VIA EMAIL AND REGULATORY PORTAL

Defense Acquisition Regulations System
Attention: Mr. Julian E. Thrash
Office of the Under Secretary of Defense (AT&L)
DAP (DARS), Room 3B855
3060 Defense Pentagon
Washington, D.C. 20301-3060


Dear Mr. Thrash:

On behalf of the Section of Public Contract Law of the American Bar Association (“the Section”), I am submitting comments on the above-referenced DFARS Case and interim rule (“Interim Rule”), issued by the Office of the Under Secretary of Defense on May 19, 2010.1 The Section consists of attorneys and associated professionals in private practice, industry, academia, and government service. The Section’s governing Council and substantive committees contain members representing these 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 Honorable Thomas C. Wheeler, a member of the Section’s Council, did not participate in the Section’s consideration of these comments and abstained from the voting to approve and send this letter.
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The Section is authorized to submit comments on acquisition regulations under special comment 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

I. INTRODUCTION

The Section recognizes that the Department of Defense (“DoD”) was obligated to implement Section 8116 of the Defense Appropriations Act for Fiscal Year (“FY”) 2010, known as the “Franken Amendment,” which prohibits the use of FY 2010 funding on certain contracts unless contractors agree not to use arbitration procedures for Title VII claims. The Section further recognizes that the Franken Amendment was adopted late in the appropriations process and, therefore, is not accompanied by a clear record reflecting legislative intent. Through comments provided on March 17, 2010, the Section supported the DoD effort to provide critical interpretative guidance in its February 17, 2010, Class Deviation (“Deviation”). The Section was concerned that the Deviation lacked some important clarity and precision and submitted comments to DoD to assist it with clarifying the requirements for compliance so that DoD could include such clarifications in its Interim Rule.

In its March 17 comments on the Deviation, the Section recommended clarification of the Deviation and adoption of language in a new DFARS clause to clarify contractors’ obligations regarding the specific subcontractor level of certification required. The Section recommended that these clarifications in the Interim Rule be made effective as of the date of the Deviation.

The Section commends and supports DoD’s adoption of some of these clarifications in the Interim Rule. The Section also commends and supports DoD’s exemption in the Interim Rule with respect to acquisitions of commercial items or commercially available off-the-shelf (“COTS”) items and urges that DOD retain this exemption in the final rule.

Nevertheless, the Section notes that many of the important clarifications are included only in the preamble to the Interim Rule. To ensure that the rules reflect

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2 This comment letter is available in pdf format at http://www.akanet.org/contract/federal/regscomm/home.html under the topic “Subcontracting and Teaming.”
these clarifications, the Section recommends incorporating them in the applicable DFARS provisions. These clarifications concern the definition of those contracts and contractors that are covered by the Franken Amendment restrictions. Further, as discussed below, because of the practical difficulties of contractors to ensure compliance with the rule by lower-tier subcontractors with whom they have no contractual privity, the Section recommends modification of the Interim Rule to require contractors to certify only their first-tier subcontractors’ compliance with the rule.

The Section recommends making these clarifications and changes in the final rule effective as of the date of the Deviation so as to avoid competing or differing interpretations of the rule.

II. BACKGROUND

The Franken Amendment, section 8116 of the Defense Appropriations Act for Fiscal Year 2010, prohibits the expenditure of the funds appropriated or made available under the Act (“FY10 Funds”) for any federal contract for an amount in excess of $1 million that is awarded more than sixty days after the effective date of the Act (February 17, 2010), unless the contractor agrees not to: (i) enter into any agreement with any of its employees or independent contractors that requires, as a condition of employment, that the employee or independent contractor agree to resolve through arbitration any claims under Title VII of the Civil Rights Act or any tort related to or arising out of sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision, or retention; or (ii) take any action to enforce any provision of an existing agreement with an employee or independent contractor that mandates that the employee or independent contractor resolve through arbitration any such claim.

