January 26, 2015

VIA REGULATORY PORTAL AND ELECTRONIC MAIL

General Services Administration
Regulatory Secretariat (MVCB)
ATTN: Ms. Flowers
1800 F Street NW., 2nd Floor
Washington, DC 20405


Dear Ms. Flowers:

On behalf of the Section of Public Contract Law of the American Bar Association (“Section”), I am submitting comments on the above-referenced Proposed Rule (“Proposed Rule”) concerning the Inflation Adjustment of Acquisition-Related Thresholds (“Inflation Adjustment”). 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 various 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.\(^1\)

The Section is authorized to submit comments on acquisition regulations under special authority granted by the American Bar 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.\(^2\)

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\(^1\) Mary Ellen Coster Williams, Section Delegate to the ABA House of Delegates, did not participate in the Section’s consideration of these comments and abstained from the voting to approve and send this letter.

\(^2\) This letter is available in pdf format under the topic “Subcontracting and Teaming” at: http://apps.americanbar.org/contract/federal/regscomm/home.html.
I. Introduction

The Section generally supports the efforts of the FAR Council to implement five-year inflation adjustments, but provides brief commentary on how the manner in which the inflation adjustments are applied affects prime contractors and subcontractors performing under government contracts. The Council recommends modifying contract clauses subject to five-year inflation adjustments to refer to the FAR provision setting out the dollar amount instead of including the dollar threshold in the clause itself. Currently, FAR clauses take inconsistent approaches: some clauses include the dollar amount directly, and other clauses incorporate thresholds by reference to the underlying FAR provision.

For example, FAR 52.215-24, Subcontractor Cost or Pricing Data (Dec. 1991), contained the dollar threshold in paragraph (a) of the body of the clause. When the clause was next modified in 1994, the threshold was removed from the text and replaced with a reference to “the threshold for submission of cost or pricing data at FAR 15.804-2(a)(1).” All subsequent versions of this FAR clause, including those in the successor version at FAR 52.215-12, follow this approach. Other clauses follow a similar approach. For example, for a number of clauses where the threshold is tied to the simplified acquisition threshold, the clause no longer includes the dollar threshold in the clause, but instead simply refers to the “simplified acquisition threshold.”

FAR clauses that take the other approach have a significant, but likely unanticipated, impact on the award of subcontracts. When the dollar threshold is in the body of the clause, the threshold applies for the life of the contract. As a result, when a prime contractor places a subcontract, it is bound to the same dollar threshold for the life of the contract. When the clause instead refers to the threshold in the underlying FAR provision, the prime contractor applies the threshold in accordance with the FAR clause itself. If the FAR clause references a threshold that has adjusted, both the prime contractor and the subcontractor will have the same understanding of the applicable threshold. This latter approach makes it easier for prime contractors and subcontractors to establish consistent internal procedures and compliance controls for flowdown requirements tied to dollar thresholds. Also, because the five-year adjustment to dollar thresholds is intended to recognize the effects of inflation on the acquisition system and because new subcontracts often continue to be placed long after

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3 The Dec. 1991 version of the clause was first implemented in an interim rule under FAR case 91-53 in Federal Acquisition Circular 90-10 on December 30, 1991. Earlier versions of the clause also contained the threshold in the body of the clause.
4 The clause was implemented under FAR Case 94-720 in Federal Acquisition Circular 90-22, effective December 5, 2014.
5 The clause was renumbered from 52.215-24 to 52.215-12 as part of the FAR Part 15 reorganization implemented under FAR Case 95-029 and published in Federal Acquisition Circular 97-02 on September 30, 1997.
6 See, e.g., FAR 52.203-6, Restriction on Subcontractor Sales to the Government, which requires flowdown to “subcontracts under [the prime] contract which exceed the simplified acquisition threshold.”
a prime contract is placed, it makes sense for the dollar threshold for flowdowns to be adjusted in lock-step with that of prime contracts – i.e., for FAR clauses to refer to underlying FAR provisions with thresholds as opposed to the dollar thresholds themselves.

One particular area where the FAR’s inconsistent approach to dollar thresholds may cause a difficulty is with respect to the applicability of the Truth in Negotiations Act (“TINA”) and the Cost Accounting Standards (“CAS”). The thresholds for both of these requirements are the same, but expressed differently in the FAR. In particular, FAR 52.230-2(d), Cost Accounting Standards (May 2014), requires flowdown to subcontracts above $700,000 that meet additional requirements. By contrast, the TINA clauses, as exemplified by the FAR 52.215-12 clause cited above, require flowdown to subcontracts that, among other things, exceed the “threshold for submission of cost or pricing data at FAR 15.403-4,” which at present also equals $700,000. Thus, at present, FAR 52.230-2(d) and 52.215-2 clauses in existing contracts require flowdown to subcontracts beginning at the same dollar threshold. Nonetheless, as soon as the higher threshold for TINA applicability, $750,000, goes into effect, the flowdown thresholds for CAS and TINA will be inconsistent for prime contracts awarded before the new thresholds under this FAR case go into effect. The threshold in FAR 52.230-2(d) will remain fixed at $700,000, while the threshold in FAR 52.215-12 will automatically adjust to $750,000 via its reference to the (updated) threshold in FAR 15.403-4.

Prime contractors thus will be forced to flowdown CAS at a lower dollar threshold than TINA, a situation likely to generate objection from subcontractors and place prime contractors in the position of either not awarding a subcontract or doing so in violation of the express, but now outdated, flowdown requirements. This potential for inconsistency has already been remedied in related provisions: when the Cost Accounting Standards Board modified the CAS thresholds, their versions of the CAS clauses referred to the TINA threshold by reference and did not include the express dollar value. Had the FAR adopted this approach, it would have ensured that the CAS and TINA thresholds for flowdown purposes remained synchronized irrespective of any future changes to the threshold. The Section encourages the FAR Council to consider doing so in the future.

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7 The flowdown language for the CAS clause at 48 CFR 99.201-4 reads as follows: “(d) The contractor shall include in all negotiated subcontracts which the Contractor enters into, the substance of this clause, except paragraph (b), and shall require such inclusion in all other subcontracts, of any tier . . . This requirement shall apply only to negotiated subcontracts in excess of the Truth in Negotiations Act (TINA) threshold, as adjusted for inflation (41 U.S.C. 1908 and 41 U.S.C. 1502(b)(1)(B)), except that the requirement shall not apply to negotiated subcontracts otherwise exempt from the requirement to include a CAS clause as specified in 9903.201-1.” See also 76 Fed. Reg. 40817 (July 12, 2011) (implementing final rule).

Conclusion

The Section supports the FAR Council’s proposed five-year inflation adjustments, but for the reasons set forth in this comment letter, the Section also recommends that FAR clauses subject to five-year inflation adjustments omit exact amounts for dollar thresholds and instead provide cross-references to the underlying FAR provisions, as is presently done for TINA clauses. Such a change will ensure that subcontracts, for flowdown purposes, are subject to the same inflation adjustments. The Section is available and willing to provide any additional information and assistance as the FAR Council may require.

Sincerely,

Stuart B. Nibley
Chair, Section of Public Contract Law

cc: David G. Ehrhart
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Council Members, Section of Public Contract Law
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