Via SEC809@dau.mil

Section 809 Panel
Attn: Mr. Larry Trowel
Section 809 Panel Commissioner
1400 Key Blvd. Suite 210
Rosslyn, VA 22209

Re: Comments on Select Provisions of FAR 52.212-5 in Response to Request from Section 809 Panel

Dear Mr. Trowel:

On behalf of the American Bar Association (“ABA”) Section of Public Contract Law (“Section”), I am submitting comments on select provisions of FAR 52.212-5 as requested in your June 6, 2017 email to the Co-Chair of the Section’s Acquisition Reform and Emerging Issues Committee.1 The Section consists of attorneys and associated professionals in private practice, industry, and government service. The Section’s governing Council and substantive committees include 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 views expressed herein are presented on behalf of the Section. They have not been approved by the House of Delegates or the Board of Governors of the ABA and, therefore, should not be construed as representing the position of the ABA.2

1 Mary Ellen Coster Williams, Section Delegate to the ABA House of Delegates, and Marian Blank Horn, Kristine Kassekert, and Heather K. Weiner, members 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.

2 This letter is available in pdf format at http://www.americanbar.org/groups/public_contract_law/resources/prior_section_comments.html under the topic “Commercial Products and Services.”
I. INTRODUCTION

The Section 809 Panel was established pursuant to Section 809 of the National Defense Authorization Act of Fiscal Year (“FY”) 2016, as amended. The Section 809 Panel established nine teams to address its stated aim of “making recommendations, including actionable changes to regulatory and statutory language, to improve the acquisition process of the Department of Defense [“DoD”].” One of the Section 809 Panel Teams, the Commercial Buying Team, has solicited the Section’s insights on the burden imposed by certain of the FAR clauses that can be incorporated into commercial-item contracts by FAR 52.212-5, Contract Terms and Conditions Implementing Statutes and Executive Orders - Commercial Items.

The Commercial Buying Team has asked the Section to answer these four questions:

1. Does compliance with this clause impose a burden on your business?
2. If yes, please describe the burden.
3. Could the clause be revised to minimize the burden on commercial contractors?
4. Does the clause impose a burden that is the same or similar to one already imposed on U.S.-based businesses that do not do business with the Federal Government?

The Section is pleased to have the opportunity to provide input on the Section 809 Panel’s consideration of reforms to improve the acquisition process at the DoD and to maintain technological advantage. For the FAR clauses that the Commercial Buying Team has asked us to review, the Section concurs with examining whether and to what extent the clauses that can be incorporated through this basic commercial item contracting clause create unnecessary disincentives for commercial entities that might sell to the Government and/or impose burdensome noncommercial terms and risks on the commercial contractors and subcontractors that do enter this market. The Section concurs that the Commercial Buying Team should consider deleting or modifying the clauses identified for the Section’s review as discussed below; doing so will reduce burdens and promote more efficient and effective commercial acquisitions for the Government.

II. BACKGROUND

In the 1990s, Congress overhauled the Government’s commercial-item contracting processes through reforms implemented in the Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355 (“FASA”), and the Federal Acquisition Reform Act (or Clinger Cohen Act of 1996), Pub. L. No. 104-106 (“FARA”). FASA was designed to make federal contracts for commercial items more consistent with their commercial counterparts so as to encourage commercial entities to enter the federal market and the Government to purchase more commercial items. See Pub. L. No. 103-355.

Through these reforms, Congress expressed a preference for purchasing commercial items and streamlined the rules for commercial-item acquisitions. See FASA, 108 Stat. 3243 at 3390; FARA, 110 Stat. 186 at 649-56. Congress recognized that some of these reforms would

FASA not only codified a preference for commercial items, but it also directed that, to the extent consistent with federal law and the Government’s needs, the Government should purchase commercial items under terms that more closely resemble those in the commercial marketplace. This direction reflected a premise that the Government could realize significant cost savings by eliminating some of its most cumbersome and expensive contract requirements in commercial purchases. Shifting to commercial terms also lowered a major obstacle to small businesses’ participating in federal procurements: they lack leverage to negotiate deviations from standard terms flowed down by prime and higher-tier subcontractors.

