Mr. Shay Assad
Director for Defense Procurement and Acquisition Policy (DPAP)
United States Department of Defense
3060 Defense Pentagon, Room 3B855
Washington, DC 20301-3060

Re: JCC-I/A Clause 952.225-0010

Dear Mr. Assad:

On behalf of the Section of Public Contract Law of the American Bar Association ("the Section"), I am submitting comments on the Joint Contracting Command-Iraq/Afghanistan ("JCC-I/A") clause 952.225-0010, Contractor Employee Legal Requirements. 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.

1 James A. (Ty) Hughes, Jr., a 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.abanet.org/contract/regscomm/home.html under the topic “Emerging Areas.”
I. BACKGROUND

On March 9, 2009, the JCC-I/A issued Interim Policy Directive #09-10 ("Interim Policy Directive"), directing that JCC-I/A clause 952.225-0010 be included in all service and construction contracts with performance in the United States Central Command ("USCENTCOM") Area of Responsibility ("AOR"). Generally, JCC-I/A clause 952.225-7040 prohibits contractors or subcontractors that are performing work in the AOR from employing persons who have been convicted of a crime against host country nationals. The full text of the clause is set forth below:

C-1 ADDED 952.225-0010 CONTRACTOR EMPLOYEE LEGAL REQUIREMENTS MAR/2009 (JCC-I/A)

(a) The contractor shall not employ, nor allow a subcontractor to employ, any person that has ever been convicted, in any U.S. court, including a court-martial, of any crime against an Iraqi and/or an Afghan national, regardless of the place at which the crime occurred.

(b) For the purpose of this clause, "crime" is defined as: "a violation of a law in which there is injury to the public or a member of the public and a term in jail or prison, and/or a fine as possible penalties." Further, the crime must be an offense that could be classified as a Class B misdemeanor, or any higher class up to a Class A felony, as referenced at 18 USC § 3559.

(c) Contractors shall exercise effective screening processes to ensure that individuals not conforming to this standard are identified and prohibited from, or removed from (if already employed) working under this contract.

(d) Contractor employees discovered to have one or more prior convictions as described above shall be removed from the contract at the contractor’s expense.

(e) Failure to adhere to the requirements of this
clause could result in a termination for cause or
termination for default, in accordance with the terms
and conditions of this contract.

The new JCC-I/A clause appears to have no statutory or regulatory
underpinning, thereby casting doubt as to its validity. On several occasions—most
recently during the April 9, 2009, meeting of the Council of Defense and Space
Industry Associations (“CODSIA”) Operating Committee—industry associations
have raised to the Office of Defense Procurement and Acquisition Policy (“DPAP”)
the problem of such nonstandard clauses and the significant burdens they impose
on federal contractors. Although DPAP has indicated that the Defense Acquisition
Regulations (“DAR”) Council is conducting a review of all non-standard clauses, it
appears that there are no open FAR cases or DAR Council efforts concerning the
use of such clauses by Department of Defense procuring agencies.

As discussed below, the Section maintains that substantive clauses like the
new JCC-I/A clause should be subject to notice and public comment and should not
be included in solicitations and contracts until the completion of this process. The
Section has also identified several ambiguities with the provision that, at a
minimum, should be clarified.

II. COMMENTS

A. Contracts Subject to the Clause

The Interim Policy Directive requires the incorporation of JCC-I/A clause
952.225-0010 in accordance with the March 4, 2009, Assistant Secretary of the
Army, Acquisition Logistics and Technology (“ASA(ALT)”) memorandum issued
by Deputy Assistant Secretary of the Army (Procurement) Edward M. Harrington.
The ASA(ALT) memorandum mandates that all Army solicitations and resultant
contracts containing the Department of Defense FAR Supplement (“DFARS”)
Clause 252.225-7040, Contractor Personnel Authorized to Accompany U.S. Armed
Forces Deployed Outside the United States, also contain a requirement that any
persons who have been convicted by a U.S. court for a crime against host country
nationals shall not be employed on contracts or subcontracts with performance in
the AOR.

