VIA HAND DELIVERY

U.S. Department of Energy
Office of Procurement and Assistance Management
1000 Independence Avenue, S.W.
Washington DC 20585
Attn: Laura Fullerton, GC-61

Re: Contract Legal Management Requirements

Dear Ms. Fullerton:

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 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 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.

These comments address the U.S. Department of Energy’s (“DOE”) proposed regulations in 10 C.F.R. Part 719 concerning contractor legal management requirements. They do not address the proposed provisions that apply to legal counsel retained directly by DOE. These comments also do not address the proposed conforming amendments to the DOE Acquisition Regulation.

The DOE’s stated purpose in issuing these new regulations is “to facilitate control of Department and contractor legal costs, including litigation costs.” Proposed 10 C.F.R. § 719.1. The Section supports DOE’s goal of controlling costs incurred by its contractors for legal services and recognizes the important role that legal counsel retained by DOE contractors should play in this effort. Proposed Part 719, however, would impose expensive and burdensome requirements and restrictions upon contractors that could impair their ability to manage their own legal affairs in their best interests. Thus, the Section believes that the proposed regulations go too far.

These comments first discuss the Section’s overarching concerns with the proposed regulations. We then identify specific provisions that the Section believes to be problematic.

I. THE PROPOSED REGULATIONS OVERREACH THEIR STATED GOAL

As a general matter, the Section is concerned that the proposed regulations go beyond what is reasonable and necessary to achieve DOE’s stated goal of controlling contractor legal costs. The Section believes that existing DOE policy[2] and procedures[3], the substance of which is largely duplicated in the proposed regulations, are sufficient to reasonably control costs. The extent to which the regulatory scheme overreaches is evident in a number of areas, discussed
A. The Scope of Coverage

In the first instance, there is no clear justification offered for DOE’s decision to extend the significant burdens imposed here from just litigation matters (currently addressed in DOE policy and procedures) to all legal services. In the background discussion section of the notice, DOE states that it “now realizes” that it needs to broaden the coverage. Yet, the non-litigation use of retained counsel would appear to pose very little risk of the arguably uncontrolled legal costs DOE has experienced historically in certain litigation matters.

Given the extensive additional costs and burden that compliance with the proposed regulation would have both on contractors and on DOE, the Section does not believe that including all legal services would yield a net benefit to taxpayers. The Section recommends further analysis and justification for this important aspect of the proposed regulation.

B. The Need for a Regulation

The Section also questions whether, even if there is a legitimate need to extend a cost-control regimen to non-litigation legal services, a regulation is the appropriate means of doing so. At its core, the entire proposed regulation is essentially internal cost-policy guidance intended to clarify DOE’s application of the FAR cost reasonableness provision, FAR 31.201-3. Such guidance could be provided just as effectively by including it in the existing DOE policy and procedures. The proposed regulations may inhibit the provision of effective legal services, which requires flexibility and the ability to act promptly and with certainty. Agency policy guidance is a more appropriate vehicle for this task, as it addresses the goal of cost control without imposing the inflexibility of mandatory regulations.

C. Conflicting Economic Interests

A third concern derives from the inherent conflict of economic interests between DOE and its cost-reimbursement contractors. Stated simply, contractors seek reimbursement for the costs that they are required to incur in performance of their contracts; DOE seeks to minimize the reimbursement. The proposed regulations would establish a process by which DOE could impair a contractor’s ability to incur costs it reasonably believes necessary to performance (and to protecting the contractor’s interests), and then base a denial of reimbursement on the results of that impairment.

In particular, section 5.1 of the Appendix makes clear that DOE can and will use the underlying cause for incurrence of contractor legal costs as a basis for finding such costs unallowable. DOE implies that it will find legal costs unallowable when there has been a finding of willful misconduct or lack of good faith by the contractor in the case of third-party liability. At the same time, the proposed regulations would give DOE broad control over the substance, strategy, and tactics employed in a legal matter (e.g., §§ 719.21 and 719.31 essentially would give DOE the power to control the contractor’s choice of outside counsel; § 719.39 would give DOE the right to impose a single counsel on a contractor involved in a multi-contractor matter; § 719.35 would give DOE a veto over the selection and use of expert witnesses and over the number of legal personnel in attendance at hearings and depositions). Thus, for example, a decision mandated by DOE not to use retained counsel or an expert witness of the contractor’s choice could contribute to a negative finding against the contractor, which in turn would lead to DOE refusing to reimburse the contractor’s legal costs. If DOE desires to manage and control the substance, strategy, and tactics of a legal matter, the better approach would be for the agency to take charge of the matter itself and fully indemnify the contractor from any potential loss.