So, among other benefits, the Government’s using commercial terms reduces costs and helps the Government meet its socioeconomic goals to purchase from small businesses. To implement this strong preference, Section 8002 of FASA mandates that contracts for acquiring commercial items include only those clauses “that are required to implement provisions of law or executive orders applicable to acquisitions of commercial items . . .” or “that are determined to be consistent with standard commercial practice” to the maximum extent practicable. Id. § 8002 (codified at 41 U.S.C. § 3307(e)(2)(B)). The FAR includes similar requirements. See FAR 12.301(a).

In recent years, government-unique clauses applicable to commercial item purchases have significantly increased. These provisions require expanded compliance programs, tracking systems, and controls not required in the commercial market, which increase the compliance burden, costs and risks of federal sales and deter at least some companies from selling to the Government.

The Government has imposed on prime contractors and subcontractors increasingly open-ended obligations to monitor their supply chains—in some instances through every tier down to individual parts. Although monitoring subcontractor “responsibility” has always been an obligation, more recent regulations change not only the degree of flowdowns and responsibility monitoring, but their very nature. Contractors and subcontractors do not always have privity of contract or unlimited resources to monitor and enforce compliance throughout the entire supply chain. The Government should recognize that it is inappropriate to place this responsibility on prime contractors or higher-tier subcontractors for a fixed price or without some safe harbor or indemnification. This dynamic has begun to impact commercial item contractors, not only traditional federal contractors.

The Government also has required an increasing number of certifications, often covering new subject matters such as human trafficking. Contractors carry the risks of investigations and suits under the civil False Claims Act (“FCA”), 31 U.S.C. 3729 et seq. for alleged certification failures. In addition, the exponential growth in implied certification cases under the FCA, often
filed by _qui tam_ relators,\(^3\) imposes further risks on contractors in situations where express certifications are not even required.\(^4\) See, e.g., _Universal Health Servs., Inc. v. United States ex rel. Escobar_, 579 U.S. ___, 136 S. Ct. 1989 (2016). Contract performance and cost accounting issues that have traditionally been resolved administratively are now being treated as fraud under the FCA. The mere submission of an invoice under a contract can lead to an allegation of fraud under the theory of implied certification. These twin risks of explicit and implied certification liability can also discourage companies that are considering whether to enter (or remain in) the federal market, making these risks particularly salient.\(^5\)

The Section 809 Panel should help reverse this trend. The Section accordingly applauds the Panel’s effort to evaluate the procurement system with these important mandates in mind and appreciates the opportunity to comment on the requested provisions of FAR 52.212-5.

### III. COMMENTS ON SELECT PROVISIONS OF FAR 52.212-5

#### A. (a)(1) Prohibition on Requiring Certain Internal Confidentiality Agreements or Statements

_Does compliance with this clause impose a burden on your business?_

FAR 52.203-19 places not-inconsequential burdens and costs on contractors and subcontractors. The requirements could be revised to reduce these burdens and costs.

_Please describe the burden._

First, the clause requires contractors and subcontractors to update existing agreements and notify subcontractors of the provision. Unlike many FAR provisions, part of this rule is retroactive: contracting officers were directed to “[m]odify existing contracts, other than personal services contracts with individuals, to include [FAR 52.203-19] before obligating FY 2015 or subsequent FY funds that are subject to the same prohibition on internal confidentiality agreements or statements.” Thus, the clause has imposed an immediate implementation burden of identifying active agreements covered by the clause.

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\(^3\) The Department of Justice reported the filing of 702 new _qui tam_ cases in fiscal year 2016. This is an 11% increase from fiscal year 2015. See Justice Department Recovers Over $4.7 Billion From False Claims Act Cases in Fiscal Year 2016 (Dec. 14, 2016) available at https://www.justice.gov/opa/pr/justice-department-recovers-over-47-billion-false-claims-act-cases-fiscal-year-2016.

\(^4\) Commercial contractors cannot recover the costs of defending a meritless FCA claim. Also, 48 CFR 31.205-47 limits the allowability of costs related to legal and other proceedings.

