January 8, 2001

VIA ELECTRONIC MAIL & HAND DELIVERY

General Services Administration
FAR Secretariat (MVRS)
1800 F Street, N.W.
Room 4035
Washington, D.C. 20405

Attn: Ms. Laurie Duarte

Re:      FAR Case 1999-024
Proposed Rule: Preference for U.S.-Flag Vessels

Dear Ms. Duarte:

On behalf of the Section of Public Contract Law (the “Section”) of the American Bar Association (“ABA”), I am submitting comments on the above-referenced matter. 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. 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 ABA’s Board of Governors. The views expressed herein have not been approved by the House of Delegates of the Board of Governors of the American Bar Association and, therefore, should not be construed as representing the policy of the American Bar Association.[1]

As reflected in the above-referenced FAR Case, the Civilian Agency Acquisition Council and the Defense Acquisition Regulation Council (the “Councils”) propose to amend the Federal Acquisition Regulation (“FAR”) to mandate the use of U.S.-flag vessels in the transportation of supplies by sea in certain subcontracts for commercial items. For the reasons set forth herein, the Section opposes the proposed rule and urges that it be withdrawn because it is inconsistent with the Federal Acquisition Streamlining Act of 1994.

If the Councils elect not to withdraw the proposed rule, then the Section recommends that it be modified to (i) eliminate any disparate effect on dealers and prime contractors, (ii) reflect the actual scope of the underlying statute that pertains to shipment of non-Department of Defense (“DoD”) cargo, and (iii) require that prime contractors notify their affected subcontractors when the commercial items being provided by the subcontractor will be subject to the privately owned U.S.-flag vessel requirement.

A. The Proposed Rule Should Be Withdrawn Because It Is Inconsistent With FASA.

In Title VIII – Commercial Items, of the Federal Acquisition Streamlining Act of 1994 (“FASA”), Congress specifically stated that the Federal Acquisition Regulation (“FAR”) “shall include a list of provisions of law that are inapplicable to subcontracts under either a contract for the procurement of commercial items or a subcontract for the

procurement of commercial items.” FASA, Section 8003, Pub. L. No. 103-355 (now codified at 41 U.S.C. § 430(b)). FASA also clearly specified that all statutes that set forth policies, procedures, requirements, or restrictions for the procurement of property or services by the Federal Government “shall be included on the list of inapplicable provisions of law” unless:

1. The provision of law provides for criminal or civil penalties; or

2. The provision of law specifically refers to this provision of FASA and provides that in any event the provision of law shall be applicable; or

3. If (1) or (2) above are not applicable, the Federal Acquisition Regulatory Council makes a written determination that it would not be in the best interest of the Federal Government to exempt subcontracts under a contract for the procurement of commercial items from the applicability of the provision of law at issue.

41 U.S.C. §§ 430(b)(2), (c).

This statutory scheme makes it clear that all statutes, whether enacted prior to or after FASA, are required to be waived for commercial item procurements, including commercial item subcontracts, unless the particular statute is specifically excluded from that waiver based on one of the statutory exemptions set forth above.

The statutory requirements regarding use of U.S.-flag vessels in transporting Government supplies by the sea were promulgated well before enactment of FASA in 1994. When a subsequently enacted law is in direct conflict with prior law, the later law is deemed to have modified the earlier law. See Kremer v. Chemical Const. Corp., 456 U.S. 461, 468 (1981); Smith v. Robinson, 468 U.S. 992, 1024 (1984). Thus, FASA and its implementing regulations must be deemed to have partially modified the requirements of 10 U.S.C. § 2631 and 46 U.S. § 1241(b) to the extent that they are in direct conflict with FASA’s mandates. See, e.g., Bethlehem Steel Corp. v. U.S., 191 Ct. Cl. 141, 423 F.2d 300 (1970); 47 Comp. Gen. 457 (1968).

Moreover, none of the statutory exemptions for waiver provided for in FASA is applicable to the U.S.-flag vessel requirements of either 10 U.S.C. § 2631 or 46 U.S.C. § 1241(b):[2]

- Neither 10 U.S.C. § 2631 nor 46 U.S.C. § 1241(b) is included among the specifically enumerated statutes that are to remain unaffected by Title VIII of FASA. Nor do any of the general exclusions apply to preclude a waiver;

- The provisions of 10 U.S.C. § 2631 and 46 U.S.C. § 1241(b) do not provide for either criminal or civil penalties. They simply state a preference for U.S.-flag vessels in connection with the transportation by sea of Government supplies;

- The provisions of 10 U.S.C. § 2631 and 46 U.S.C. § 1241(b) predate the enactment of FASA and do not contain any provisions which otherwise specifically override the statutory waiver provisions in Title VIII of FASA; and

- To the Section’s knowledge, there has been no written determination by the Federal Acquisition Regulatory Council that it would not be in the best interest of the Federal Government to exempt commercial item subcontracts from the provisions of 10 U.S.C. § 2631 and 46 U.S.C. § 1241(b). Moreover, there does not appear to be a reasonable basis upon which to make such a determination.

