August 23, 2013


Dear Mr. Butler:

The American Bar Association (“ABA”) Section of Public Contract Law welcomes this opportunity to comment on the above-referenced proposed rule published on June 12, 2013 in the Federal Register by the Department of Energy (“DOE”) to amend the Department of Energy Acquisition Regulation (“DEAR”). 78 Fed. Reg. 35195 (June 12, 2013). 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. 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 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.\(^2\)

The Section commends the DOE for recognizing the importance of export controls as applied to DOE contracts and contractors. We recognize that DOE’s efforts are similar to the multi-year process undertaken by the Department of Defense (“DOD”)

\(^1\) The Honorable Mary Ellen Coster Williams, the 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 “International Procurement” at: http://apps.americanbar.org/contract/federal/regscomm/home.html.
regarding export controls which culminated in Defense Federal Acquisition Regulation Supplement (“DFARS”) provisions implemented in 2010. The Section also recognizes that while DOD does not have its own export regime, DOE has independent jurisdiction over certain export controls set forth in 10 C.F.R. Part 810 (although not over the Department of Commerce’s Export Administration Regulations (“EAR”) or the Department of State’s International Traffic In Arms Regulations (“ITAR”)). Nonetheless there are some aspects of the proposed DOE rule that the Section believes may warrant further consideration prior to the issuance of a final rule. These are the requirements to:

- Place an “Export Restriction Notice,” “in all transfers, sales or other offerings of unclassified information, materials, technology, equipment or software pursuant to a DOE contract.”

- Notify the Contracting Officer in a timely manner, in writing, of “any export control requirements it has determined apply to contract performance.”

- Notify the Contracting Officer in a timely manner, in writing, “that it has taken appropriate steps to comply with such requirements.”

These aspects of the rule go beyond the underlying export control legal regimes they are meant to highlight for contractors and subcontractors (including those in 10 C.F.R.) and create new obligations not called for by substantive export control law and regulations. In so doing, they may lead to inefficiencies and potential confusion as contractors seek to work with DOE, and may also lead to uncharted contract or other disputes with DOE, which does not have underlying jurisdiction for most export-controlled items and technology and whose acquisition workforce is not specially trained in export licensing and compliance.

The final DFARS rule in 2010 (which was the result of significant public comment on predecessor preliminary and interim rules) simply called out the importance of export control laws and regulations to DOD contractors at all tiers while not subsuming the rightful jurisdiction of the underlying export control agencies and injecting contracting officers into an area of regulation in which they traditionally have little training. Although we recognize that DOE’s efforts are largely patterned on DOD’s multi-year process of developing DFARS export-control coverage, and therefore commend DOE’s efforts to align itself with DOD’s thoughtful approach, we encourage DOE to consider scaling back its rule to align it even more closely with the 2010 DFARS rule and thus to consider eliminating the requirements set forth above. We note that this approach would also be consistent with how the FAR Council ultimately tailored FAR 52.225-13, Restrictions on Certain Foreign Purchases, a number of years ago to align closely with OFAC sanctions, rather than creating independent requirements relating to U.S. sanctions compliance.
We look forward to continued communications regarding these important issues, and we appreciate your consideration of these comments. The Section is available to provide additional information or assistance as you may require.

Sincerely,

Sharon L. Larkin
Chair, Section Public Contract Law

cc:
Stuart B. Nibley
David G. Ehrhart
James A. Hughes
Jeri Kaylene Somers
Council Members, Section of Public Contract Law
Chairs and Vice Chairs, International Procurement Committee
Kara M. Sacilotto
Craig M. Smith