On August 16, 1996, the Section submitted comments to the General Services Administration regarding its interim rule amending FAR Parts 28 and 52. The interim rule provides, inter alia, for use of irrevocable letters of credit ("ILC") as security for Miller Act Bonds.

The Section expressed concern that the language of the interim rule appears to limit potential payment protection options unnecessarily. This may be contrary to the intent of the Federal Acquisition Streamlining Act ("FASA") and result in the preference of ILC as one of only two alternatives presented to contractors.

The Section also advised that Uniform Customs and Practices Document ("UCP") 400 was replaced, effective January 1, 1994, by UCP 500. UCP 500 does not include a force majeure exception that may be an unacceptable condition to the payment requirements of an ILC.

August 16, 1996

General Services Administration
FAR Secretariat (MVRS)
18th and F Streets, N.W.
Room 4035
Washington, D.C. 20405

ATTN: Ms. Beverly D. Fayson


Dear Ms. Fayson:

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 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.

We would like to take this opportunity to comment on the above-referenced Interim Regulation amending Parts 28 and 52 of the FAR (the "Regulation"). The Regulation provides, inter alia, for use of irrevocable letters of credit ("ILC") as security for Miller Act Bonds, and for alternatives to Miller Act Bonds for contracts valued at $25,000 to $100,000. The Regulation presents several issues of concern that are discussed below. Section 28.102-1 provides, inter alia, that in construction contracts of a value greater than $25,000 but not greater than $100,000, the contracting officer is required to select at least two of five possible payment protection options. The alternatives include: (1) a payment bond; (2) an ILC; (3) a tripartite escrow agreement; (4) certificates of deposit; and (5) the deposit of a security instrument. The Regulation further directs the contracting officer to give "particular consideration to inclusion of an irrevocable letter of credit as one of the selected alternatives."

The favoring of ILCs in Section 28.102-l(b)(1) and the broad discretion given to contracting officers to select as few as two of the five available payment protection options is of concern. Given the preference for ILCs stated in the Regulation, it seems likely that contracting officers will inevitably select ILCs as one of possibly only two options to be utilized. Thus the language appears to unnecessarily limit the potential options available to contractors to utilize recognized, valid payment protections. The approach taken by the Regulation would not appear to serve any particular public policy interest, and, in operation, may be inconsistent with the Federal Acquisition Streamlining Act ("FASA"). FASA raised the threshold for Miller Act bond requirements so as to cover contracts valued at more than $100,000. FASA reflected the intent of Congress to facilitate federal contracts participation by small and disadvantaged contractors who may not be able to obtain a bond. In its present form, the Regulation could thwart that intent by limiting the alternatives available to smaller companies wishing to do business with the Federal government.

Finally, practical difficulties have been encountered when contractors have attempted to utilize tripartite escrow agreements as a form of protection. The escrow-related costs may often be prohibitive in small contracts. In addition, escrow agreements may or may not address all of the potential variables that may affect the timing and amounts of payments to be made by the escrow agent during the course of, or after contract performance.

Based on all the above, we question the Regulation's designated preference for one of the five acceptable payment protection options, as well as its grant of discretion to contracting officers to designate as few as two payment protection mechanisms. We believe that public policy would better be served by an alternative approach. Consideration should be given to permitting any of the five payment protection options to be utilized in the absence of a specific, supported finding by the contracting officer that one or more of the options is inappropriate for a particular contract. In the alternative, consideration should be given to directing that the contracting officer select from not less than three of the five payment protection options available, without directing that the contracting officer favor one option over another.

Another area of concern involves the reference in the Regulation to a uniform customs and practices document ("UCP"). (See Sections 28.204-3(h) and 52.228-14.) The UCP 400 document in question includes, at Article 19, a force majeure exception that may serve as an unacceptable condition to the payment requirements of an ILC. The Regulation prescribes certain ILC forms that provide that the force majeure clause of UCP 400 is inapplicable. However, the provision in the prescribed forms would not be necessary if the current UCP 500 document is referenced in the Regulation. UCP 400 was replaced, effective January 1, 1994, by UCP 500, which does not include a force majeure clause.

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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