On November 5, 1996, the Section submitted comments to the General Services Administration regarding its proposed rule on procurement integrity. The proposed rule would implement recent amendments to Section 27 of the Office of Federal Procurement Policy Act, Section 4304 of the Federal Acquisition Reform Act (FARA), as codified at 41 U.S.C. 423.

The Section applauded the fact that the proposed rule largely repeated, without substantive change, the requirements of Section 27 as amended. The proposal would remove many of the more burdensome obligations of the prior procurement integrity rules while still protecting the integrity of the procurement process.

The Section also suggested a number of improvements it believed would improve the rule by further advancing the goal of removing duplicative and unnecessary burdensome and confusing requirements of the prior law.

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November 5, 1996

General Services Administration
FAR Secretariat (MVR)
18th & F Streets, N.W., Room 4040
Washington, D.C. 20405

Re: Proposed Rule on Procurement Integrity,
FAR Case No. 96-314, 61 Fed. Reg. 47390 (Sep. 6, 1996)

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 the above-referenced matter. The Public Contract Law Section consists of attorneys and associated professionals in private practice, industry and Government service. The Section's governing Council and substantive committees contain a balance of 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 captioned proposal implements last year's amendments to section 27 of the Office of Federal Procurement Policy Act, in section 4304 of the Federal Acquisition Reform Act ("FARA"), as codified at 41 U.S.C. 423. The Section is pleased to see that the proposal largely repeats, without substantive change, the requirements of section 27 as amended. The amended statute, and this proposal, remove many of the more burdensome obligations of the prior procurement integrity rules, while still protecting the integrity of the procurement process. In light of the goal of removing duplicative, unnecessarily burdensome and confusing requirements of the prior law, the Section has a number of comments to offer that we believe will improve upon the final rule.

**Proposed Section 3.104-1(b)**

Proposed section 3.104-1(b) reminds agency employees that other statutes and regulations also may address matters covered by the procurement integrity rules. This provision provides a good cross reference to such other rules, particularly those which remain in effect beyond the period the procurement integrity rules apply. However, because this is only a partial list of the many related statutes, we believe there is a potential for confusion. This provision should be clarified to refer to substantially all other civil or criminal laws and regulations which may address prohibited conduct. Thus, it should include a reference to FOIA, since much proprietary information that is temporarily protected by procurement integrity rules will remain protected from release after a procurement is awarded or canceled. The Privacy Act and the Trade Secrets Act are also appropriate references. This should reduce the risk of any misunderstanding the effect of the expiration of procurement integrity application to a particular matter.

While adding those references, care should be taken not to try to make this provision too substantive, i.e., by trying to fully summarize the other laws. This runs the risk of encouraging affected persons not to seek out the actual laws and relevant details, if the provision appears to summarize the law for them.

**Proposed Section 3.104-2(a)**

Proposed section 3.104-2(a) states that the data disclosure and employment discussion restrictions at proposed 3.104-3(a)-(c) apply to the conduct of every Federal agency procurement using competitive procedures. While it appears self-evident that sole source procurements will not be subject to the restrictions, the proposed rule should be clarified to expressly exclude non-competitive procedures, as defined in FAR Part 6, and to emphasize that any competitive procurement, however conducted, is covered. For example, ordinarily contract modifications would not be competitively awarded. However, on occasion the government has been known to "compete" a requirement which results in a decision to award an out-of-scope modification to an existing contract. The process leading to such a modification should be covered by these procurement integrity protections.

**Proposed Section 3.104-2(b)**

Proposed section 3.104-2(b) identifies to whom the new post-employment restrictions apply, based on when the official's employment ends, i.e., after January 1, 1997.[1] The second sentence sets out an exception to these restrictions:

Former officials of a Federal agency whose employment by a Federal agency ended before January 1, 1997, are subject to restrictions imposed by 41 U.S.C. 423 as it existed before Pub. L. 104-106.

