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Office of the Director  
Defense Procurement and Acquisition Policy  
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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 have 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.

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.

In response to the Department of Defense request for comments regarding contract financing, including Part 32 of the Federal Acquisition Regulation (the “FAR”), the Section submits these suggested modifications to FAR Parts 32.9 and 32.8.

1 Mary Ellen Coster Williams, Jeri Kaylene Somers, and Carol Park Conroy, Council members of the Section of Public Contract Law, 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 at: http://www.abanet.org/contract/regscomm/home.html under the topic “Payment Issues.”

FAR Part 32.9 Receiving Reports

In 1982, Congress enacted the Prompt Payment Act (the “Act”) to ensure payment of contractors in a timely manner. The underlying goal of the Act was to improve the Government’s relationships with its contractors, increase competition for government business, and reduce overall government contracting costs. As amended, the Act requires the Government to pay contractors within thirty days of the Government’s receipt of a valid invoice or acceptance of supplies and services, whichever occurs later. For invoices not paid within this time period, the Act requires the Government to pay interest to the contractor at a rate established by the Secretary of the Treasury.

In order for a contractor’s invoice to be paid, the Act, as set forth in FAR Part 32.9, requires that the government paying office receive, inter alia, a “proper invoice” and a “receiving report or other Government documentation authorizing payment.” FAR 32.905(c) requires agency receiving officials to forward receiving reports to designated payment offices within five working days of government acceptance. Notwithstanding these payment provisions, it has come to the Section’s attention that the current ways in which the Government processes the receiving reports have either limited or entirely prevented contractors from receiving prompt payment.

Contractors have expressed concern that in certain instances the contracting officer has delayed the preparation of a receiving report, which has then prevented the paying office from paying the contractor’s invoices promptly. When the contractor has then requested prompt payment from the paying office, the paying office has contended that it paid the contractor’s invoices as soon as it received the receiving report from the contracting officer. Contractors have also confronted the situation in which the paying office has contended that it could not pay the contractor’s invoices because the paying office was awaiting the contracting officer’s processing of paperwork to identify which funds should be charged for the expense. In both situations, contractors have expressed concern that it is extremely

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5 In 1999, the implementing regulations for the Act were codified in 64 Fed. Reg. 52579 (Sept. 29, 1999), found at FAR 32.9. Part 32.904(b) sets forth the determination of payment due dates.
6 FAR 32.905(b).
7 FAR 32.905(c).
difficult for them to determine exactly where the payment problem occurs and then to attempt to help resolve the problem.

Although contractors will earn the right to Prompt Payment Act interest from the Government before a receiving report is generated and forwarded to the government paying office, many contractors are more interested in timely payment of the principal amount due than they are in recovering Prompt Payment Act interest. A right to receive Prompt Payment Act interest in the future does not generate the cash needed today to pay current obligations. The requirement in FAR 32.905(c) that receiving reports “should” be forwarded to the designated government payment office by the fifth working day following government acceptance or approval of the work has not been sufficiently strong to assure that contractors in fact receive prompt payment as the Act intended.

**FAR Part 32.8 Assignment of Claims**

FAR Part 32.8 addresses the requirements for accomplishing a valid assignment of the proceeds of a government contract to a bank, trust company or other financial institution. This part of the FAR implements the Assignment of Claims Act, 31 U.S.C. § 3727 and 41 U.S.C. § 15. Such assignments, as an exception to the “no assignment” rule for government contracts, were found to be in the Government’s interest in the 1940s when Congress recognized that assignments to financial institutions were needed to aid government contractors in acquiring capital for contracts to support the war effort. Beginning at that time, the ways of the financial world came face-to-face with the culture and practices of the government contracts world.

In government contracting, contractors generally accept at face value that a person signing a government contract on behalf of the Government and claiming to be a government contracting officer is a contracting officer with authority to bind the Government to that contract. Even for the largest contracts, contractors rarely insist upon receiving written evidence that the person claiming to be a contracting officer has authority covering the value of the particular contract being executed. Contractors incur substantial costs in reliance upon the government signator’s authority represented solely by the signature on the page. This practice exists

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8 FAR 32.904(b) sets the interest payment due dates as the later of 30 days after the billing office receives a proper invoice or 30 days after the Government accepts supplies delivered or services performed. Thus, interest will accrue with or without a receiving report. FAR 32.905(c) requires receiving reports only for authorization to pay invoices.
although FAR Part 1.602-1 requires contracting officers to make “readily available” the limits of their contracting authority.9

The practice is very different in the private financial world. In the private financial world, it is customary for a lender or investor relying upon the future revenues of a particular contract vehicle as the “credit” for making a financial commitment to require as part of its due diligence and as a condition of the commitment that written evidence of the authority of the signators to the contract be provided. Thus, when private lenders and investors are considering participation in a third-party financed government contract, they often will require evidence of the contracting officer’s authority to bind the Government to that contract.

At this point, the practice in government contracting of contractors not requiring such evidence before entering into a contract collides with the practice in the private financial world. Reasonable requests from contractors on behalf of their third-party financial institutions to contracting officers for written evidence of their authority are not always met with open arms. Because the financial institutions more often than not require such evidence, contractors may be forced to resort to Freedom of Information Act requests, which can take significant time, or hope to convince financial institutions that there is little risk the contracting officer lacks authority. If a financial institution agrees to go forward without written evidence of a contracting officer’s authority, the cost of capital to the contractor generally will increase by some amount because of the perceived increased risk to the financial institution. That cost, like all costs a government contractor incurs, at some point, directly or indirectly, is passed on to the Government.

A solution is to recognize the reasonable requirement of financial institutions for such written evidence and to sensitize contracting officers to that need. Although as a practice contracting officers and contractors do not share written evidence of the contracting officer’s authority when entering into a contract, it should be considered common to do so in cases where contractors are seeking private financing to perform that contract. To make such requests more customary and part of the ordinary course of business, the Section recommends additional training for contracting officers on the requirements of private financial markets or, alternatively, an addition to FAR Part 32.8 on assignments of contract proceeds.

9 FAR 1.602-1 states that “Contracting officers shall receive from the appointing authority clear instructions in writing regarding the limits of their authority. Information on the limits of the contracting officers’ authority shall be readily available to the public and agency personnel.”
which references the requirement in FAR Part 1.602-1 that contracting officers make readily available the limits of their authority.

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

Sincerely,

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Chair, Section of Public Contract Law

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