A related concern is the risk that DOE may not raise objections to various terms of the submissions made by a contractor (including the engagement letter, legal management plan, budget, and staffing and resource plan), but later determine that costs incurred in conformance with these documents are unreasonable and not reimbursable. Thus, the proposed regulation would allow DOE to penalize contractors who appropriately followed the procedures and relied on DOE’s silence as acquiescence. A better approach would be to establish as allowable, reasonable, and reimbursable all costs incurred in conformance with any requirement of the proposed regulation to which DOE does not timely object.

Similarly, there is a risk that DOE, relying on the legal management plan, could refuse to reimburse a legitimate cost incurred by a contractor in a non-litigation setting. For example, if an issue arises during contract performance concerning the Price-Anderson clause, a contractor might require legal advice from retained counsel even though such work had not been anticipated in the legal management plan. Could DOE refuse to reimburse such costs? Such a result
would be unfair and unreasonable.

D. Privilege and Ethical Issues

The Section’s final overarching concerns are with the privilege and ethical issues that arise from the proposed regulations. As drafted, the regulations would require extensive submissions by contractors to DOE of sensitive information that may be protected by the attorney-client and attorney work product privileges (e.g., § 719.15 staff and resource plan requirement; § 719.17 budgetary requirement; §§ 719.20 and 719.21 engagement letter requirement). There are at least two problems in this respect.

First, even if the interests of the DOE and a contractor are common, the provision at § 719.21(a)(2) may be ineffective to prevent the provision of such information to DOE from being deemed by a court as being a waiver of both the attorney-client and attorney work product privileges. See, e.g., *In re Columbia/HCA Healthcare Corp.*, 192 F.R.D. 575, 580 (M.D. Tenn. 2000) (disclosure to government agency waives attorney work product protection despite agreement with Government to the contrary); *Genetech, Inc. v. U.S. Int’l Trade Comm.* 122 F.3d 1409, 1417 (Fed. Cir. 1997) (refusing to recognize limited waiver of attorney client privilege).

Second, there are predictable circumstances when the DOE and a contractor no longer have common interests or are indeed adversaries in a legal matter (e.g., in a dispute over the reasonableness of incurred costs). In such circumstances, the sensitive information in DOE’s hands as a result of the proposed regulation -- and which otherwise would be protected from discovery by an assertion of privilege -- could be used by DOE against the contractor.

Furthermore, the proposed regulations may pose ethical issues for the contractor’s in-house counsel and retained counsel. See, e.g., *Model Rules of Professional Conduct* Rule 1.6 (1983) (“A lawyer shall not reveal information relating to representation of a client.”). Provisions of the proposed regulations that require a contractor to provide documents to DOE and expose retained counsel to audit may be irreconcilable with the attorney’s duty to his or her client.

The Section recommends that these privilege and ethical issues be analyzed and addressed prior to issuance of a final rule.

II. PARTICULAR PROVISIONS CREATE ACTUAL AND POTENTIAL PROBLEMS

In addition to the issues discussed above, the Section has specific concerns with the following sections of the proposed regulations for the reasons stated below:

§ 719.3: This section would make proposed Part 719 applicable to all cost-reimbursement contracts in excess of $10,000,000, involving work performed at DOE facilities, and containing an appropriate contract clause. This would extend the ambit of the proposed regulation beyond that of the existing Final Policy Statement, which applies only to M&O contractors. There is no explanation for this extension, and the Section suggests limiting coverage to M&O contractors.

§ 719.6(a): This subsection appears to make the proposed regulations applicable to the retention of counsel by “insurance providers of third party administrator services or retrospective policies where the Department retained the risk of liability.” We do not believe this was the intention of the drafters and suggest that the language be clarified.

§§ 719.10-.14: These sections describe the requirements for a legal management plan, as well as set forth procedures for the contractor to prepare and submit the plan and for DOE to review the plan. These sections are flawed in several respects.

