April 8, 1998

Mr. Allan Brown
Acting Administrator
Office of Federal Procurement Policy
New Executive Office Building
725 - 17th Street, N.W. Room 9001
Washington, DC 20503

Re: FAC 90-40, Requirement for Funding Cancellation Ceiling Liability in DOD Multi-Year Procurement Actions

Dear Mr. Brown:

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.

For over two decades, the Department of Defense (DoD) has had authority to enter into multi-year procurements. Because there was no comparable authority for the civilian agencies, regulatory coverage was in the DFARS. This situation was changed with FASA, and FAC 90-40 issued July 26, 1996 addressed the new government-wide multi-year procurement authority in Part 17.
During all the years this authority resided with DoD, there was no requirement to obligate funds to cover the cancellation ceiling liability. Obligation of funds was required, however, in an amount necessary to fully fund the instant year contract and the termination liabilities associated with any advance buys or economic order quantities. The amounts identified in any given year for the cancellation ceiling were deemed contingent liabilities. Although it was necessary for the procuring agency to ensure that funds authorized and appropriated to date were adequate to liquidate this liability without seeking supplemental funding from the Congress, the amounts were deemed contingent liabilities and did not require obligation.

With issuance of FAC 90-40, FAR 17.104(c) stated that: "... the funds obligated for multi-year contracts must be sufficient to cover any potential cancellation and/or termination costs; ...". We understand that this proscription was inserted because of concern over the ability or inclination of the civilian agencies to deal with cancellation ceiling liabilities effectively. To our knowledge, the DoD has never sought additional funding from Congress as a result of a multi-year procurement liability, and thus a similar concern has not been manifested in the DoD. Nevertheless, FAR 17.104(c) applies to DoD.

As a result, if DoD is required to obligate funds in an amount adequate to fully fund the instant year, termination liabilities, and the cancellation ceiling, multi-year procurement actions will never be initiated by the DoD notwithstanding this acquisition approach, in appropriate circumstances, is acknowledged to be a very cost effective and streamlined contracting technique.

A DFAR provision has been drafted (DFARS 217.104(c)(70)) which states: "Departures from the policies in OMB Circulars A-11 and A-34 using flexibility provided to DoD by 10 U.S.C. 2306b (f) or 10 U.S.C. 2306(g)(3) shall be coordinated by the contracting officer with the cognizant Comptroller. However, this flexibility does not apply to economic order quantity advance procurements . . .". This provision would simply restore to DoD the same authority it has had for over two decades.

We understand that OFPP is opposed to such authority. However, we believe OFPP's concerns to be unwarranted in the case of DoD. Moreover, the problem created by the funding requirements of FAR 17.104(c) is exacerbated in DoD due to the limitations on procurement funds relative to the period for which they are available for obligation (three years). Most multi-year procurement actions in the DoD have cancellation ceilings running for four to five years. The problem is self-evident. Therefore, we urge OFPP to reconsider its opposition to proposed DFARS 217.104(c)(70).

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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