wishing to report fraud, waste, or abuse, the Section recommends clarifying the scope of the employees’ and subcontractors’ reporting rights.

The Section submits that clarifying that reporting refers to the appropriate executive branch agency office or entity under which a particular report of waste, fraud or abuse relates would provide at least minimal protection to an employee who wished to report. It also would help to avoid creating a situation that could cause confusion or otherwise lead to inefficiencies, such as where the report is inadvertently made to the wrong agency, or to entities that have no responsibility for the procurement matter.

B. The Section Recommends That the Proposed Rule Be Revised to Exclude Contracts for Commercial Items, Including Commercially Available Off-The-Shelf Items.

The proposed rule is inconsistent with the Federal Acquisition Streamlining Act of 1994 (“FASA”), which created a preference for commercial items and also provided that, to the extent consistent with federal law and the Government’s needs, the Government should purchase commercial items under terms more closely resembling those found in the commercial marketplace. An underlying premise of FASA is that the shift to commercial-item procurements would allow the Government to reduce barriers to entry and to realize significant cost savings by eliminating some of the more cumbersome and expensive contract requirements that contractors often face when doing business with the Government. While the Section recognizes that there are circumstances in which commercial terms are not acceptable to the Government, this proposed rule would interfere with customary commercial practices and, as described more fully below, the proposed rule would increase contractors’ costs and risks, which may be passed on to the Government. Indeed, the proposed rule may deter certain valued commercial vendors from participating in Government procurements.

The preamble to the proposed rule states the FAR Council’s basis for applying the proposed rule to contracts for commercial items:

13 Id. at 3765.
In making the initial determination to prohibit restrictions on the ability of employees and subcontractors to report waste, fraud, or abuse to appropriate Government authorities, it is not in the best interest of the Federal Government to waive the applicability of section 743 to contracts and subcontracts in amounts not greater than the simplified acquisition threshold, or for the acquisition of commercial items (including commercially available off-the-shelf items), since it would exclude a significant number of acquisitions and thereby further limit the number of contractor and subcontractor employees affected by section 743.

The FAR Council considered the following factors: (1) The benefits of the policy in furthering Administration goals, (2) the extent to which the benefits of the policy would be reduced if an exemption is provided for acquisitions in amounts not greater than the simplified acquisition threshold, or for the acquisition of commercial items (including commercially available off the-shelf items), and (3) the burden on contractors if the policy is applied to acquisitions in amounts not greater than the simplified acquisition threshold, or for the acquisition of commercial items (including commercially available off the-shelf items).

The Section believes that the analysis is misplaced under the three stated factors. For the first factor, the FAR Council states: “[T]he Administration is committed to implementing policy that ensures reducing waste, fraud, or abuse in all Federal acquisitions is achieved. This proposed rule makes certain that there are no restrictions that prevent contractors and subcontractors from reporting these types of situations to a designated Government representative.”

The Section does not question the value of eliminating barriers to the reporting of waste, fraud, and abuse; however, nothing in the statute indicates that commercial items or purchases below the simplified acquisition threshold are a significant source of this type of waste, fraud, or abuse such that there would be great benefit to the Government in extending its application to these procurements. The proposed rule further states, for the second factor, that “the FAR Council believes [the impact of excluding acquisitions] may inhibit contractor employees and subcontractors subject to such internal confidentiality agreements from reporting of waste, fraud, or abuse such that there would be great benefit to the Government in extending its application to these procurements.”

Finally, according to the preamble’s justification for inclusion of commercial item contracts within its coverage it provides that: “[T]his proposed rule imposes a minimal burden on offerors and contractors, requiring only that offerors represent by submission of the offer that they do not require certain internal confidentiality agreements, and contractors must notify employees that the prohibition and restrictions of any internal confidentiality agreements covered