Accordingly, the proposed changes to the FAR do not meet the requirements set forth in FASA for extending the application of 10 U.S.C. § 2631 and 46 U.S.C. § 1241(b) to commercial item subcontracts. Therefore, the proposed rule should be withdrawn.

B. The Proposed Rule Should Be Modified To Eliminate Any Disparate Effect On Dealers And Prime Contractors.
According to the proposed rule, subcontracts for the purchase of commercial items will not be exempt from the preference for the use of privately owned U.S.-flag vessels for ocean transportation if the prime contractor is not adding value to the “items it is reselling or distributing to the Government.” 65 Fed. Reg. 66921-922. Furthermore, in its planned FAR implementation, the proposed rule deletes from its current list of exceptions to the preference for U.S.-flag vessels “[c]ontracts awarded using the simplified acquisition procedures in Part 13.” Id. See FAR 47.504 (“the policy and procedures in this subpart do not apply to the following: . . . (d) Contracts awarded using the simplified acquisition procedures in Part 13.”).

The proposed rule would appear to have a disparate impact on prime contractors that are dealers (many of which are small businesses), as typically such prime contractors do not add value to the items that they are reselling. In addition, with the proposed elimination of the exception for purchases under FAR Part 13, it appears that all dealer supplies that are obtained from off-shore sources will have to comply with the preference for the use of privately owned U.S.-flag vessels, regardless of dollar value. This appears to be an unintended consequence of the proposed rule that should be corrected.

Further, in many circumstances, such as when supporting “just in time” inventories at Government activities, dealers and other prime contractors may choose to have their products sent directly to the end-user activity, rather than washing the products through their inventories, to meet an immediate Government need. The proposed rule does not appear to take into account the impact that the preference for the use of privately owned U.S.-flag vessels may have on prime contractors and dealers in such circumstances.

Accordingly, the Section recommends that, if the proposed rule is not withdrawn, the Councils modify the proposed rule to exempt prime contractor dealers. The Section also recommends that the Councils recognize that, in some limited circumstances, it is in the Government’s interest to have items shipped directly to an end user, rather than having it drop-shipped to the prime contractor. The proposed rule should be modified accordingly.

C. The Proposed Rule Should Be Modified To Reflect The Actual Scope Of The Underlying Statute.

In March 2000, the Acting Director of Defense Procurement issued a final rule that amended the DoD FAR Supplement (“DFARS”) and “clarified requirements for use of U.S. vessels under subcontract[s] for the acquisition of commercial items.” See 65 Fed. Reg. 14400. According to DoD, the final rule implemented the statutory requirement set forth in 10 U.S.C. § 2631, which establishes a preference for the use of privately owned U.S.-flag vessels for the ocean transportation of supplies purchased by DoD. Id. According to the statute:

Only vessels of the United States or belonging to the United States may be used in the transportation by sea of supplies bought for the Army, Navy, Air Force or Marine Corps. However, if the President finds that the freight charged by those vessels is excessive or otherwise unreasonable, contracts for transportation may be made as otherwise provided by law. 10 U.S.C. § 2631(a). Although the Section opposed this provision as written, it was included in the DFARS nonetheless. See Letter to Ms. Amy Williams (DAR Council) from Rand L. Allen (Chair, Section of Public Contract Law) (August 25, 1999).

Under the proposed rule, this preference for privately owned U.S.-flag vessels is being extended to the purchase of supplies by all Federal agencies. Yet the statute setting forth the U.S.-flag preference requirement for non-DoD cargo differs significantly from the applicable DoD statute. Indeed, unlike the DoD statute, the civilian agency statute (i) includes limits on the amount of cargo that must be shipped in privately owned U.S.-flag vessels, (ii) requires a determination and balancing of cargo shipped by geographic region, and (iii) establishes criteria that must be met for a ship to qualify as U.S.-flag vessel based on a number of factors that would not reasonably be known to commercial item suppliers:

Whenever the United States shall procure, contract for, or otherwise obtain for its own account, or shall furnish to or for the account of any foreign nation without provision for reimbursement, any equipment, materials, or commodities, within or without the United States, or shall advance funds or credits or guarantee the convertibility of foreign currencies in connection with the furnishing of such equipment, materials, or commodities, the appropriate agency or agencies shall take such steps as may be necessary and practicable to assure that at least 50 per centum of the gross tonnage of such equipment, materials, or commodities (computed separately for dry bulk carriers, dry cargo
liners, and tankers), which may be transported on ocean vessels shall be transported on privately owned United States-flag commercial vessels, to the extent such vessels are available at fair and reasonable rates for United States-flag commercial vessels, in such manner as will insure a fair and reasonable participation of United States-flag commercial vessels in such cargoes by geographic areas: . . . For purposes of this section, the term "privately owned United States-flag commercial vessels" shall not be deemed to include any vessel which, subsequent to September 21, 1961, shall have been either (a) built outside the United States, (b) rebuilt outside the United States, or (c) documented under any foreign registry, until such vessel shall have been documented under the laws of the United States for a period of three years: Provided, however, That the provisions of this amendment shall not apply where, (1) prior to September 21, 1961, the owner of a vessel, or contractor for the purchase of a vessel, originally constructed in the United States and rebuilt abroad or contracted to be rebuilt abroad, has notified the Maritime Administration in writing of its intent to document such vessel under United States registry, and such vessel is so documented on its first arrival at a United States port not later than one year subsequent to September 21, 1961, or (2) where prior to September 21, 1961, the owner of a vessel under United States registry has made a contract for the rebuilding abroad of such vessel and has notified the Maritime Administration of such contract, and such rebuilding is completed and such vessel is thereafter documented under United States registry on its first arrival at a United States port not later than one year subsequent to September 21, 1961.