We recommend this exception be modified and limited for several reasons. The restrictions imposed under the new law are, for the most part, much more limited than those imposed under current procurement integrity provisions. In particular, fewer employees will be considered covered officials because the dollar threshold for covered actions has been set at $10 million. Further, the post-employment time period
restriction has been reduced to one year, versus the current two year limitation. However, the new post-employment restriction is now an absolute bar to employment by particular contractors, whereas the old law permits such employment with a limitation on what the former government employee could do for such contractors.

The proposed rule would treat two groups of former federal employees very differently, strictly based on the date the employee leaves government employment. Employees retiring only one day apart would be subject to significantly different restrictions. For example, a procurement official who retires on December 31, 1996, may accept employment with a competing contractor, but there is a two-year restriction on what type of work may be performed. However, if the same employee retires on January 2, 1997, under the proposed rules, the limitation on employment would apply for only one year, but he may not take a job with the same contractor. In addition, because of the narrow focus of the new law, there is a much greater proportion of departing government employees who would not be covered at all.

These examples emphasize the disparate results of operating under two different regulatory schemes, and increase both the employees' and potential employers' difficulty in complying with the regulations. Because the restrictions have been eased under the new law, and the apparent intent of Congress is to have clearer and less burdensome procurement integrity rules across the board, we recommend that the new restrictions be applied to all covered officials, regardless of when they terminate (or terminated) their employment. We believe this is consistent with Congress' intent, is achievable within the regulatory authority provided by statute, and can be administered fairly and evenly.

Without impairing the rights of persons who depart under the old law, the proposed regulation should be revised to transition immediately to the new rules for all present and former employees. Specifically, employees who have left government service before January 1, 1997, should on that date be covered by the new rules to the greatest extent possible, thus:

- be allowed to keep jobs taken in reliance on the old law; but
- have their two-year restriction dropped to one year; and
- be relieved of all post-employment restrictions if they do not meet the new definition of covered officials.

Employees who retire after January 1, 1997, will have substantially the same rights with one exception – the ban on working for covered contractors. Preserving this distinction between the two classes of former employees is not inherently unfair, because employees that leave prior to the rule change should be allowed to rely upon the law as it stood when they left, and in any case would retain this right even under the rules as presently proposed. This one difference is a far less material distinction between the two otherwise-identical classes of employees than that presented by the proposed rule.

We believe this approach better reflects Congress' intent in enacting a simplified, unified conflict of interest statute, and is within the authority delegated to the FAR Council, as well as within the agency's interstitial rulemaking responsibility and authority. Specifically, 4401(b)(2) of FARA states:

(2) Other Matters.—An amendment made by this division shall also apply, to the extent and in the manner prescribed in the final regulations promulgated pursuant to section 4402 to implement such amendment, with respect to any matter related to—

(A) a contract that is in effect on the date described in paragraph (3);

(B) an offer under consideration on the date described in paragraph (3); or
This provision clearly expresses an intent to convert even existing contract actions to the new rules as of January 1, 1997. The old rules will apply to acts that occur before that date, but afterward actions on the same contract will be covered by the new rule. Our recommended changes to the post employment restrictions will have the same effect -- persons who leave government service prior to January 1, 1997, will be covered by the old rules until that date. If they violate the two year post-employment restriction on December 30, 1996, they violate the old law and may be punished accordingly. However, as of January 1, 1997, all present and former employees will be covered only by the new rules, with one exception to protect employees who accepted employment in reliance on the old law. See also H. Rep. 104-Rep. 104-450, 104th Cong., 2d Sess. at 971 (legislative history of section 4401).

Section 4401 does not offer any guidance about how to handle procurement actions that are not still pending in some manner as of January 1, 1997. Section 4402, however, appears to provide that coverage, and further supports the conclusion that Congress anticipated a rapid transition to the new law under all circumstances. This section anticipates the possible alteration of rights established under the old law, by providing in subsection 4402(d)(2) that prior actions taken shall be deemed valid, despite the new law, "except to the extent and in the manner prescribed in [the new] regulations." Thus there is regulatory authority to change the rules for prior contracts and prior government retirements in this provision. Subsection 4402(d)(3) goes on to emphasize that the prior law shall continue in effect only until the effective date of the regulations implementing the new statute. This further confirms our conclusion that Congress intended a substantially complete transition to the new law, for everybody and every contract, as of January 1, 1997.

