Re: Federal Acquisition Regulation; Government Property

Dear Mr. Loeb:

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.

Our review of the proposed regulations disclosed one item of major concern.

In several important instances the proposed rule intrudes into the areas of cost allowability and cost allocability, which are the province of FAR Part 31 and the Cost Accounting Standards. Section 45.001 of the proposed regulation changes the definition of “equipment” from “personal property of a capital nature” (FAR 45.101) to “items whose use is not limited to, or with only minor modification would not be limited to, the
development, production, or maintenance of a particular item or the performance of a particular service." It further provides that the term "equipment" includes items such as hand tools (62 Fed. Reg. 30190). This is a marked departure from the current FAR definition which specifically includes small tools normally consumed in the course of performing a contract within the definition of "material" (FAR 45.301). This distinction is critical in that material items are more often charged to a contract as direct costs, whereas general purpose equipment items tend to be capitalized and the associated depreciation included in overhead pools and allocated to contracts as an indirect expense.

Section 45.103(a) of the proposed revision provides further as follows:

A contractor’s contention that such equipment was acquired to perform a specific contract and is not needed for any other purpose does not alter the fact that such items are general purpose items that **might not qualify for treatment as direct costs** under the contractor’s cost accounting practices and FAR 31.202.


In line with prevailing practice, most contractors currently classify small hand tools as "expendable" or "consumable" material for a number of reasons, including the fact that these tools are hard to track and are lost or broken at a high rate in the normal course of contract performance. Thus, the proposed change in the definitions of "material" and "equipment" and the strong suggestion in proposed section 45.103(a) that equipment acquired for a specific contract and not needed for any other purpose nevertheless "might not" qualify as a direct cost will have a far-reaching impact. Contractors will have to (1) change their accounting practices for the classification of such items as direct vs. indirect costs; or (2) risk the disallowance as direct costs of hand tools and other equipment items that are properly classified as "direct" pursuant to the contractor’s established and disclosed accounting practice.

The cost issues raised by this proposal really have little to do with the administration of Government property, and it should not be necessary to intrude into FAR Part 31 territory to rewrite the Government property regulations. At the very least, if the proposed revisions discussed above are deemed necessary to solve a perceived problem in the administration of Government property, the impact on contractors’ cost accounting and cost recovery should be thoroughly aired and the reason(s) why such provisions are considered necessary should be discussed. As the proposal now stands, it contains no explanation of what the Government is trying to accomplish by reclassifying hand tools as "equipment" and changing the definition of "equipment." The proposal in its current form is likely to be a trap for the unwary, particularly smaller, unsophisticated contractors who are most likely to buy non-capital items for the performance of a single contract.

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.
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    Michael K. Love
    Council Members