First, the term “deficiencies” is left undefined. This leaves open to dispute whether a deficiency is limited to an objectively identifiable issue, such as the failure of a legal management plan to meet a mandatory requirement of section 719.10, or whether it also encompasses the subjective judgment of DOE as to the content and substance of the plan. The Section suggests a deficiency be defined within the regulation as the former. If the term is intended to include the latter, DOE could exercise unwarranted control over contractor decisions as to how it selects, retains, and supervises outside counsel.

Second, the regulation fails to specify a process for addressing disputes concerning deficiencies in the legal management plan. As currently drafted, this implies that the process required by the “Disputes” clause of the relevant
contract would control. This would raise the dispute of this peripheral issue to the same level as one regarding a central contractual issue. The Section does not believe this is an appropriate or efficient allocation of DOE or contractor resources and taxpayer dollars.

Third, these sections fail to specify a remedy or remedies that DOE could apply if the dispute over the deficiency is not resolved. This implies that the contract could be terminated for default for failing to correct a deficiency to the satisfaction of DOE. Such a sanction is unduly harsh for an administrative shortcoming.

§§ 719.15-16: These sections would require retained counsel to submit to the contractor a staffing and resource plan for significant matters. The first issue raised here arises through the definition of “significant matters” in section 719.2. Under this definition, a matter is significant if, *inter alia*, it involves issues DOE counsel determines to be significant. Thus, whenever DOE made this determination (whether it be at the outset of a matter or at some much later date), DOE could impose the section 719.5(a) demand that the contractor require retained counsel to submit the staffing and resource plan. If the plan is to be of any value, it surely needs to be prepared in advance of completion of substantial work on the matter. We suggest the regulation include a process by which a contractor seeks, and DOE provides, a determination of matter significance as soon as the issues giving rise to the matter are known to the contractor.

A more important concern is what, if any, review or recourse is available to DOE regarding the staffing and resource plan. These sections would require the contractor to forward the plan (and subsequent updates) to DOE. Proposed 10 C.F.R. §§ 719.15(a); 719.16(c). Unlike the regulation’s provision for DOE review of the legal management plan (which is in the same subpart as the staffing and resource plan), these sections are silent as to the staffing and resource plan. Because, for significant matters, the two plans necessarily are interrelated, it seems illogical that DOE would retain the ability to object to one and not the other. The Section suggests the regulation be clarified in this regard. If DOE is to review and object to the staffing and resource plan, the subsection explicitly should say so. Further, as discussed above with respect to the legal management plan, the process should be subject to a limited disputes resolution mechanism and the remedy for noncompliance should be appropriate. If DOE has no right to review and reject the plan, the regulation should so state.

§ 719.17: This section’s requirement for submission of an annual legal budget suffers from the same deficits as those on the staffing and resource plan, discussed immediately above. The regulation as drafted is silent as to whether DOE has any right to review and reject the contractor’s budget. The Section suggests the regulation be clarified in accordance with our proposal for the staffing and resources plan sections, above.

Further, subsection (c) as drafted implies that DOE could refuse to reimburse costs or impose some penalty on the contractor for failure to remain within its budget. Given the inherently unpredictable nature of legal matters, it is not reasonable to expect a contractor to be able to project with precision expected legal costs for a year in advance. This subsection should be eliminated or clarified to make clear that no penalty will be imposed for a simple failure to adhere to an annual budget projection.

§§ 719.20-.21: These sections, which require a specified engagement letter between the contractor and retained counsel, raise three issues. First, these sections raise the questions of privilege and waiver thereof, which are discussed in part I.D. *supra*.

Second, the proposed regulation gives DOE and the General Accounting Office the right “to inspect, copy, and audit all [retained counsel’s] records documenting fees and costs and any other records or systems of records relevant to the representation by retained counsel.” Proposed 10 C.F.R. § 719.21(b)(3). This provision embodies the principal concern we raised above: the regulations go beyond what is needed to enable DOE to control contractor litigation costs. Although it may be reasonable in pursuit of this goal for government auditors to examine retained counsel’s records of “fees and costs,” there is no such justification for exposing “any other records or systems of records relevant to the representation.” This broad, open-ended requirement could sweep up documents that have absolutely no relevance to the cost issue, thereby exposing extremely sensitive information that may be critical to the contractor’s success in the matter. For example, what value to DOE’s cost-control effort would be letters or memoranda between the contractor and retained counsel concerning the merits of the matter or trial strategy and tactics? The answer is clear – such information would add nothing to the effort to control costs. Accordingly, the Section proposes that the audit authority be limited to records of fees and costs.