The proposed rule does not accurately reflect the requirements for the carriage of cargo in privately owned U.S.-flag vessels as set forth in 46 U.S.C. § 1241. Nor, in the case of subcontracts for the purchase of commercial supplies, can either a prime contractor or subcontractor be expected to “take [the] steps as may be necessary and practicable to assure that at least 50 per centum of the gross tonnage” of the commercial supplies are being shipped in privately owned U.S.-flag vessels, that the rates for those vessels are fair and reasonable, and that the selection of the vessels will ensure the “fair and reasonable participation of United States-flag commercial vessels in such cargoes by geographic areas.” Id. Thus, in reality, the extension of the proposed rule to civilian agencies places an almost insurmountable burden on Government prime contractors and subcontractors to ensure that they meet all of the requirements of 46 U.S.C. § 1241(b)(1).

Accordingly, the Section recommends that the extension to non-DoD agencies of the preference for privately owned U.S.-flag vessels in commercial item subcontract procurements should either be withdrawn as impracticable or modified to include appropriate guidance on how to meet the actual requirements of the underlying statute.

D. The Proposed Rule Should Be Modified To Require Notice To Affected Subcontractors.

If, despite the foregoing, the Councils do not withdraw the proposed rule as the Section has recommended, it nonetheless should be modified to require prime contractors to advise their subcontractors, on a case-by-case basis, when 10 U.S.C. § 2631 and 46 U.S.C. § 1241(b) will apply to a subcontract so that the required preference for the use of privately owned U.S.-flag vessels for ocean transportation does not become a trap for unwary subcontractors.

The purpose of 10 U.S.C. § 2631 and 46 U.S.C. § 1241(b) is, inter alia, to ensure that (i) supplies bought for the Government that must be transported by sea are transported in privately owned U.S.-flag vessels and (ii) the rates charged by those vessels are not excessive or unreasonable. 10 U.S.C. § 2631(a); 46 U.S.C. § 1241(b). Nowhere in either of these statutes does the term “commercial item” or the word “subcontractor” appear.

Despite these omissions, the proposed rule makes the statutes a mandatory flow-down requirement in subcontracts for commercial items. See, e.g., 65 Fed. Reg. 66921-922 (proposed 52.212-5(e)(4)). Significantly, the proposed clause that implements this mandatory flow-down provision appears to place on the commercial item subcontractor the responsibility for determining when it must use a U.S.-flag vessel to transport its subcontract items. Id.

It is not reasonable to assume that a subcontract supplier of commercial items will know when, for example, those items will be shipped in direct support of U.S. military operations or, in most cases, how the prime contractor intends to use the commercial items. Yet the proposed rule places the burden on the commercial item subcontractor to comply with the requirements of 10 U.S.C. § 2631 and 46 U.S.C. § 1241. It is the prime contractor, however, and not the subcontractor

that knows or can easily determine the destination of the commercial items it is buying from its suppliers and whether it is adding value to those items. Accordingly, the Section recommends that the Councils modify the proposed rule to place the burden on the prime contractor to notify its subcontractors when 10 U.S.C. § 2631 or 46 U.S.C. § 1241 will apply to the shipment by sea of a subcontractor’s commercial products.

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

Very truly yours,

Gregory A. Smith
Section of Public Contract Law

cc: Norman R. Thorpe
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[1] Mary Ellen Coster Williams, an Officer of the Public Contract Law Section, did not participate in the Section’s consideration of these comments, and she abstained from voting to approve and send this letter.

[2] The May 1, 1996 memorandum from the then-Administrator of the Office of Federal Procurement Policy, Dr. Steve Kelman, to the DoD regarding the continued applicability of certain cargo-preference laws to commercial item contracts does not support the proposed regulations. Dr. Kelman’s May 1, 1996 memorandum addressed the continued applicability of such cargo-preference laws to prime contracts for commercial items and did not state or imply that such laws continued to apply to subcontracts for commercial items. In fact, Dr. Kelman’s May 1, 1996 memorandum makes it clear that there is a complete waiver of such cargo-preference laws for commercial item subcontracts.