The Interim Policy Directive is unclear regarding the contracts to which the
new clause applies. In particular, the Interim Policy Directive states that the new
clause should be included in “all service and construction contracts with
performance in Iraq and Afghanistan.” Nevertheless, the ASA(ALT)
memorandum, referenced in the Interim Policy Directive, directs that contractors
and subcontractors must modify only those contracts with performance in the AOR.
"containing the provision at DFARS 252.225-7040." The result of this discrepancy is that it is unclear whether the new JCC-I/A clause must be included in service or construction contracts being performed in the AOR even when the contractor or subcontractor employees are not deployed with U.S. Armed Forces.

B. Employees Subject to the Clause

Certain provisions in JCC-I/A clause 952.225-0010 make it unclear as to whether the restrictions in the clause are limited to employees working in the AOR or extend to any employee working under a contract containing the clause. Specifically, JCC-I/A clause 952.225-0010(a) broadly mandates that contractors "shall not employ, nor allow a subcontractor to employ, any person that has ever been convicted, in any U.S. court, including a court-martial, of any crime against an Iraqi and/or Afghan national, regardless of the place at which the crime occurred." In addition, subparagraph (c) provides that individuals who have been convicted of a crime against host country nationals are prohibited from (or, if already employed, must be removed from) working under the contract, without specification that the clause applies only to individuals working in the AOR. This requirement arguably contemplates employees working under the contract who have never performed work in Iraq or Afghanistan, including contractor employees working in the United States. Furthermore, such broad language appears to contravene the ASA(ALT) memorandum’s requirement that the new JCC-I/A clause must be incorporated only in contracts including DFARS 252.225-7040, which governs contractor employees deployed with the military outside the United States.

The clause also implies that the consequences for an employee found to have been convicted of a crime against a host country national is not just removal from the AOR, but also termination of his or her employment with the contractor. The Section believes that this language is too ambiguous and potentially infringes upon the right of contractors to hire and employ whomever they choose for work outside the AOR.

C. Substantive Issues Regarding JCC-I/A Clause 952.225-0010

1. Compliance with Screening and Identification Requirements

The ASA(ALT) memorandum requires contractors to identify employees working in the AOR under a contract containing DFARS 252.225-7040 who have been convicted of a crime against host country nationals. Similarly, JCC-I/A clause 952.225-0010(c) requires contractors to "exercise effective screening procedures" to identify such employees and prohibit them from working under the contract. The Section maintains that, as drafted, these restrictions likely will be
difficult to implement. In particular, the clause does not provide direction to AOR contractors and subcontractors regarding the screening or identification services that should be used, whether employee self-certification would be adequate, whether the Government will provide the screening service, or whether screening must be outsourced from a private firm. Although the Interim Policy Directive and ASA(ALT) memorandum indicate that the implementation of effective screening procedures will be the responsibility of the contractor, private services hired by AOR contractors will not have access to confidential Department of Defense court-martial records, which must be reviewed in order to comply with the JCC-I/A clause.

Moreover, the clause and ASA(ALT) memorandum call for immediate removal of a contractor or subcontractor employee determined to have been convicted of a crime against host country nationals. Neither the clause nor memorandum designates specific procedures for the employee in question to contest such a determination. Furthermore, the clause and ASA(ALT) memorandum do not specify a time period for the Government to hear such challenges or permit the contractor to suspend performance while it seeks to replace the removed employee. Additionally, the clause makes no provision for convictions reversed on appeal.

2. Adequacy of Screening Services

The broad language of the clause contemplates a prohibition on employees who have ever been convicted of a crime against a host country national, regardless of how long ago such crime was committed. This open-ended requirement also presents compliance challenges. For example, it is unlikely that screening and identification services can provide conviction records dating back more than 15 to 20 years. Additionally, no screening service can provide the nationality of crime victims, so if an employee is found to have a conviction, presumably there will be no method, beyond a statement by the employee in question, to verify the nationality of the victim for purposes of the contractor’s obligation to screen for convictions for crimes against host country nationals. In addition, if commercial services are to be used, the Government should specify which are adequate so that if the screening service misses a conviction, the contractor will not be held responsible for the service’s error.

