December 30, 2013

VIA REGULATORY PORTAL AND FACSIMILE

Defense Acquisition Regulations System
Attn: Annette Gray
OUSD(AT&L)DPAP/DARS
Room 3B855, 3060 Defense Pentagon
Washington, DC 20301–3060

Re: Interim Rule, DFARS 237.102–79; DFARS Case 2012–D036;
Defense Federal Acquisition Regulation Supplement: Private Sector
Notification Requirements of In-Sourcing Actions (Oct. 31, 2013)

Dear Sir or Madam:

On behalf of the Section of Public Contract Law of the American Bar
Association (the “Section”), I am submitting comments on Interim Rule, DFARS
237.102–79; DFARS Case 2012–D036; Defense Federal Acquisition Regulation
Supplement: Private Sector Notification Requirements of In-Sourcing Actions (Oct. 31,
2013) (the “Interim Rule”). 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 a
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

¹ Sharon L. Larkin, Section Chair, Jeri K. Somers, Section Budget Officer, Mary Ellen Coster
Williams, Section Delegate to the ABA House of Delegates, and Anthony N. Palladino, member of the
Section Council, 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.americanbar.org/groups/public_contract_law/resources/prior_section_comments.html under
the topic “Privatization and Competitive Sourcing.”
I. INTRODUCTION

These comments address the Interim Rule regarding the notification of United States Department of Defense ("DOD") insourcing decisions under 10 U.S.C. § 2463 to affected incumbent contractors. The Section recognizes that the Interim Rule is a step in the right direction. Nevertheless, as will be discussed below, the Section believes that the Interim Rule can be improved in two ways: (1) by requiring issuance of the insourcing notice at least a reasonable amount of time prior to the commencement of the insourcing action; and (2) by providing specific guidance about what information must be included in the insourcing notice.

II. BACKGROUND

A. Section 938 of the National Defense Authorization Act for Fiscal Year 2012 Added a Notification Requirement for Insourcing Decisions

Prior to fiscal year ("FY") 2012, DOD was not required to timely notify contractors whose services were converted under 10 U.S.C. § 2463(a)\(^3\) to performance by DOD civilian employees. DOD became required to do so after passage of the National Defense Authorization Act ("NDAA") for FY 2012: Section 938 of the NDAA created a new subsection 10 U.S.C. § 2463(f), which stated that “[t]he Secretary of Defense shall establish procedures for the timely notification of any contractor who performs a function that the Secretary plans to convert to performance by Department of Defense civilian employees pursuant to [10 U.S.C. § 2463(a)].”

On January 29, 2013, the Office of the Assistant Secretary of Defense issued a memorandum, “Private Sector Notification Requirements in Support of In-sourcing Actions” (the “DOD Memorandum”), to implement the requirements in the new 10

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\(^3\) By way of background, 10 U.S.C. § 2463 provides “guidelines and procedures for use of civilian employees to perform Department of Defense functions,” including whether a function performed by contractors should be converted to performance by DOD civilian employees. Under 10 U.S.C. § 2463(a), “[t]he Under Secretary of Defense for Personnel and Readiness shall devise and implement guidelines and procedures to ensure that consideration is given to using, on a regular basis, Department of Defense civilian employees to perform new functions and functions that are performed by contractors and could be performed by Department of Defense civilian employees.” Among other things, 10 U.S.C. § 2463(b) requires that these “guidelines and procedures . . . provide for special consideration to be given to using Department of Defense civilian employees to perform” certain functions performed by contractors, including inherently governmental functions, certain critical functions, acquisition workforce functions a function closely associated with the performance of an inherently governmental function, a function that has been performed by Department of Defense civilian employees at any time during the previous 10-year period, and a function that has been performed pursuant to a contract awarded on a non-competitive basis. 10 U.S.C. § 2463(e)(1) establishes, in part, a cost comparison framework that the Secretary of Defense must consider when determining whether “a function should be converted to performance by Department of Defense civilian employees.” However, this framework does not apply to the conversion of inherently governmental functions, certain critical functions, acquisition workforce functions and functions closely associated with the performance of inherently governmental functions.
U.S.C. § 2463(f). The DOD memorandum required DOD agencies to “determine and document final decisions to in-source,” and directed contracting officers to “provide a written notification” to affected incumbent contractors “[w]ithin 20 business days of the [contracting officer’s] receipt of such [insourcing] decision.” DOD Memorandum at 1. The DOD Memorandum also indicated that the contracting officer’s written notification “may summarize, in an appropriate format, the requiring official’s final determination as to why the service is being in-sourced.” Id.

