
The Section expressed concern that the interim rule does not limit its applicability to "covered contracts" as that term is defined by 10 U.S.C. § 2324(1)(a) and 41 U.S.C. § 256(1)(l). The Section suggested that in order to be consistent with the statute the regulation should be similarly limited.

The Section also expressed concern that the interim rule extends the definition of "officer in a senior management position" to include "intermediate home offices and/or segments," but does not specify whether the terms "intermediate home office" and "segment," as used in the interim rule, are to be given the same meaning that they have under Cost Accounting Standards. The Section pointed out that the application of these terms to individual contractors may engender disputes over their meaning.

The Section further observed that the failure to limit the application of the interim rule to "covered contracts" may result in application of penalties by the Defense Contract Audit Agency especially to a greater number of small businesses. In addition, the Section observed that extending the "top five" definition to "intermediate home offices and/or segments" may result in application of penalties in cases in which there is a good faith difference of opinion regarding the definition of "intermediate home office" or "segment." The Section urged the FAR Council to take steps to prevent such outcomes.

March 3, 1997

General Services Administration
FAR Secretariat (VRS)
Attn: Ms. Beverly Fayson
Room 4035
18th and F Streets, N.W.
Washington, D.C. 20405

Re: FAC 90-45; FAR Case 96-325; Interim Rule on Compensation of Certain Contractor Personnel
(62 Fed. Reg. 269)
Dear Ms. Fayson:

On behalf of the Section of Public Contract Law of the American Bar Association ("the Section"), I am submitting comments on the above-referenced matter. The Public Contract Law 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 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 interim rule implements Section 809 of the FY 1997 National Defense Authorization Act, Pub. L. 104-201, which imposes a $250,000 limit on allowable compensation of any one "officer" of a Government contractor. The interim rule makes clear that this limit is applicable only to contracts awarded during fiscal year 1997 and to costs incurred under such contracts during the period from October 1, 1996 through September 30, 1997. However, the interim rule does not limit its applicability to "covered contracts." Section 809 limits the applicability of the $250,000 limitation to "covered contracts" as that term is defined by 10 U.S.C. § 2324(l)(a) and 41 U.S.C. § 256(l)(1) (statutorily unallowable costs). These provisions define "covered contract" as those exceeding $500,000, except fixed-price contracts without cost incentives and firm fixed-price contracts for the purchase of commercial items. To be consistent with the statute, the applicability of the new FAR 31.205-6(p) should be similarly limited.

The interim rule defines the term "officer in a senior management position" by using the Securities and Exchange Commission ("SEC") executive compensation disclosure requirements for publicly traded companies. The SEC "top five" definition inarguably has the advantage of being a "bright line," easily applied rule. However, the "bright line" advantage of the SEC definition may be lost when the definition is extended by the interim rule to "intermediate home offices and/or segments." (The rule should specify whether the terms "intermediate home office" and "segment" are to be given the same meaning that they have under Cost Accounting Standards.) The Section recognizes that the Conference Report explains the intent of the conferees that the definition of "officer" encompass individuals with "responsibility for the management of a firm or a major segment thereof." H.R. Conf. Rep. No. 104-724 to accompany H.R. 3230, 104th Cong., 2d Sess. at 770 (1996) (emphasis added). However, we note that the application of these terms to contractors' individual circumstances may engender disputes over whether a particular part of an organization is a "segment" or "intermediate home office."

The Defense Contract Audit Agency has previously taken the position that compensation costs incurred in excess of the statutory limitation are expressly unallowable and subject to penalties. Failure to limit the application of the statutory cap to "covered contracts" therefore will likely result in the imposition of penalties on a greater number of small businesses. Additionally, extending the "top five" definition to "intermediate home offices and/or segments" may result in application of penalties where the allowability of a cost depends on a good faith difference of opinion with respect to whether a particular part of an organization qualifies as a "segment" or "intermediate home office." We believe application of penalties in these circumstances would be unfortunate, and urge that the FAR Council take whatever steps it can to prevent such problems.

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

Sincerely,

John T. Kuelbs
Chair, Section of Public Contract Law

cc: Marcia G. Madsen
Compensation of Certain Contractor Personnel

David A. Churchill
Rand L. Allen
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