\(^5\) The Government has been encouraging new commercial item contractors to enter the government market. For example, DoD’s Better Buying Power 3.0 initiative explained that the United States risks losing its technological superiority and recognized that technological innovation comes “increasingly” from the “commercial sector and from overseas.” See Memorandum from Frank Kendall, Implementation Directive for Better Buying Power 3.0—Achieving Dominant Capabilities through Technical Excellence and Innovation, Attachment 2, at 1 (Apr. 9, 2015) available at http://www.acq.osd.mil/fo/docs/betterBuyingPower3.0(9Apr15).pdf.
Second, the clause does not contain model or “safe harbor” language. Thus, contractors and subcontractors may need to engage counsel to ensure compliance with the clause, particularly if they handle classified and sensitive information, which may remain subject to communication limitations under the clause. Further, other laws and regulations may need to be considered by a subcontractor when adding new language to its agreements, including the Defend Trade Secrets Act of 2016, Pub. L. No. 114-153.

Third, separating agreements covered by the clause and those that are not covered creates a burden. The clause and implementing guidance assume a federal contractor operates as a single entity instead of a complex enterprise, with multiple business units, selling to a mix of commercial and government customers, for which employees are sometimes shared. Commercial partners may resist including this clause in a standard commercial agreement and instead insist on a standard non-disclosure provision. Thus, a contractor or subcontractor must determine whether a contract is covered by this clause in order to negotiate the language with its partner or it must have two sets of agreements—one for activities covered by the clause and one for commercial activities. The covered activities agreements containing the additional provision may be more time-consuming or expensive to administer, and result in differing charges or the unavailability of an established supplier or subcontractor.

Fourth, contractors and subcontractors may face significant penalties (such as a withhold) merely for omitting certain language from confidentiality agreements. In other words, the clause does not only penalize a contractor or subcontractor that has tried to prevent the disclosures contemplated by the clause or that has taken action against an employee or subcontractor that has disclosed covered information.

Could the clause be revised to minimize the burden on commercial contractors?

Yes. The Section recommends that the clause not be retroactive and that it be revised to provide a six-month phase-in.

Second, the Section recommends that the clause be revised to contain model or “safe harbor” language that contractors and subcontractors may (but are not required to) use in their covered agreements. For example, during the comment period, the following language was proposed:

Neither the confidentiality provision contained in the [insert title of agreement, statement, policy], nor confidentiality provisions contained in any existing employment agreement or contract with [insert name of contractor] shall be construed to prohibit or otherwise restrict you, as an employee or [sub]contractor of [insert name of contractor] from lawfully reporting waste, fraud, or abuse to a designated investigative or law enforcement representative of a federal department or agency authorized to receive such information under the procurement.
82 Fed. Reg. 4717, 4719 (Jan. 13, 2017). The FAR Council did not adopt this language but stated that it contained “appropriate language that could be included in an internal confidentiality agreement or statement.” Id.

Third, a contractor’s or subcontractor’s actual conduct should be considered before the Government imposes any penalties. Penalties should be reserved for contractors and subcontractors that take deliberate action to try to prohibit the reporting of fraud, waste, or abuse.

*Does the clause impose a burden that is the same or similar to one already imposed on U.S.-based businesses that do not do business with the Federal Government?*

No. This is a unique burden imposed on government contractors.

**B. (a)(4) Applicable Law for Breach of Contract Claim**

*Does compliance with this clause impose a burden on your business?*

FAR 52.233-4 provides that United States law will apply to resolve any claim of breach of this contract. This clause does not place a burden on contractors. United States law is the most well developed law on government contracts claims.

*Please describe the burden.*

N/A

*Could the clause be revised to minimize the burden on commercial contractors?*

N/A

*Does the clause impose a burden that is the same or similar to one already imposed on U.S.-based businesses that do not do business with the Federal Government?*

Yes.

**C. (b)(2) Contractor Code of Business Ethics and Conduct**

*Does compliance with this clause impose a burden on your business?*

While much of FAR 52.203-13 expressly does not apply to commercial-item contracts, the clause continues to require government contracting-specific codes of business ethics and conduct that can substantively differ from codes used in commercial businesses. Further, the clause does not establish what must be included in a required code of business ethics and conduct aside from the need to (a) exercise due diligence in preventing and detecting criminal conduct, and (b) promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.
To address the burdens imposed by the clause, commercial businesses that do not yet have codes of business ethics and conduct might contract for “off the shelf” codes, policies, and procedures lacking features needed for the specific business to satisfy the clause. Or large commercial businesses may have more general codes that can apply across national borders but lack terms focused on U.S. Government contracting. These differences create a potential disconnect between what the commercial business is contractually required to do and how an agency suspension and debarment official (“SDO”) might evaluate the commercial business’s compliance program. The Section has seen, over the years, that some SDOs expect all contractors, whether or not selling commercial products and services, to have what those SDOs judge to be best-in-industry-sector codes of ethics and business conduct and compliance programs appropriate for the size of the business.

