VIA HAND DELIVERY

General Services Administration
FAR Secretariat (MVRS)
1800 F Street, N.W.
Room 4035
Washington DC 20405
Attn: Laurie Duarte

Re: FAR Case 1999-026
Final Contract Voucher Submission

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 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.

The FAR Council Does Not Have Authority To Preclude Board Or Court Review Of Disputes

The proposed rule would deprive the boards of contract appeals and the Court of Federal Claims of jurisdiction over disputes concerning certain contracting officer determinations. Specifically, in situations where a contractor fails to submit a timely completion invoice or voucher to close out a contract, the rule would allow the contracting officer to issue a unilateral determination of amounts due under the contract that is (i) “[f]inal and binding upon the contractor . . .” and (ii) “[n]ot subject to the right of appeal under the Disputes clause.” Proposed 48 C.F.R. § 42.705(c)(2).

This proposed rule is at odds with the decision of the U.S. Court of Appeals for the Federal Circuit in Burnside-Ott Aviation Training Center v. Dalton, 107 F.3d 854 (Fed. Cir. 1997), as well as the decision of the U.S. Court of Federal Claims in Rig Masters, Inc. v. United States, 42 Fed. Cl. 369 (1998). Addressing Federal Acquisition Regulation (“FAR”) language virtually identical to that proposed in FAR Case 1999-026, the courts have stated that any attempt to eliminate board or Court of Federal Claims jurisdiction over unilateral contracting officer determinations “subverts the purpose” of the Contract Disputes Act of 1978 (“CDA”), 41 U.S.C. § § 601-613, and is invalid and unenforceable.

In Burnside-Ott, the Federal Circuit addressed FAR 16.404-2(a), which purported to exclude award fee determinations from the appeals process under the CDA. The FAR language read in pertinent part:

This [award fee] determination is made unilaterally by the Government and is not subject to the Disputes clause.

Id. (emphasis added). The court held that this attempt to divest the boards or the Court of Federal Claims of jurisdiction was invalid.

The court started from the premise that, under the CDA, an agency’s final determination as to facts “shall not be binding in any subsequent proceeding” before the boards or Court of Federal Claims, 41 U.S.C. § 605(a). *Burnside-Ott*, 107 F.3d at 858. Thus, the court explained:

any attempt to deprive the Board of power to hear a contract dispute that otherwise falls under the CDA . . . subverts the purpose of the CDA. In government contract disputes, unlike contract disputes between two private parties, the initial determination in each dispute is made by one of the parties, i.e., the CO [Contracting Officer]. *Congress commanded that the CO’s decision on any matter cannot be denied Board review.*

107 F.3d at 858 (emphases added). Accordingly, the court held that any FAR provision purporting to divest the boards or the Court of Federal Claims of jurisdiction under the CDA is void unless another statute specifically authorizes such a limitation. Notably, the FAR was subsequently amended by the FAR Council to reflect the holding in *Burnside-Ott.* See 64 Fed. Reg. 72414 (Dec. 27, 1999) (amending FAR 16.405-2).

In *Rig Masters*, the Court of Federal Claims considered a FAR clause that purported to exempt from CDA review any contracting officer decision concerning Value Engineering Change Proposals (“VECPs”). Specifically, FAR 52.248-1(e)(3) provided that:

the Contracting Officer’s decision to accept or reject all or part of any VECP and the decision as to which of the sharing rates applies shall be final and not subject to the Disputes clause or otherwise subject to litigation under the Contract Disputes Act of 1978 (41 U.S.C. 601-613).

*Id.* (emphasis added). Following the holding in *Burnside-Ott*, Judge Bruggink in *Rig Masters* held that “[t]he regulation is . . . in direct conflict with the CDA and cannot stand.” 42 Fed. Cl. at 372.

The proposed rule regarding final contract voucher submission -- like the award fee and VECP provisions found invalid in *Burnside-Ott* and *Rig Masters* -- purports to divest board and court jurisdiction over certain unilateral contracting officer determinations. Indeed, it uses the same language (“not subject to the . . . Disputes clause”) that the courts have explicitly rejected as void and unenforceable. There does not appear to be a statutory basis for this effort to limit the application of the CDA.

Thus, the Section believes that the CDA requires the unilateral decisions contemplated in the proposed rule to be subject to the Disputes clause and board or court review. The proposed rule should be modified accordingly.

The Rule Should Provide For Notice To The Contractor And An Opportunity To Respond

The purpose of the proposed rule is to expedite the contract closeout process. The proposed rule states that the contracting officer may issue a unilateral determination of amounts due if a contractor fails to submit a completion invoice or voucher within 120 days after settlement of the final indirect cost rates. The Section recommends that the proposed rule incorporate the same procedural safeguards already in place in analogous FAR provisions concerning the closeout of terminated contracts.

In situations where the contractor has not submitted a timely termination settlement proposal, the contracting officer may make a unilateral determination of the amount due. *See* FAR 49.109-7(a). The FAR, however, includes a number of procedural protections to enhance the fairness of the process. First, as discussed above, such unilateral determinations are subject to the Disputes clause and board or court review. Second, before issuing a unilateral determination, the contracting officer must give the contractor *sufficient notice of that intention and an opportunity to submit the required information.* *See* FAR 49.109-7(b).
The Section believes that the proposed rule concerning final contract voucher submission should likewise include a provision requiring the contracting officer to provide written notice to the contractor and an opportunity to respond before the issuance of a unilateral determination of amounts due. Doing so would avoid the possibility of miscommunication or unfair surprise.\[2\] In addition, it would avoid the creation within the FAR of inconsistent procedures for the closeout of terminated versus non-terminated contracts, and it would further the stated purpose of the proposed rule — to make it more likely that the contracting officer will timely receive all information necessary to make an accurate assessment of the amounts due and to timely close out the contract.

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

Sincerely,

Gregory A. Smith  
Chairman, Public Contract Law Section

cc: Norman R. Thorpe  
Mary Ellen Coster Williams  
Hubert J. Bell, Jr.  
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Chairs and Vice Chairs, Contract Claims and Disputes Resolution Committee  
Richard P. Rector

\[1\] Mary Ellen Coster Williams, an Officer of the Public Contract Law Section, did not participate in the Section’s consideration of these comments, and she abstained from voting to approve and send this letter.

\[2\] Indeed, a number of factors may prevent a contractor from submitting a completion invoice or voucher within 120 days after settlement of its final annual indirect rates. For example, the contractor may need to wait for settlement of subcontractor rates or resolution of subcontractor claims.