October 20, 1997

Dear Mr. Layser:

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.

We commend the Director of Defense Procurement for taking substantial steps toward implementing the Office of Inspector General's March 28, 1997 recommendations regarding the clarification of the roles of the Defense Logistics Agency ("DLA") and the Defense Contract Audit Agency ("DCAA") in Contractor Insurance/Pension Reviews ("CIPRs"). The previous regulation, in practice, created significant confusion regarding the appropriate roles of these two agencies. Although the following comments are substantially technical in nature, we do have some concern regarding the extent to which the regulation may increase
the number of reviews and/or audits of contractor's insurance, pension, and other deferred compensation costs.

Under current regulation, the CIPR "should be the only formal review of a contractor's insurance/pension program except for periodic tests of the system performed by contract administration and DCAA, or any special reviews initiated by the administrative contracting officer." 48 C.F.R. § 242.7301(d). This provision in practice has restricted the DCAA's ability to conduct CIPRs. Although the proposed regulation defines DCAA's role, the removal of this language could effectively remove DCAA's limitation on conducting similar and duplicative reviews. Without limitations, the proposed rule could increase contractors' burdens for complying with requests for information and responding to reviews and audits.

Similarly, the proposed rule's expansion of required "special" CIPRs could significantly increase the workload of DLA and DCAA while increasing requirements of contractor cooperation and response to repetitive CIPRs. We believe the current rules, which allow instead of mandate CIPRs "under certain circumstances, e.g. prior to a major contractor award, in conjunction with in-depth overhead review, or subsequent to mergers or divestitures," provide the DLA sufficient flexibility to perform CIPRs at appropriate times.

Additionally, there are several technical changes that need to be made to the proposed regulation. First, the definition of insurance/pension specialist has been eliminated from the proposed regulation. The current regulation defines an insurance/pension specialist as being "located at the Defense Contract Management Districts in Los Angeles and Chicago and at the Defense Contract Management Area Operations in New York." 48 C.F.R. § 242.7301(c). Although the identification of the physical location of these specialists is not necessary, the proposed regulation does not define the agency for which these specialists work. A further description of these specialists would clarify the proposed regulation.

Part 242.7301(d) of the proposed regulations states: "When special reviews of the contractor's insurance/pension program are desired, forward a request to the ACO." This statement is unclear regarding who may submit such a request. Some clarification of the parties or organizations that may appropriately make such a request would clarify the proposed regulation.

As a grammatical clarification, the definition of "Initial CIPR" should include the following underlined revisions: "A comprehensive review of the contractor's insurance program, pension plan, and other deferred compensation plan. Including plans, including a detailed review of the contractor's policies, procedures and practices to determine whether the programs and plans are in compliance with FAR and Cost Accounting Standards (CAS)."

Finally, a grammatical addition should be made to part 242.7303(b) of the proposed regulations. The word "is" should be between "[t]he insurance/pension specialist" and "responsible for," so the sentence will read: "The insurance/pension specialist is responsible for --"

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
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Alexander J. Brittin

Return to Regulatory Coordinating Committee Home Page