The Franken Amendment also prohibits the expenditure of any FY 2010 funds for any federal contract awarded more than 180 days after the effective date of the Act (June 17, 2010) unless the contractor certifies that it requires each covered subcontractor to agree not to enter into, and not to take any action to enforce any provision of, any agreement described in the above paragraph with respect to any employee or independent contractor performing work related to the subcontract. The Franken Amendment defines a “covered subcontractor” for purposes of this provision as “an entity that has a subcontract in excess of $1,000,000 on a contract” that is subject to the above described requirements of the amendment.
On February 17, 2010, the Office of the Under Secretary issued the Deviation to implement the provisions of the Franken Amendment, announced that it would publish an interim DFARS rule, and stated that it would consider comments received within two weeks after the date of the Deviation in formulating the interim rule. On May 19, 2010, DoD issued the Interim Rule and requested that comments on the Interim Rule be submitted by July 19, 2010.

III. COMMENTS

A. DoD Should Ensure That The Final Rule Includes a Definition of “Covered Contract”

The preamble to the Interim Rule sets forth examples to help determine the applicability of the Franken Amendment restrictions. Although these examples are helpful, some of them provide important guidance and, therefore, should be incorporated in the DFARS provisions directly. The Section recommends that in drafting the final rule, DoD add the following definition of “covered contract” in DFARS 252.222-7006:

“Covered contract,” as used in this clause, means any contract (including task or delivery orders under, and bilateral modifications adding new work to, an existing contract) in excess of $1 million that is awarded after February 17, 2010, except for contracts (including task or delivery orders under, and bilateral modifications adding new work to, an existing contract) for the acquisition of commercial items or commercially available off-the-shelf items.

The Section also recommends that DoD amend the text in DFARS 222.7404 prescribing the use of the DFARS clause at DFARS 252.222-7006 Restrictions on the Use of Mandatory Arbitration Agreements (date) (the “DFARS Clause”), as follows:

Use the clause at 252.222-7006 Restrictions on the Use of Mandatory Arbitration Agreements, in all solicitations and contracts (including task or delivery orders under, and bilateral modifications adding new work to, existing contracts) valued in excess of $1 million utilizing funds appropriated or otherwise made available by the Fiscal Year 2010 Defense Appropriations Act (Pub. L. 111-118) that are awarded after February 17, 2010, except in contracts
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(including task or delivery orders under, and bilateral modifications adding new work to, existing contracts) for the acquisition of commercial items or commercially available off-the-shelf items.

The Section further recommends that DoD amend paragraph (b)(2) of the DFARS Clause by replacing the text “by signature of the contract, for contracts awarded after June 17, 2010” in the first and second lines with the text “by signature of any covered contract awarded after June 17, 2010.”

B. The Final Rule Should Provide that Prime Contractors Are Required to Certify Only Their First-Tier Subcontractors’ Compliance With the Rule

The Section recommends that DoD’s rule provide that the prime contractor’s obligation to certify their subcontractors’ compliance with the rule applies only to the prime contractor’s first-tier subcontractors. The interim Rule, by its definition of covered subcontractor in DFARS 252.222-7006 Restrictions on the Use of Mandatory Arbitration Agreements, requires contractors to certify that they require each of their subcontractors at any tier to comply with the rule. Paragraph (a) of the DFARS clause defines covered subcontractor as “any entity that has a subcontract valued in excess of $1 million, except a subcontract for the acquisition of commercial items, including commercially available off-the-shelf items.” 75 Fed. Reg. at 27948. It further defines a subcontract, as used in the clause, as “any contract, as defined in Federal Acquisition Regulation subpart 2.1, to furnish supplies or services for the performance of this contract or a higher-tier subcontract thereunder.” Id. (emphasis added).

The Section recommends that paragraph (a) of the DFARS clause be amended in the final rule to define “subcontract” as follows:

Subcontract means any first-tier subcontract, as defined in Federal Acquisition Regulation subpart 44.1, under a covered contract to furnish supplies or services for performance of such covered contract.