14 Id. at 3764.
15 Id.
16 Id.
by the clause are no longer in effect. This proposed rule does not contain any information
collection requirements. This conclusion does not acknowledge the due diligence and effort
necessary before a contractor can truthfully and accurately represent and certify compliance with
these new requirements, as a result overlooking the significant effort and expense to accurately
track, trace, and represent the status of its confidentiality agreements. This requirement is the
type of Government unique requirement that FASA was intended to address. Imposition of this
burden is inconsistent with commercial practices. In addition, to meet the intent of the rule,
contractors will be required to review current internal confidentiality agreements, identify
provisions, if any, that conflict with the regulatory requirement and modify or enter into new
internal confidentiality agreements to the extent necessary to ensure compliance to the new rule.
Absent data collection regarding the terms that routinely are included in internal confidentiality
agreements used by commercial item contractors, it appears to be premature to conclude that this
rulemaking will impose minimal burdens on offerors and contractors as discussed further below,

Accordingly, the Section recommends that commercial items, including commercially
available off-the-shelf items, and purchases below the simplified acquisition threshold be
excluded from the proposed rule. At a minimum, prime contractors should not be required to
flow down the clause to commercial item subcontractors at any tier as is currently proposed.18

C. Implementation Burden Concerns

The Section believes the proposed rule poses a significant and overlooked implementation
burden for entities doing business with the Federal government. Presently, no requirement
obligates contractors to maintain their confidentiality agreements and statements with employees
and subcontractors at all or in a uniform manner, let alone to store them in a central, searchable
repository. Depending on the industry, contractors may execute freestanding confidentiality
agreements, provide statements, or otherwise incorporate terms governing the disclosure of
information into other agreements. Most companies will have some combination of these
approaches. Tracking and tracing those could be quite onerous.

In any case, many companies likely lack a system that would permit the prompt
identification of confidentiality terms necessary to make the representation required by the
proposed rule. An offeror/contractor would have to review each agreement or statement to
determine whether it would be covered and compliant. The offeror/contractor would need to
assign resources to locate, trace, and amend those agreements and statements and notify the
persons or entities affected before it could be in a position to make the representation required
under the proposed rule. All offerors/contractors likely would also require considerable legal
advice to comply, particularly because the consequence of a mistake would be ineligibility for
award and/or non-payment for violation of a requirement of an appropriation restriction. Worse,
an error could give rise to false claims accusations.

16 Id.
18 Id. at 3766.
D. The Section Recommends Clarifying the Proposed Rule’s Representation and Notice Requirements.

1. Time Frame and Scope of Representation

The proposed rule would preclude the Government from using certain appropriated funds for a contract with an entity that requires its employees or subcontractors to sign confidentiality agreements that would “prohibit[] or otherwise restrict such employees or subcontractors from lawfully reporting . . . waste, fraud, or abuse to a designated investigative or law enforcement representative of a Federal department or agency authorized to receive such information.” The representation proposed for FAR 3.909-2 requires an offeror to represent that “it does not” require its employees and subcontractors to enter into such confidentiality agreements.

The Section recommends that the representation be revised to provide for prospective applicability. The alternative approach, a retrospective representation, would require offerors to locate and review all of its employee and subcontract agreements (among others, depending on the final definition of an internal confidentiality agreement) to identify which of those remain in effect and confirm that no agreement still in effect contains the kind of confidentiality agreement that would be prohibited. For entities that have been in business for many years, this review could be a time-consuming and costly task that would involve examining current and archived files in multiple locations. In addition, entities could have subcontractors that are successors-in-interest to predecessor entities with different names, limiting the effectiveness of keyword searches for relevant agreements.

The Section also submits that the rule as currently proposed could be construed in a manner broader than the stated policy for the proposed rule, for example, by applying to business activities that are unrelated to federal contracting. Because the proposed rule is designed to implement a policy to reduce waste, fraud, and abuse “in all federal acquisitions,” the Section recommends that the proposed rule be amended to clarify that it addresses only those agreements or statements involving the employees or contractors directly performing work on federal contracts. Such a change would prevent the proposed rule from being construed to cover agreements or statements unrelated to the direct performance of a federal contract.

Accordingly, the Section recommends clarifying the representation’s scope to state more precisely what timeframe and business activities are covered by the representation. Because current or potential contractors have not previously been subject to any collection and review requirements regarding confidentiality agreements, the Section further recommends that the rule be revised to require offerors to represent that they have no such agreements in place with regard to current employees and current subcontracts used for performance of government contracts and it agrees that it will not enter into any new confidentiality agreements or statements that include prohibited limitations on reporting. The Section believes these changes would make compliance with the proposed rule less difficult and expensive.

