
Dear Mr. Pelkey:

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 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
Employment Prohibition - Fraud or Other Felonies

The proposed amendment to the DFARS, issued on October 2, 1997, expands the scope of positions that contractors are prohibited from filling with persons convicted of fraud or any other felonies arising under a Department of Defense ("DoD") contract. 56 Fed. Reg. 51623 (Oct. 2, 1997). The proposed amendment also permits the DoD to extend the prohibition beyond five years. Id.

A. Class of Positions Covered by the Prohibition

Currently, DFARS 203.570-2 prohibits contractors and first-tier subcontractors from allowing persons convicted of fraud or a contract related felony from serving in a management or supervisory position; on the Board of Directors; or as a consultant, agent or representative. As amended, the regulation would expand the list of covered positions to include:

any other capacity with the authority to influence, advise, or control the decisions of any DoD contractor or subcontractor with regard to any DoD contract or first-tier subcontract.

Proposed DFARS 203.570-2(a)(4).

The proposed amendment to the DFARS is apparently intended to implement 10 U.S.C. §2408(a)(1)(D), which provides:

An individual who is convicted of fraud or any other felony arising out of a contract with the Department of Defense shall be prohibited from each of the following:

* * *

(D) Being involved in any other way, as determined under regulations prescribed by the Secretary of Defense, with a defense contract or first tier subcontract of a defense contract.

The discretion given by Congress to DoD to define the positions for which persons convicted of fraud may not be hired will not have been exercised as required by statute unless DoD alters the proposed regulations to provide meaningful guidance. It is apparent that Congress in this circumstance enacted a generalized standard and gave DoD direction to adopt particularized and practical rules. The proposed regulations are, however, contrary to this statutory purpose. In essence, the proposed regulations merely repeat the statutory requirement. That makes the regulations effectively meaningless and, therefore, renders meaningless Congress' action in directing that regulations be adopted in the first place. Thus the proposed regulations are incompatible with the intent of Congress and with the purpose of 10 USC Sec. 2408(a)(1)(D).

The Section recognizes the difficulty of providing clear and practical guidance when Congress has been unable or has chosen not to do so in statutory language, but such difficulty is no excuse; it is the challenge. The Section offers the following analysis and suggestions to achieve by regulation the certainty that Congress sought to achieve. By providing clear and practical guidance, the procurement system will be more fair and disputes, litigation, and unnecessary costs will be avoided.

Although marginally better than the statutory language, the "any other capacity" language in Proposed DFARS 203.570 2(a)(4) does not clear up the ambiguity for contractors and the Government for a requirement under which criminal liability is imposed for violations. 10 U.S.C. § 2408(b); see, e.g., United States v. K.I.M. Aerotech, CR95-101 01PHX PGR (D. Ariz. Sept. 18, 1995). Specifically, because the phrase "with the authority to influence, advise, or control" is undefined, it is not clear from the proposed
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amendment what positions within a company would be covered by the prohibition. Compounding this problem is the fact that the proposed regulation does not provide a mechanism for a contractor to use in determining whether a particular position is covered. Rather, contractors are only provided with a contact to determine whether a particular person has been convicted of applicable crimes. Proposed DFARS 252.203-7001(h) (1997).

Broadly interpreted, the proposed amendment could apply to virtually every position in a company. Further, without a clear regulatory definition of the covered positions, contractors could be subject to inconsistent interpretations by different activities within DoD. This creates an unnecessary degree of uncertainty for both contractors and the individuals charged with enforcing this provision. One possible remedy is for the “point of contact” to be required to advise a contractor whether a particular position falls within the ambit of Proposed DFARS 203.570-2(a)(4) if such request is presented in writing.

B. The Length of the Prohibition

With respect to the length of the prohibition, the proposed amendment would conform the Regulation to the underlying statute and provide the Government with more flexibility. Specifically, 10 U.S.C. §2408(a)(2) (1997) provides:

Except as provided in paragraph (3), the prohibition in paragraph (1) shall apply for a period, as determined by the Secretary of Defense, of not less than five years after the date of conviction.

Currently, DFARS 203.570.2(b) stipulates a five year prohibition from the date of conviction - unless waived by the agency. In other words, the current Regulation does not provide the Government with the power to extend the prohibition beyond five years notwithstanding the statutory authority to do so. The proposed Regulation provides this flexibility and fairly requires a written determination by the agency head or designee when a period of greater than five years is deemed to be appropriate.

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

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