VIA FACSIMILE AND FIRST CLASS MAIL

General Services Administration
Regulatory Secretariat (VIR)
1800 F Street, N.W.
Room 4035
Attn: Ms. Laurieann Duarte
Washington, DC 20405


Dear Ms. Duarte:

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 have members representing these three segments to ensure that all points of view are considered. By presenting their consensus view, 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

1 Mary Ellen Coster Williams and Jeri Kaylene Somers, Council members of the Section of Public Contract Law, did not participate in the Section’s consideration of these comments and abstained from the voting to approve and send this letter.
Board of Governors of the American Bar Association and, therefore, should not be construed as representing the policy of the American Bar Association.\textsuperscript{2}

On February 16, 2007, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council ("FAR Councils") published a proposed rule setting forth a new formal obligation for certain government contractors to establish codes of ethics and business conduct and compliance programs and internal controls that meet minimum standards. 72 Fed. Reg. 7588. These comments are intended to highlight a number of practical concerns that we believe have not been fully addressed in the proposed rule.

The Section concurs that it is important for government contractors and subcontractors to comply with all applicable laws, rules, regulations, and their contractual obligations. We believe that creation and maintenance of a compliance program is a prudent business decision that pays dividends and agree that a company with a significant volume of federal contract work should have a compliance program, including a code of ethics and business conduct, appropriate to its size and extent of involvement in federal contracting. We acknowledge that many of the larger defense contractors already have comprehensive ethics and compliance programs in place.

Despite supporting the creation and maintenance of compliance programs, we suggest that the FAR Councils may wish to revisit the need for rules that add a further level of compliance and enforcement obligations where contractors already are or may be contractually or statutorily obliged to comply. In lieu of its proposed compliance rules, we recommend that the FAR Councils consider establishing a government-industry panel to develop a minimum suggested code of ethics and business conduct based upon the best practices that many contractors already employ. Alternatively, rather than imposing obligations that may conflict with existing compliance efforts or impose unclear or unnecessary obligations, the FAR Councils may wish to focus regulatory efforts on education and training rather than on multiplying the consequences of compliance failures through contract clauses.

In the event the FAR Councils proceed with the proposed code of ethics and business conduct rules, the Section offers the following comments. While we support contractor code of ethics and business conduct, the Section believes that aspects of the proposed regulation are unduly burdensome and not appropriate for all contractors because they mandate compliance tools that may be excessive in

\textsuperscript{2} This letter is available in pdf format at http://www.abanet.org/contract/federal/regscomm/home.html under the topic “Ethics.”
some instances, may apply to businesses for which some of the requirements would be inapplicable, and they likely would be expensive and impractical to administer.

The threshold issues identified below seek clarification of the trigger for applicability of the proposed rule. The balance of our comments address concerns with the implementation of the proposed rule.

- Although the $5 million threshold to trigger applicability of the proposed rule may be appropriate, its applicability requires clarification to ensure that contractors with appreciable government contracting business are covered. Specifically, the proposed regulation is silent as to the manner in which the $5 million trigger for the application of the clause is to be determined. For example, it is unclear whether the $5 million threshold would apply to a contract with a multiple-year term. A ten-year contract at a $5 million value, for example, may not represent a contractor with appreciable government business. With regard to contracts with options, it is unclear whether the clause applies to the base period of the contract or, alternatively, if the threshold would apply to the base period plus all options years. Because the Government has no obligation to exercise options, the regulations should judge contract value by reference to the base year(s) when the contract contains base and option years. Accordingly, we recommend that the proposed rule clarify that the $5 million dollar threshold applies to contracts exceeding $5 million for a one-year term and, in contracts with options, apply only to the base year of the contract.

- The proposed rule is unclear whether the provision applies to requirements contracts or indefinite delivery-indefinite quantity ("IDIQ") contracts and, if so, how. It would seem that because, by definition, the total contract value of a requirements contract or IDIQ contract cannot be definitively determined at the time of award, the proposed clause probably should not apply to such contracts (unless the guaranteed minimum for an IDIQ contract or the estimate for a requirements contract is in excess of $5 million). We recommend that the FAR Councils clarify the applicability of the proposed rule to these contract types.

- The 120-day minimum performance period for the triggering transaction is likewise too short and would, for example, encompass companies that may be unable to set up the required systems and training in the time allowed by the draft regulation. Companies with such a limited relationship with the Government should not be put to the expense and effort (and risk) that the proposed rule would cause. This formal obligation should only be
associated with longer-term contractual commitments of at least a year, if not more.

- The clause shifts from a requirement that contractors “should” meet a broad goal (in the first paragraph of proposed section 3.1002) to require that contractors “shall” undertake a number of specific actions to implement that goal, and appears to make mandatory many suggestions that should be subject to the discretion of the contractor in determining how best to implement a program in its environment. The regulation should clarify that the extent and nature of a compliance program and code of ethics and business conduct should not be the subject of regulatory absolutes. It should authorize and emphasize flexibility to develop programs appropriate under the circumstances. For example, today, many (if not most) large prime contractors already include in their standard terms and conditions a requirement that their subcontractors and vendors adhere to the prime contractor’s standard of business ethics and conduct or equivalent standards. In contrast, additional guidance for small businesses with small volumes of government contracting business regarding their obligations to implement a code of ethics commensurate with their size may be appropriate.