B. The Interim Rule is Consistent with Prior DOD Guidance

DOD issued the Interim Rule to implement the DOD Memorandum’s directions. Through the Interim Rule, DOD is revising DFARS 237.102-79, which has set forth DOD policy related to insourcing, by incorporating the same requirements found in the DOD Memorandum:

In accordance with 10 U.S.C. § 2463, contracting officers shall provide written notification to affected incumbent contractors of Government in-sourcing determinations. Notification shall be provided within 20 business days of the contracting officer’s receipt of a decision from the cognizant component in-sourcing program official. The notification will summarize the requiring official’s final determination as to why the service is being in-sourced and shall be coordinated with the component’s in-sourcing program official. No formal hiring or contract-related actions may be initiated prior to such notification, except for preliminary internal actions associated with hiring or contract modification. . . .


III. COMMENTS

The insourcing notification requirements under the Interim Rule represent a step in the right direction, although the Section believes that the Interim Rule can be improved.

A. The Interim Rule Should Require Issuance of the Insourcing Notice In a Reasonable Time Prior to DOD’s Commencement of the Insourcing Action.

Although the Interim Rule requires the contracting officer to notify an affected incumbent contractor about an insourcing decision within 20 business days of receiving the decision from the insourcing program official, the Interim Rule does not
specifically address how soon DOD can commence the insourcing action after issuance of the notice. In other words, the Interim Rule does not require that DOD, once it determines that it will insource services being performed by a contractor, notify a contractor any particular time before the contractor’s contract lapses or is terminated in part or in full and DOD begins to perform the services with DOD personnel.4

To limit the potential adverse impact of an insourcing action on a contractor (e.g., loss of work leading to a potential reduction in force), the Interim Rule should require issuance of the notice at least a reasonable amount of time prior to commencement of the insourcing action. This minimum lead time will provide the contractor with time to prepare for its reduced or eliminated scope of work resulting from the insourcing action (e.g., shift employees to other projects, seek additional work, etc.).

B. The Interim Rule Should Provide Better Guidance About What Information Must Be Included in the Notice.

The Interim Rule offers little guidance about what specific information must be included in the contracting officer’s insourcing notification. Instead, the Interim Rule requires the contracting officer only to “summarize the requiring official’s final determination as to why the service is being in-sourced . . . .” 78 Fed. Reg. at 65219 (proposed revised DFARS 237.102–79 (emphasis added)). As a result, insourcing notifications will likely contain varying amounts information; there will be less consistency across DOD agencies and offices. Further, there is no guarantee that a contractor will be provided any meaningful insights about the rationale for the insourcing decision.

Including specific guidance in the Interim Rule about what meaningful information must be contained in the insourcing notification will help ameliorate these concerns. Additionally, such guidance will result in greater transparency in DOD insourcing decisions, leading to better accountability.

IV. Conclusion

As discussed above, the Section supports the efforts by the DOD to ensure that affected incumbent contractors receive timely notice of DOD insourcing decisions, but it believes that the Interim Rule can be improved with certain minimal changes. The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.

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4 The Interim Rule indicates that “[n]o formal hiring or contract-related actions may be initiated prior to such notification, except for preliminary internal actions associated with hiring or contract modification.” 78 Fed. Reg. at 65219 (proposed revised DFARS 237.102–79).
Sincerely,

Stuart B. Nibley  
Chair-Elect, Section of Public Contract Law

cc: Sharon L. Larkin  
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Council Members, Section of Public Contract Law  
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