March 11, 1998

Honorable Franklin D. Raines
Director, Office of Management and Budget
Executive Office of the President
Washington, D.C. 20503

Re: Potential Removal of Service Contract Act From Commercial Item Subcontract Waiver List

Dear Mr. Raines:

On behalf of the Section of Public Contract Law of the American Bar Association (the "Section"), I am submitting comments on the above-referenced action under consideration within the Office of Management and Budget. 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. In this manner, the Section seeks to improve the 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.

It has come to the Section's attention that there is a discussion ongoing within OMB and between OMB and the Department of Labor concerning the possible removal of the Service Contract Act ("SCA") from the list of statutes waived for commercial item subcontracts contained in Federal Acquisition Regulation § 12.504(a). The Section strongly opposes any such action for the following reasons.

Statutory Requirements for Waiver Are Clear
In Title VIII - Commercial Items of the Federal Acquisition Streamlining Act of 1994 ("FASA"), Congress clearly and specifically stated that the Federal Acquisition Regulation "shall include a list of provisions of law that are inapplicable to subcontracts under either a contract for the procurement of commercial items or a subcontract for the procurement of commercial items." Section 8003 of FASA, Pub. L. No. 103-355 (now codified at 41 U.S.C. § 430(b)). (Emphasis supplied.) FASA also clearly specified that all statutes which set forth policies, procedures, requirements or restrictions for the procurement of property or services by the Federal Government "shall be included on the list of inapplicable provisions of law" unless:

1. the provision of law provides for criminal or civil penalties; or
2. the provision of law specifically refers to this provision of FASA and provides that in any event the provision of law shall be applicable; or
3. if (1) or (2) above are not applicable, the Federal Acquisition Regulatory Council makes a written determination that it would not be in the best interest of the Federal Government to exempt subcontracts under a contract for the procurement of commercial items from the applicability of the provision of law at issue.

41 U.S.C. § 430(b)(2); (c). (Emphasis supplied.)

In addition to the above general provisions, Congress also specifically enumerated the following statutes that were to remain unaffected by Title VIII - Commercial Items of FASA:

1. 10 U.S.C. § 2323 (the Defense Department's Small Disadvantaged Business Program);
2. Section 7102 of FASA (now codified at 15 U.S.C. § 644 note and which extended the DoD SDB Program to civilian agencies through September 30, 2000);
3. 40 U.S.C. § 759 (the Brooks Act, which was subsequently repealed); and

This statutory scheme made clear that all statutes, whether prior or future enacted, were required to be waived for commercial item subcontracts unless specifically excluded from waiver based on one of the statutory exemptions provided for in FASA.

When a subsequently enacted law is in direct conflict with prior law, the later law is deemed to have modified the earlier law. See Kremer v. Chemical Const. Corp., 456 U.S. 461, 468 (1981); Smith v. Robinson, 468 U.S. 992, 1024 (1984). The Service Contract Act was promulgated in 1965 and amended in 1972 and 1976 and was all-inclusive of service contracts and subcontracts. FASA was enacted in 1994 to streamline the way the Government procures its needed supplies and services. FASA specifically requires that all statutes which set forth policies, procedures, requirements or restrictions for the procurement of property or services by the Federal Government shall be waived in connection with commercial item subcontracts unless one of the statutory exemptions applies. FASA and its implementing FAR regulations must be deemed to have partially modified the SCA to the extent that the SCA or its implementing regulations are in direct conflict with FASA's mandate. See, e.g., Bethlehem Steel Corp. v. U.S., 191 Ct. Cl. 141, 423 F.2d 300 (1970); 47 Comp. Gen. 457 (1968). In implementing FASA's statutory mandate, the Federal Acquisition Regulations have excluded subcontracts for commercial services from SCA application. Accordingly, FASA and the implementing FAR regulations should be interpreted as modifying the provisions of the SCA to exempt subcontracts for commercial services.

The Service Contract Act Is Required to be Waived

As explained below, none of the statutory exemptions from waiver provided for in FASA are applicable to the Service Contract Act. Therefore, the Service Contract Act is required to be waived for commercial item subcontracts.
The Service Contract Act is not one of the specifically enumerated statutes that is to remain unaffected by Title VIII of FASA. Nor do any of the general exclusions apply to preclude waiver of the Service Contract Act.

The Service Contract Act does not provide for any criminal or civil penalties. The Act is remedial and not penal in nature. The Act requires government contractors and subcontractors to pay service employees minimum wages and benefits determined by the Secretary of Labor. 41 U.S.C. § 351(a). In the event of violations, the Act provides for damages in the form of payment by the contractor or subcontractor of the underpaid wages and benefits to the affected workers. 41 U.S.C. § 352 (a); 354(b). Such damages are directly related to the injuries suffered and are not civil penalties. The Act also provides that contractors and subcontractors may be suspended and debarred from contracting with the Federal Government for violations of the Act. 41 U.S.C. § 354(a). Nevertheless, debarment and suspension are not considered civil penalties. See Janik Paving & Const., Inc. v. Brock, 828 F.2d 84, 91 (2nd Cir. 1987) (holding that debarment is not a civil penalty and need not be specifically authorized by statute in order to be exercised by the Secretary of Labor).

The Service Contract Act predates the enactment of FASA and does not contain any provisions which otherwise specifically override the statutory waiver provisions in Title VIII of FASA.

Finally, there has been no written determination by the Federal Acquisition Regulatory Council that it would not be in the best interest of the Federal Government to exempt commercial item subcontracts from the Service Contract Act. Moreover, there does not appear to be any basis to make such a determination because the interests protected under the Act are those of the affected workers and not the interests of the Federal Government. Further, the best interests of the Federal Government should be to further reduce impediments to acquiring commercial items, including commercial services. The best interests of the Federal Government are served by removing government-unique terms and conditions, such as the provisions of the Service Contract Act, from its commercial item contracts and subcontracts.

**Conclusion**

For all of the above reasons, the Section strongly urges OMB to retain the Service Contract Act on the list of statutes waived for commercial item subcontracts contained in Federal Acquisition Regulation § 12.504(a).

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

Sincerely,

Marcia G. Madsen
Chair
Section of Public Contract Law

cc: David A. Churchill
Rand L. Allen
Gregory A. Smith
Patricia A. Meagher
Marshall J. Doke, Jr.
John T. Kuelbs
Michael K. Love
Council Members
Chair and Vice Chairs, Commercial Products and Services Committee
Alexander J. Brittin

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