19 Id. at 3765.
20 Id. at 3764.
2. Notice Requirements

The proposed rule would create a new provision, FAR 52.203-YY, Prohibition on Contracting with Entities that Require Certain Internal Confidentiality Agreements. Subsection (b) of that new provision states: “The Contractor shall notify employees that the prohibitions and restrictions of any internal confidentiality agreement covered by this clause are no longer in effect.” The preamble to the rule states that “[t]his notice could be accomplished through normal business communication channels, such as email.”21 The Section suggests that the preamble be amended to validate more flexible forms of notification that could be selected by the contractor/offeror. Notification by email may be useful; however, there are alternative means that a contractor should be permitted to use in the manner of its choosing for the notification of its personnel. For example, a contractor may choose, in the spirit of consistency in its compliance practices, to provide this notification in the same manner that it informs its personnel and subcontractors of any other changes to its compliance policies, such as through the use of company compliance training and materials.

E. The Section Recommends That the Final Rule Include Protections of Agency Controlled But Unclassified Information, And Contractor Agreements to Implement Agency Requirements.

The Section appreciates the proposed rule’s clarity in specifying that it does not contravene the requirements governing the protection and handling of classified information, The Section believes, however, that the proposed rule should also address the interplay with procedures for handling controlled unclassified information (“CUI”), including other information protection agreements the contractor enters into with employees or subcontractors because they are mandated by the agency. When an agency has included contract requirements that restrict the sharing of information outside the agency, an employee or subcontractor who wishes to report waste, fraud, or abuse should still be responsible for the proper protection and handling of such matters. If an agency has identified an appropriate point of contact for reporting violations or concerns, the Section recommends that the Government require contractor employees and subcontractors to honor those restrictions by revising the proposed rule to specify that it does not contravene the procedures established for handling such CUI.

Additionally, certain agencies have statutory limitations or internal firewalls that may be undermined if a contractor’s employee or subcontractor is allowed to report the details of waste, fraud, or abuse without limitation. For example, if a contractor to a law-enforcement agency’s inspector general has been engaged to conduct a forensic audit on a department of that agency, a contractor’s employee or subcontractor reporting to personnel beyond the firewall or limitation could compromise that underlying investigation. Clarifying the definitions of key terms as discussed above will assist in minimizing the improper disclosure, but when an agency has a reason to limit the reporting of waste, fraud, or abuse to a limited chain of individuals, the Section recommends that the proposed rule be revised to respect those limits.

21 Id.

The Section recommends that prudent practice would be to provide definitive guidance in the proposed rule as to language that would comply with the requirements for notice. This approach would be in line with the SEC’s settlement with KBR. Such guidance would eliminate doubt about what a contractor needs to include to satisfy the FAR’s limited nonconfidentiality and notice mandate. Accordingly, the Section recommends revising the proposed rule to recognize that including the following clause in a confidentiality agreement would render a confidentiality statement or agreement with a contractor’s employee or subcontractor acceptable under the proposed rule:

Neither the confidentiality provision contained in this ________ [insert title of agreement, statement, policy], nor confidentiality provisions contained in any existing employment or contract with [insert name of contractor] shall be construed to prohibit or otherwise restrict you, as an employee or contractor of _____ [insert name of contractor] from lawfully reporting waste, fraud, or abuse to a designated investigative or law enforcement representative of a federal department or agency authorized to receive such information under the procurement.

The Section believes that recognizing this type of safe-harbor provision as acceptable would serve a dual purpose. First, safe-harbor language would provide a bright line that could be used by contractors to facilitate compliance while enabling them to adopt confidentiality provisions that address their interest in protecting attorney-client privilege, trade secrets, commercial or financial information, intellectual property rights, or proprietary data from unauthorized disclosure. Second, such acceptable language would minimize the risk of time-consuming and expensive disputes over whether a particular policy runs afoul of the proposed rule.

III. CONCLUSION

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

Sincerely,

David G. Ehrhart
Chair, Section of Public Contract Law

cc:
James A. Hughes
Aaron P. Silberman
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Council Members, Section of Public Contract Law
Chairs and Vice Chairs, Acquisition Reform & Emerging Issues Committee
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