- Although the following might be viewed as addressing the concerns in the previous comment, we believe that the use of terms like “shall require the contractor to . . . [e]stablish a[] . . . program . . . commensurate with the size of the company and its involvement in Government contracting” (see proposed rule at 3.1003(b)(2)(ii)) as a mandatory requirement is too vague and could lead to inconsistent implementation and enforcement. Such generalities open contractors, especially small ones, to potentially significant problems based on mere disagreement about what is “commensurate.” This statement should be qualified to emphasize the discretionary nature of the obligation being set.

In this regard, although the proposed rule states that the employee training program and internal control system “shall be suitable to the size of the company and its involvement in Government contracting” (see proposed rule at 3.1002(a) and 52.203-XX(b)(2)(ii)), it provides no guidance with respect to such “suitability” concerns. The FAR Councils have suggested in the Regulatory Flexibility analysis for this proposed regulation that “contractors have the ability to determine the simplicity or complexity and cost of their programs,” but there is no reference to such flexibility in the proposed FAR provisions themselves.
While saying that appropriate contractors “shall” have a code of conduct alone is not overly troublesome as long as the contractor retains discretion, the proposed rule dictates a number of elements of an appropriate code, and in particular the appropriate internal controls, which go farther than necessary. Specifically:

- Section 52.203-XX(c)(1)(i) mandates that the contractor’s internal control system shall “[f]acilitate timely discovery and disclosure of improper conduct in connection with Government contracts” and section 52.203-XX(c)(1)(ii) requires that the control system “[e]nsure corrective measures are promptly instituted and carried out.” These mandatory requirements, however, appear to conflict with the overall policy of the proposed rule that contractors adopt policies that are suitable to their size and their involvement in government contracting.

- Section 52.203-XX(c)(2)(v) essentially provides that contractor compliance programs must include reporting to the Government of any suspected violations or other irregularities. This ignores the contractor’s routine day-to-day contract administration work that should address such “suspected violations” and “irregularities” and elevates all of them to mandatory reportable issues. It also fails to address contractor employees’ constitutional protection from self-incrimination.

Also, many contractors already have internal ethics departments that are the first line for reports and investigation of suspected violations and other irregularities. This proposal appears to undermine those existing controls. Contractors at least should be permitted to investigate the merits of allegations, instead of encouraging contractors to report “any suspected” violation or “irregularity,” regardless of its merit. Moreover, given current strains on contracting personnel within the Government, it is not clear whether the Government’s ability or resources to handle reports of every suspected violation and every minor question that may be deemed an “irregularity” has been evaluated or taken into consideration.

Voluntary reporting is often used in government today, is officially encouraged, and is a good tool to enhance compliance, but the decision to make such reports should remain entirely in the discretion of the contractor. There are substantial incentives to report voluntarily, such as the Sentencing Guidelines and the DoD
Voluntary Disclosure program, but contractors should not be forced to surrender their rights.

Further, the chilling effect of such a requirement on reporting would undercut the goal of this regulation -- to have contractors develop effective internal compliance programs -- and may prevent eligible and responsible small businesses from doing business with the Government. The knowledge that disclosure is mandated would be a substantial disincentive to disclosure of issues by employees. The clause, therefore, should more appropriately recommend (not require) that internal controls include consideration of all possible corrective actions, including voluntary disclosure, without mandating disclosure.

- Section 52.203-XX(c)(2)(vi) effectively mandates full cooperation in investigations and, again, would compromise contractor employees’ constitutional rights. It also could potentially be used to force companies to relinquish or waive the attorney-client privilege. The nature and extent of cooperation should remain within the discretion of each contractor, with all the attendant benefits and consequences. The risk that this provision could be interpreted to make such waivers a condition of doing business with the Government is substantial.

- The mandate to flow down these requirements to subcontractors requires clarification. While the requirement to flow down the proposed clause may be appropriate, the inclusion of this mandatory provision in subcontracts may be interpreted to create an obligation on the part of the prime contractor to oversee enforcement of ethics requirements for the subcontractor. Such an obligation, if imposed, would further add to the burden of establishing a compliant program at the prime contractor level and potentially make prime contractors responsible for subcontractor behavior. If so interpreted, the provision may raise the specter of a small or medium-sized prime contractor supervising the compliance of a major subcontractor -- a somewhat impractical situation. We recommend that the FAR Councils clarify that the prime contract is required to flow down this provision where applicable, but is not otherwise responsible for monitoring subcontractor compliance.

As discussed, the Section concurs that contractors performing substantial federal contract work should have compliance programs. We note that many
contractors already have such programs and recommend that the FAR Councils revisit their proposed regulations and, instead, consider establishing an industry panel to evaluate the best practices industry already follows.

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

Sincerely,

Michael A. Hordell
Chair, Section of Public Contract Law

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