Under the circumstances, the Section believes its recommended changes to the proposed rule are authorized by the statute.

Proposed Section 3.104-3(a) and (b)

Proposed subsections 3.104-3(a) and (b) identify the statutory and related prohibitions, restrictions, and requirements under FARA relating to the disclosure or obtaining of procurement information. The new statute prohibits the disclosure or obtaining of procurement information before award of a Federal agency procurement contract or after cancellation before award, unless the agency plans to resume the procurement. 41 U.S.C. § 423 (a), (b), and (h).

A few clarifications of these proposals would be of help. The draft provisions leave some uncertainty as to when the relevant prohibitions end, or how the prohibitions apply when the information in question is relevant to more than one procurement. Such information is available in the current rules, in the definitions of section 3.104-4. In addition, it may not always be clear whether the agency intends to resume a canceled procurement. Therefore, we recommend that clarifying language be added to each of these subparagraphs (3.104-3(a) and (b)). In particular, we recommend these rules require the agency to inform affected companies and persons through a public notice if the agency intends to resume a canceled procurement.

In addition, proposed section 3.104-3(a)(2) applies the restrictions on disclosure of information to any person who is advising or has advised the government regarding a procurement. To ensure there is no confusion on this point, this provision should expressly state that advisory and assistance-type contractor employees who provide input for the procurement process also can be covered by this restriction. We further recommend that a provision be added to require notice to covered persons -- both government and contractor employees -- that procurement integrity restrictions apply to their activities on behalf of the government. Current section 3.104-5(d) provides for creation and maintenance of lists of persons with access to proprietary or source selection information. Continuation of this practice, or some new mechanism, should be considered.

Proposed Section 3.104-3(d)
Proposed section 3.104-3(d) prohibits former government officials from accepting compensation from a contractor if the official served in specified capacities for procurement actions in excess of $10 million. However, it is not clear how the threshold amount of $10 million would be calculated under different types of contracts where the value may be determined in more than one way, such as contracts with options; IDIQ and requirements contracts; BPAs, BOAs, and other Basic Agreements; and Multiple Award Schedule ("MAS") IDIQ contracts.

To ensure consistent application of this prohibition throughout the government, we think that clarifying language should be added. For example, contracts containing one or more options should be valued either on the basis of the amount of the base year only or including all option periods, and IDIQ and requirements contracts could be valued either on the basis of the guaranteed minimum or the estimated total purchases.

However, Basic Agreements, BOAs, and BPAs are not contracts, and are not a guarantee that orders in any amount will be placed. For such agreements, coverage under this paragraph should not be required for the underlying agreement, but only for the individual orders placed under these instruments, if they exceed the $10 million threshold. An alternative would be to allow discretionary application, based on a contracting officer (or more senior official) finding, if a particular agreement which may ultimately exceed $10 million should be covered because of the particular circumstances of the award. Similarly, MAS contracts, which generally do not have specific estimated values, and because they guarantee a minimum of only $100, should not be covered at award. Individual MAS orders, if they exceed $10 million, should be covered.

**Proposed Sections 3.104-4 and 3.104-5(c)**

Proposed section 3.104-4 defines source selection information to include information prepared for use by a Federal agency for the purpose of evaluating a bid or proposal to enter into a contract, and delineates ten categories of source selection information. The tenth category states:

(10) Other information marked as "SOURCE SELECTION INFORMATION—SEE FAR 3.104" based on a case-by-case determination by the head of the agency or designee, or contracting officer, that its disclosure would jeopardize the integrity or successful completion of the Federal agency procurement to which the information relates.