The foregoing interpretation of subcontract, and thus covered subcontractor, is reasonable in view of the ambiguity of the Franken Amendment’s definition of covered subcontractor. As noted above, the Franken Amendment defines a covered subcontractor as an entity that has a subcontract in excess of $1,000,000 on a contract subject to restrictions of the Amendment. A subcontract on a contract can
reasonably be construed to mean a first-tier subcontract on the contract. Further, such an interpretation is consistent with the Franken Amendment’s policy goals and the principles of integrity, fairness, and openness under the Guiding Principles for the Federal Acquisition System.

Particularly with major defense acquisition programs, there may be multiple levels of subcontractors. In such an instance, the prime contractor or first-tier subcontractor would not have privity with, and might not even be aware of, the identity of, the various lower-tier subcontractors. By definition, lower-tier subcontractors would not have any direct contractual relationship with the prime contractor (or higher-tier subcontractor) that are two or more levels above them in the contracting chain. The prime contractor or first-tier subcontractor, in turn, probably would not have any contractual leverage to impose a requirement on such entities to comply with the Franken Amendment restrictions in such circumstances. To be able to certify to such entities’ compliance, as the Interim Rule would require, therefore, a prime contractor or first-tier subcontractor might determine that it now must have a direct contractual agreement with each and every subcontractor at the various lower tiers, which would add considerable burden and (potentially) cost to acquisitions.

The burdens of requiring prime contractors and higher-tier subcontractors to monitor the compliance of lower-tier subcontractors (with whom the prime or higher-tier subcontractors probably would not be in privity of contract) would appear to outweigh the additional benefits (if any) that could be gained over those benefits that could be achieved through the customary approach of including a flow down requirement in the DFARS clause. Accordingly, the Section recommends revising the final rule to revise the definition of “subcontract” to include first-tier subcontractors only.

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3 The Section notes that Senator Franken, the sponsor of the Franken Amendment, has advised DoD of his view that “covered subcontract,” and presumably a “covered subcontractor,” includes subcontracts and subcontractors at any tier. Letter of Senator Al Franken to Mr. Shay D. Assad, Director, Defense Procurement and Acquisition Policy, Department of Defense (March 2, 2010). Post-enactment “statements of legislators on legislative intent have been disapproved” by some courts. 1 A Norman J. Singer & J.D. Shambie Singer, Sutherland on Statutes and Statutory Construction § 48:20 (7th ed. 2009).

4 See FAR 1.102-2 (c).
C. If Prime Contractors Are Required to Certify Subcontractor Compliance at All Subcontractor Tiers, then the Rule Should Require the Flow-Down of the DFARS Clause to All Subcontractor Tiers.

If the final rule requires prime contractors to certify the compliance with the rule of subcontractors at all tiers, then the DFARS clause should be amended to require flow-down of the clause in each covered subcontract. In such event, a prime contractor would be in a position to require its subcontractors at every tier to flow down the DFARS clause to the next lower-tier subcontractor in order to support the prime contractor's certification of the compliance of its subcontractors at every tier. Making the clause a mandatory flow-down clause would better enable prime contractors and higher-tier subcontractors to ensure compliance with the objectives of the clause by making clear that such a clause (and compliance therewith) is not a matter of negotiation for subcontracts. The final rule should also provide that contractors fulfill their responsibility to ensure their covered subcontractors' compliance with the rule by flowing down the DFARS clause to their subcontractors at all tiers and by obtaining from their first-tier covered subcontractors certifications as to their compliance with the rule.

IV. CONCLUSION

The Section recommends that DoD incorporate the amendments and clarifications addressed in these comments in the body of the pertinent DFARS provisions and DFARS clause to be adopted in the final rule. The incorporation of these definitions and the adoption of the Section's recommended amendments of the Interim Rule will clarify the obligations of prime contractors to ensure their subcontractors' compliance with the final rule. The Section supports DoD's exemption of the acquisition of commercial items and COTS and urges DoD to retain this exemption in the final rule.

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

Sincerely,

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