Additionally, some in the enforcement community have asserted that the flowdown requirement imposes on contractors a duty to assess the appropriateness and effectiveness of their subcontractors’ codes of business ethics and conduct. Commercial companies do not necessarily have personnel in-house with the skill needed for these assessments.

These additional compliance requirements result in increased costs. Commercial businesses may not be able to absorb these increased costs without raising prices. A change in prices could make a commercial business less competitive with nongovernment contractors in the commercial arena; absorption of costs also may result in reduced net earnings and impair business valuation. These are further financial disincentives for commercial businesses in the federal market.

This clause also emphasizes the mandatory disclosure rule, which focuses on transparency, remediation, discipline, and punishment if a violation rises to the level of criminal conduct. While there is a burden on contractors imposed by the clause, the Section does not see a difference in the impact of the mandatory disclosure rule on a commercial business compared with a more traditional government contractor.

Could the clause be revised to minimize the burden on commercial contractors?

The public interest could be served by limiting the clause to require only that covered companies have a code of business ethics and conduct appropriate for the commercial nature of the business, so long as that code requires compliance with the mandatory disclosure rule. The information necessary to judge commercial businesses’ responsibility would still be brought forward through the mandatory disclosure rule. But covered commercial businesses would no longer need to develop a separate, government-contracts-focused (and potentially ill fitting) code of business ethics and compliance. Additionally, removing the clause’s existing requirements for codes of business ethics and conduct could help contractors succeed in Administrative Procedures Act challenges to unduly aggressive SDO positions, which over the long run might also reduce compliance burdens for commercial businesses. Finally, while a de minimis exception to the mandatory disclosure rule might be a welcome development for contractors expending time, resources, and effort to create disclosures where a simple refund to the government might suffice, such a proposal exceeds the scope of the question posed by the Panel.
Does the clause impose a burden that is the same or similar to one already imposed on U.S.-based businesses that do not do business with the Federal Government?

For the code of conduct requirements, some commercial companies require that their suppliers maintain a code of conduct. But those requirements generally are not as burdensome as the requirements imposed by this clause. The mandatory disclosure requirements are unique to government contracting.


The Section believes that no funds remain available for expenditure under the American Recovery and Reinvestment Act of 2009 (“ARRA”) and that, there being no new contracts issued under ARRA, this clause should be removed from the FAR.

E. (b)(9) Updates of Publicly Available Information Regarding Responsibility Matters

Does compliance with this clause impose a burden on your business?

FAR 52.209-9 requires contractors to update disclosures in the Federal Awardee Performance and Integrity Information System (“FAPIIS”) regarding responsibility matters semi-annually during a contract. While the Section has questions about the sheer volume of FAPIIS disclosures generally, that issue is beyond the scope of this question. For this specific question, and to the extent that this information is important to agencies’ administration of ongoing contracts, requiring that the responsibility-specific information in FAPIIS be updated semi-annually imposes minimal additional burden.

F. (b)(27) Prohibition of Segregated Facilities

Does compliance with this clause impose a burden on your business?

FAR 52.222-21 requires a contractor to agree “that it does not and will not maintain or provide for its employees any segregated facilities at any of its establishments, and that it does not and will not permit its employees to perform their services at any location under its control where segregated facilities are maintained.” This and other provisions of the clause do not impose a significant additional burden on commercial item contractors.

Namely, the requirements mirror existing federal statutory requirements, such as those in Title VII of the Civil Rights Act of 1964, which prohibits workplace segregation. For instance, 42 U.S.C. § 2000e-2(a)(2) prohibits segregating employees based on race. A separate subsection

6 Under this provision, an employer may not “limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.”
places a similar requirement on labor unions. See 42 U.S.C. § 2000e-2(a)(2). Title VII also includes a catch-all provision that has been broadly construed. In 42 U.S.C. § 2000e-2, an “unlawful employment practice” is also described as “when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.”