3. Right of Government to Terminate the Contract

JCC-I/A clause 952.225-0010(e) provides that an AOR contractor’s "[f]ailure to adhere to the requirements of this clause could result in a termination for cause or termination for default, in accordance with the terms and conditions of
this contract.” Nevertheless, the clause does not specify the extent of the Government’s right to terminate the contract. For example, will the Government have the right to terminate the contractor’s entire schedule contract or indefinite-delivery/indefinite quantity contract if the employee in violation of the clause only performs work under certain task orders under that contract? Can contract work continue that is not in the AOR?

D. Lack of Opportunity for Public Comment

Finally, under FAR §§ 1.301(b) and 1.301(d)(1), all agency acquisition regulations of the military department and defense agencies issued subject to the authority of the Secretary of Defense must be “published for comment in the Federal Register in conformance with the procedures in FAR Subpart 1.5 and as required by section 22 of the Office of Federal Procurement Policy Act . . . when they have a significant effect beyond the internal operating procedures of the agency or have a significant cost or administrative impact on contractors or offerors.” FAR Subpart 1.5, in turn, requires that a minimum period of 30 days, and normally 60 days, shall be given for receipt of comments on the proposed rule from agencies, nongovernmental organizations, and individuals. See FAR § 1.501-2(c). The only exceptions to the requirement for a comment period in advance of a final rule are for insignificant revisions to an existing rule or when exceptional circumstances make a comment period impracticable. Even in such exceptional circumstances, the rule must be issued on a temporary basis and provide for at least a 30-day public comment period. See FAR § 1.501-3. Under DFARS § 201.304, the Director of Defense Procurement and Acquisition Policy (OUSD(AT&L)) must approve promulgation of DoD agency supplements. This DFARS provision further provides:

Each department and agency must develop and, upon approval by OUSD(AT&L), implement, maintain, and comply with a plan for controlling the use of clauses other than those prescribed by FAR or DFARS.

DFARS § 201.304(4).

The new JCC-I/A clause and implementation requirements in the ASA/ALT memorandum were issued without publication in the Federal Register and without an opportunity for the public to comment on the clause and its requirements, thus resulting in the type of non-standard clause that DPAP has previously committed to address. Because the new clause imposes far greater administrative and cost burdens than previously-issued rules, comments from the defense industry and nongovernmental organizations regarding the new JCC-I/A clause likely would
assist the Department in clarifying the requirements of the clause to mitigate such burdens. Indeed, other previously-published rules have afforded the opportunity for public comment. For example, the proposed rule issued in FAR Case 2007-013, Employment Eligibility Verification, see 73 Fed. Reg. 33374 (Jun. 12, 2008), required federal contractors to use, at no cost, the already-established U.S. Citizenship and Immigration Service's E-Verify system to verify the employment eligibility of their employees by ensuring that all contractor employees were in compliance with federal immigration laws. By comparison, the new JCC-I/A imposes far greater burdens on AOR contractors, requiring them to hire a costly service to screen employees and potentially pay for the removal of certain identified employees from the AOR. Yet, the more burdensome JCC-I/A clause was issued without public notice and comment while the less burdensome Employment Eligibility Verification rule was issued with a 60-day public comment period. Moreover, the applicability date of the final Employment Eligibility Verification rule, see 73 Fed. Reg. 67,651 (Nov. 14, 2008), has been delayed several times to give the Obama Administration sufficient time to review the final rule. Thus, it appears inconsistent with both the FAR and standard practices for a significant acquisition rule, which implements a contract clause imposing substantial administrative and financial consequences on AOR contractors, to be issued without providing the public an opportunity to submit comments.

III. CONCLUSION

The Section believes that the new JCC-I/A clause would benefit from designation as a proposed rule and the use of the public comment process to address the issues discussed above, as well as other issues that affected parties may identify. Accordingly, the Section urges DPAP to immediately direct deletion of this non-standard clause from pending and new solicitations until such time as it has been properly subjected to the appropriate FAR and DFARS public notice and comment procedures.

The Section is available to provide additional information or assistance as you may require.

Respectfully submitted,

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Chair, Section of Public Contract Law
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