This category 10 is the only category that requires information be marked. The first nine categories need not be marked in order to be considered source selection information.

However, proposed section 3.104-5(c) subsequently states:

Individuals responsible for preparing material that may include information designated as source selection information in accordance with 3.104-4 shall mark the cover page and each page that contains source selection information with the legend "SOURCE SELECTION INFORMATION—SEE FAR 3.104."

Although the material described in 3.104-4 is considered to be source selection information whether or not marked, all reasonable efforts shall be made to mark such material with this legend.

Two questions are raised by this paragraph. First, while correctly characterizing categories 1 - 9 as source selection information "whether or not marked," by generalizing about all information listed in section 3.104-4, this provision also suggests that the marking of category 10 information may be permissive. The language in this paragraph should be revised to clarify that category 10's "other information" must be marked in order to be considered source selection information, i.e., if it is not marked properly, it is not source selection information.

Second, section 3.104-5(c) contradicts the definition of "other information" as source selection information.
in 3.104-4. Proposed section 3.104-4 requires a determination by the head of the agency or designee, or by the contracting officer, that information falls under category 10. However, proposed 3.104-5 as written would permit other individuals, e.g., technical requirements personnel, to determine what other information is to be marked as source selection information. While it is appropriate to require that such persons mark documents they create, which may draw upon material that already is properly marked under category 10, the draft rule would allow such persons to bestow protected status on completely new documents and information simply by marking it as such. This is not authorized by the law.

**Proposed Section 3.104-7(e)**

Proposed section 3.104-7(e) provides that a requester or a contractor may rely in good faith on an ethics advisory opinion, and that neither will be found to have knowingly violated any restriction based on such good faith reliance. However, the proposed rule does not include a duty to inquire and the corresponding protections such as are available under the current FAR 3.104-8(a)-(d). For example, current 3.104-8(a) provides:

(a) Knowing violations. Neither a procurement official nor a competing contractor violates the restrictions set forth in 3.104-3 unless the prohibited conduct is engaged in knowingly. For these purposes, conduct is not "knowing" when—

(1) A competing contractor engages in specific conduct after having satisfied the duty to inquire under paragraphs (b), (c), and (d) of this subsection, or when the competing contractor engages in conduct based upon good faith reliance on an agency ethics advisory opinion . . . .

The proposed 3.104-7 does not have counterparts to these provisions of the present rules. We recommend that this omission be reconsidered, and a similar provision be included in the final rule. However, if the decision remains not to include such provisions, then, at a minimum, explanations for the final rule should make it clear that no negative implication is intended; i.e., that in situations which raise concern, good faith inquiry will still be a factor in determining whether conduct is or was knowing.

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

Sincerely,

John T. Kuelbs
Chair, Section of Public Contract Law

cc: Marcia G. Madsen
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    Alan C. Brown
    Council Members
    Chair and Vice Chairs of the Conflicts of Interest and Ethics Committee
    Alexander J. Brittin

**ENDNOTES**

1.) Given the short period of time available, we are assuming that the relevant date in each case is the final statutory implementation deadline of January 1, 1997.
2.) Further support for this analysis may be found in the contrast between the regulatory authority provided by the two subsections of 4402(b). The first subsection states that the new statute shall apply "in the manner prescribed in the final regulations" to all new solicitations after January 1, 1997. This is an unconditional mandate for all new procurement actions. The second subsection, however, relating to contract actions that are somewhat farther along as of January 1, 1997 (quoted in text above), provides that the statute shall apply "to the extent and in the manner prescribed in the final regulations . . . ." This choice of language, in contrast to the preceding subsection, is significant. In our opinion, it provides the leeway needed to develop a more flexible regulatory implementation than now appears in the draft rule, without relaxing in any way the mandatory application of the statute. Thus, while certain interim measures may be necessary to transition to the new regulatory structure without impairing the rights of former government employees, the focus of this provision is to ensure as full an implementation as possible, as early as possible.