*Please describe the burden.*

Commercial contractors selling to the Government do face four additional burdens under FAR 52.222-21 that are not found in the commercial market (nationally):

- Contractors cannot have facilities that are segregated by additional classes of individuals not found in Title VII: sexual orientation and gender identity. But the Section anticipates that it will become increasingly unlikely that employers will have facilities segregated based on those additional categories so as to violate the FAR clause.

- Contractors must flow this requirement down to subcontractors. This obligation places little additional burden on commercial prime contractors because their subcontractors also must comply with Title VII and therefore face minimal additional burdens under FAR 52.222-21.

- Under the FAR clause, a contractor is responsible for a facility if the contractor’s employees work there, even if the contractor does not control the facility. As noted above, the FAR clause mandates that an employer “not permit its employees to perform their services at any location under its control where segregated facilities are maintained.” Contractors thus must ensure that other facilities they use to perform covered contracts meet these requirements—though those facilities are likely covered by Title VII’s prohibitions as well. A contractor might face challenges and additional burdens, however, if its covered employees perform contracts outside the United States and the international jurisdiction does not have similar protections.

- Title VII applies only to companies with 15 or more employees, while FAR 52.222-21 does not have a similar size limit. Very small federal contractors thus may be subject to these segregation prohibitions earlier than very small commercial-only businesses.

*Could the clause be revised to minimize the burden on commercial contractors?*

N/A

*Does the clause impose a burden that is the same or similar to one already imposed on U.S.-based businesses that do not do business with the Federal Government?*

Yes. This is a burden (with the exceptions noted above) shared by nearly all companies doing business in the United States.
G.  (a)(3) Protest After Award

Does compliance with this clause impose a burden on your business?

FAR 52.233-3 allows the contracting officer (“CO”) to stop work if a protest is filed or expected. The clause further prescribes the rights and remedies of the parties if the contract is ultimately terminated. The clause burdens contractors by not establishing a firm timeline for processing an equitable adjustment (“EA”) arising from a protest-related stop-work order.

Please describe the burden.

The clause requires only that the CO receive and act upon an EA proposal before making the final payment on a contract. By not specifying a shorter timeline for resolving EAs, the clause burdens contractors. For example, some long-term federal contracts require lengthy close-out procedures. EA proposals under these contracts can become stale, all the while creating uncertainty for the contractor’s financial performance.

Could the clause be revised to minimize the burden on commercial contractors?

The Section recommends revising the clause to establish a definitization schedule for EAs related to post-protest stop-work orders. The timeline would include the steps required after a contractor asserts its right to such an EA. One model for consideration is the definitization timeline and process described in FAR 16.603-2(c). While that exact process and timeline may not be appropriate for post-award protest related EAs, it may spur discussion of the appropriate timelines for commercial-item contracts. As an alternative, the Section 809 Panel could consider recommending that a provision be added to FAR 52.212-4 to establish the process and period for resolution of EA proposals more broadly.

Does the clause impose a burden that is the same or similar to one already imposed on U.S.-based businesses that do not do business with the Federal Government?

No. This is a unique burden imposed on government contractors.

H.  (b)(25) Convict Labor

Does compliance with this clause impose a burden on your business?

FAR 52.222-3 does not appear to impose much, if any, burden on commercial item contractors, which do not appear to have a strong demand to use prison labor for supplies and services sold to the Government. For contracts above the micro-purchase threshold performed inside the U.S. and its territories, the clause prohibits using convict labor unless several specific conditions are satisfied, including that inmates are authorized to work at paid employment, the work is voluntary and paid, local unions are consulted, the employment will not displace employed workers, the rates of pay are comparable to the marketplace for non-convict labor, and the program has been approved by the Attorney General. The clause applies only to inmates sentenced within the United States or its territories and does not apply to prison labor sentenced
and incarcerated by foreign governments. Furthermore, the clause does not apply to supplies or services purchased from Federal Prison Industries, Inc., or the acquisition of finished supplies from existing stocks from any state prison (as distinguished from supplies requiring special fabrication).

Please describe the burden.

Again, the Section is not aware of any significant burden imposed by FAR 52.222-3. The clause implements Executive Order 11755 issued by President Nixon on December 29, 1973, relating to prison labor. The Executive Order acknowledges that meaningful employment of inmates can facilitate their rehabilitation but that “care must be exercised to avoid either the exploitation of convict labor or any unfair competition between convict labor and free labor in the production of goods and services.” E.O. 11755 and FAR 52.222-3 strive to balance these competing interests in a way that provides for beneficial employment of U.S.-based inmates while avoiding exploitive forms of prison labor (such as involuntary labor or labor compensated at below-market rates). The Section does not anticipate that cutting-edge commercial companies would be deterred from entering the federal market because of the reasonable restrictions on the use of prison labor set forth in FAR 52.222-3.

