Dear Ms. Haberlin:

On behalf of the Section of Public Contract Law of the American Bar Association (the "Section"), I am submitting comments on the above-referenced proposed rule concerning a new requirement for Central Registration. The Section consists of attorneys and associated professionals in private practice, industry, and Government service. The Section's governing council and substantive committees contain a balance of members representing these three segments, to ensure that all points of view are considered. In this manner, 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 American Bar Association's Board of Governors. The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association, and therefore, should not be construed as representing the policy of the American Bar Association.

The proposed rule would require contractor registration in a Defense Department Central Contractor Registration database prior to award of a contract, basic agreement, basic ordering agreement or blanket...
purchase agreement. The proposed rule requires contractors to register on a one-time basis and to "acknowledge" at the time that the information they submit is "current, accurate and complete." The proposed rule also would require contractors to confirm on an annual basis that their registration remains current, accurate and complete. The Section offers the following comments on the proposed rule.

First, while the Section does not support the implementation of any central contractor registration system, we are unclear why the proposed rule is being issued only by the Defense Acquisition Regulations Council and not jointly with the Civilian Agency Acquisition Council. The cited bases for the proposed rule, the President's Executive memorandum entitled "Streamlining Procurement through Electronic Commerce" and the Debt Collection Improvement Act of 1966, apply to all government departments and agencies. As a result, it would appear that the basic requirements addressed by the proposed rule need to be met by all government departments and agencies and not just the Department of Defense (DoD).

The proposed rule's stated objective of "presenting 'one DoD face to industry,' and thereby, eliminating duplicate requirements and processes" is very desirable from the perspective of vendors selling commercial items to the Government. Nevertheless, the proposed rule and stated objective fall short by providing for central contractor registration for DoD activities only and not covering the entire federal government so that one government face is presented to industry. For the most part, commercial item vendors do not have specialized sales forces that focus only on DoD opportunities, but rather, if they have a separate government sales force at all, their responsibilities include both defense and civilian agencies within a particular sales region. The proposed rule establishes a system whereby a commercial item contractor will be required to register and annually update registration information with DoD and, presumably, if the DAR council model is followed, with each separate federal agency. Such duplication of effort would be wasteful and inconsistent with streamlining efforts. While the Section does not agree that a central contractor registration system is necessary, it would seem to make sense that if such a system is to be implemented by DoD that it be made government-wide. Accordingly, the Section recommends that the proposed rule be either withdrawn in its entirety or reissued, consistent with our comments below, as a Federal Acquisition Regulation ("FAR") amendment.

Second, the Section is concerned with the "Registration Acknowledgment" requirement on page 2 of the proposed form which states: "I hereby acknowledge that the information provided is current, accurate, and complete as of the date of this submission." Section 4301 of the Clinger-Cohen Act of 1996. (Pub. L. 104-106) prohibited new requirements for certifications unless either specially imposed by statute or approved in writing by Administrator of the Office of Federal Procurement Policy. See FAR 1.107. The use of the term "acknowledge" rather than "certify" appears to be an inappropriate attempt to circumvent the statutory prohibition against new certification requirements in federal procurement. To our knowledge, this certification is neither required by statute nor approved in writing by the Administrator. Nor does there appear to be any material difference between the meaning of word "certify" as used in the Clinger-Cohen Act's prohibition and the meaning of the word "acknowledge" in the context of the proposed rule particularly when the proposed rule would make the contractor completely liable for the government's reliance on inaccurate or incomplete data. See DFARS 252.204-700X(c). The Section recommends that the DAR Council comply with the statutory prohibition and remove the above cited sentence.

Third, the Section is concerned with the requirement in the Proposed Rule that permits a prospective awardee to be denied a contract award for failure to register before award (see DFARS 204.7303(a)(2) and (b)) without any liability or responsibility on the part of the Government to timely process registrations (other than the unexplained statement that "initial registration in the CCR database may take up to 30 days..." see DFARS 252.204-700X(b)(4)). This would unfairly penalize commercial item vendors that only occasionally do business with DoD as well as penalize the Government by requiring it to accept a less desirable or higher priced commercial item. This is particularly true in those circumstances where FAR Parts 5 and 12 now allow fewer than 30 days response time for solicitations issued for commercial items. In those situations, the proposed rule could drastically reduce the possibility of new commercial item vendors being able to compete for DoD's business.

The Section recognizes that the proposed rule attempts to deal with this problem by allowing the contracting officer to delay award until a prospective awardee is registered in those circumstances where "the needs of the requiring activity allow for delay..." DFARS 204.7303(b)(1). Nevertheless, there are too
many circumstances where DoD's needs do not allow for delay and where the proposed rule would not serve the best interest of the Government, e.g., the end of the fiscal year, when contracting activities must award contracts or otherwise lose the appropriated funds. Based on the fact that a commercial item vendor should not be penalized for DoD's delay in processing a Central Contractor Registration form, the Section recommends that the proposed rule be amended so that award would be made to any contractor that has submitted a complete registration form and that all prospective awardees be given a reasonable amount of time in order to submit the registration form. The award decision should be based on submission of the form and not on the processing time required by the government.

Fourth, the Section notes that the proposed rule duplicates the requirement for submission of certain information contained in the mandatory provision for all commercial item contracts, FAR 52.2212-3, Offeror Representations and Certifications - Commercial Items, such as business type, business size, and taxpayer identification number. This duplication is unnecessary and could be resolved simply if the DAR Council would reissue the proposed rule in conjunction with civilian agencies as recommended above. Such action would allow the further simplification of FAR 52.212-3 by eliminating any overlapping information requirements.

Finally, the Section is concerned that the proposed rule places complete liability on the contractor for any use by the Government of any inaccurate or incomplete information. DFARS 252.204-700X(c). The cited subparagraph would make contractors liable for any use of the information by the Government without requiring any notice to the contractor as to how the Government intends to use the information. A more reasonable approach, fostered by the concept so often discussed in today’s environment by top Government procurement officials of making commercial item vendors “partners” in doing business with the Government, would be for the Government to specify its intended uses of the information and to give the contractor notice of those intended uses.

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

Sincerely,

Marcia G. Madsen
Chair
Section of Public Contract Law

cc: David A. Churchill
Rand L. Allen
Gregory A. Smith
Patricia A. Meagher
Marshall J. Doke, Jr.
John T. Kuelbs
Michael K. Love
Council Members
Chair and Vice Chair(s) of the Commercial Products and Services Committee
Alexander J. Brittin

Return to Regulatory Coordinating Committee Home Page