Third, the provisions regarding engagement letters suffer from the same deficits as those on the staffing and
resource plan, discussed above. Once again, the regulation as drafted is silent as to whether DOE has any right to review and reject the terms of the engagement letter.\textsuperscript{[9]} The Section suggests that the regulation be clarified in accordance with our proposal for the staffing and resources plan, above.

Lastly, section 719.21(d)(3) appears to contain an clerical error. We believe the reference to “this subpart C” should be to “subpart D.”

\textbf{§§ 719.35-.36:} These provisions require a contractor to seek written approval from DOE counsel prior to the incurrence of particular types of costs. As a general matter, this requirement is another manifestation of the danger that DOE’s desire to control costs will impede a contractor’s ability to decide for itself how best to manage its legal affairs. If a contractor and its retained counsel conclude, for example, that attendance at a hearing by more than one person is essential, DOE should not be permitted to second guess this decision.

Further, the Section is concerned that this requirement may prove unworkable in certain circumstances. For example, if retained counsel is directed to appear at a hearing on short notice, and more than one person is required to be at the hearing, it is unlikely that there would be sufficient time before the hearing: for retained counsel to notify the contractor; for the contractor to draft and submit a written request to DOE counsel; for DOE counsel to consider and approve the request; and for the contractor to notify retained counsel.

The Section suggests that the requirement for advance approval be eliminated and that the costs included be treated as all other costs not specifically enumerated as unallowable.

\textbf{§ 719.37:} This section, which requires contractors to monitor subcontractor legal costs, would impose a substantial new burden on the contractor that DOE failed to include in its analysis under the Paperwork Reduction Act. In addition, the proposed process likely would be unmanageable, especially given the almost certain resistance by subcontractors. Lastly, to properly comply with this requirement likely would require contractors to hire substantial additional staff, the cost of which would be passed on to DOE. The Section recommends that this entire requirement be eliminated.\textsuperscript{[10]}

\textbf{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,

Gregory A. Smith
Chair, Public Contract Law Section

cc: Norman R. Thorpe
Mary Ellen Coster Williams
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Richard P. Rector
The thrust of the proposed regulation also appears to conflict with DOE’s declared intention to eliminate certain DOE-specific regulations regarding M&O contractors and rely instead on the general precepts in the FAR. See, e.g., 65 Fed. Reg. 13418 (March 13, 2000); 65 Fed. Reg. 37335 (June 14, 2000).


In an apparent effort to expand beyond the scope of the Major Fraud Act and FAR 31.205-47, DOE also implies in section 5.1 that costs will be unallowable when there has been a violation of law or regulation even if there is no allegation of fraud or imposition of monetary penalties.

The proposed regulations present other troubling scenarios that could negatively affect a contractor’s ability to pursue its legal rights. DOE could, after approving a contractor’s legal management plan and hiring of outside counsel, and after the pertinent legal matter has been underway for months, change its mind and demand that the contractor change counsel. Similarly, DOE could delay its approval of a contractor’s submitted plans such that the contractor would have to retain counsel and proceed before DOE had agreed to the level of legal expenditure required for the matter. The possibility of such results should be avoided.

These sections also go beyond the access to records requirements of the FAR, both with respect to the prime contractor and subcontractors. See, e.g., FAR 52.215-2.

As discussed above, the exposure of even the fee and cost records implicates the issues of attorney-client privilege.

Such a requirement may, in fact, deter many law firms from representing DOE contractors in these circumstances, contrary to the best interests of both the contractor and DOE.

Note that section 5.2 of the Appendix to the proposed regulation cautions that the contractor should seek approval from DOE before agreeing to any request by retained counsel for an increase in its fees. This implies that DOE has approval authority over the rates originally set forth in the engagement letter.

Subsection (b) would make DOE counsel the arbiter of the allowability of subcontractor legal costs. This conflicts with FAR Part 42, which gives the subcontractor’s ACO the right to make such determinations.