Could the clause be revised to minimize the burden on commercial contractors?

N/A

Does the clause impose a burden that is the same or similar to one already imposed on U.S.-based businesses that do not do business with the Federal Government?

The Section is not aware of similar legal prohibitions (statutory or contractual) on the use of convict labor (although similar provisions may exist in a few states or localities). At the same time, the Section does not believe that state governments or the federal government makes prison labor available to commercial companies on terms and conditions that materially differ from the conditions required by FAR 52.222-3(b)(3). In short, the Section believes this clause prohibits commercial companies from using prison labor in a manner that is largely unavailable in the labor market in the United States and its territories.

I. (b)(8) Protecting the Government’s Interest When Subcontracting with Contractors Debarred, Suspended, or Proposed for Debarment

Does compliance with this clause impose a burden on your business?

FAR 52.209-6 prohibits contractors from entering into subcontracts in excess of $35,000 (other than subcontracts for commercially available off-the-shelf (“COTS”) items) with a subcontractor that is debarred, suspended or proposed for debarment. This clause does not present an unreasonable burden to commercial item contractors. Contractors can verify whether a subcontractor has been debarred, suspended, or proposed for debarment by searching the excluded parties database on the System for Award Management website.
The Section accordingly does not recommend changing this requirement. Although the subject matter of the clause is unique to the Government, any additional burden to contractors is justified by the Government’s strong policy interest in not supporting contractors ineligible for award of federal contracts. Further, the clause contains two sensible limitations that appropriately minimize its burden upon commercial item contractors. First, the clause does not apply to contracts for COTS items. Second, even where the clause does apply to a prime contractor, it must be flowed down only to subcontracts that exceed $35,000 and are not for COTS items. With these limits in place, the Government’s legitimate policy objectives outweigh any additional burden to commercial item contractors.

IV. ADDITIONAL COMMENTS

The Section 809 Panel has not requested the Section’s comments on all clauses identified in FAR 52.212-5. The Section is aware that other associations have been asked for their input on these additional clauses. In addition to being interested in the recommendations from those other associations, the Section would note that there are also DFARS clauses that the Section 809 Panel may wish to consider and solicit comments on in the future.

Regarding the sample provided for Section comment, the Section submits that there may be limits on adjusting certain clauses because they implement statutory requirements. For example, the sample provided includes FAR 52.204-10, Reporting Executive Compensation and First-Tier Subcontract Awards. The Section believes that because only contractors and subcontractors that earn more than 80% of their revenues and more than $25 million in each previous year from federal contracts (hereafter 80%/$25M rule) must comply, many commercial-item contractors would be exempt from the burdens of this clause. The clause also exempts contractors earning less than $300,000 in revenues per year. Thus, it appears the legislation was intended to ensure transparency among contractors that predominately support federal agencies and are larger than most sole proprietorships.

But there are burdens that could be remedied with the following revisions:

1. Move the 80%/$25M rule from the clause text to the clause prescription in FAR 4.1403(a). Further, eliminate the “preceding fiscal year” language to make this a determination that must be made only at contract award. Retaining the “preceding fiscal year” language turns this clause into a contingent liability for the contractors who need to start complying with this clause at some undetermined time during contract performance.

2. Either increase the revenues exemption threshold substantially or delete the separate exemption based solely on revenues and apply only the 80%/$25M rule. Retaining the $300K exemption as currently drafted is redundant in light of the 80%/$25M rule. An increased threshold could perhaps be based on the revenues size standards that delineate between small and large business based on North American Industry Classification System (“NAICS”) codes where NAICS are based on revenues.

The Section recognizes that these suggested changes will require engagement with Congress since these regulations are imposed by statute.
V. CONCLUSION

The Section appreciates the opportunity to provide feedback to the Section 809 Panel to further its efforts to streamline the commercial item contracting process. The Section is available to provide additional information or assistance as you may require.

Sincerely,

James A. Hughes
Chair, Section of Public Contract Law

cc:
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Council Members, Section of Public Contract Law
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