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AMERICAN BAR ASSOCIATION

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June 20, 2008

General Services Administration
Regulatory Secretariat (VPR)
Attn: Ms. Laurieann Duarte
1800 F Street, N.W., Room 4041
Washington, D.C. 20405

Re: Preserving the Attorney-Client Privilege, the Work Product Doctrine, and Employee Legal Protections in Connection with FAR Case 2007-006, "Contractor Compliance Program and Integrity Reporting," 72 Fed. Reg. 64019 (November 14, 2007; Original Proposed Rule) and 73 Fed. Reg. 28407 (May 16, 2008; Second Proposed Rule)

Dear Ms. Duarte:

On behalf of the American Bar Association ("ABA") and its more than 413,000 members, I write to express our concerns over certain key provisions in the above referenced revised proposed FAR rule, "Contractor Compliance Program and Integrity Reporting," and to urge the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council ("Councils") to add language to the rule that would better protect companies' attorney-client privilege, work product, and employee legal rights. As Chair of the ABA Task Force on Attorney-Client Privilege, I have been authorized to express the ABA's views on these important issues.

Although the ABA has not taken a position on the overall proposed rule,[1] we urge the Councils to delete language in the revised proposed rule that requires contractors to disclose to the Office of Inspector General and the Contracting Officer when they have "reasonable grounds to believe" that a violation of federal criminal law or the civil False Claims Act has occurred. In addition, we urge the Councils to add language to the final FAR rule clarifying that federal officials may not pressure contractors to waive their attorney-client privilege or work product protections or take certain unfair punitive actions against their employees during any audit, investigation, or corrective action. Enclosed is specific proposed language that we believe would achieve these goals without impairing the effectiveness of the revised proposed rule in any way.

The Importance of the Attorney-Client Privilege, the Work Product Doctrine, and Employee Legal Rights

The attorney-client privilege enables both individual and organizational clients to communicate with their lawyers in confidence, and it encourages clients to seek out and obtain guidance in how to

[1] While the ABA has not taken a position on the overall proposed rule, the ABA Section of Public Contract Law filed comments expressing its views regarding the original proposed rule on January 18, 2008. The Section's comments were not reviewed or considered by the ABA House of Delegates or Board of Governors and therefore should not be construed as representing the views of the full ABA Those comments are available at http://www.abanet.org/contract/federal/regscomm/conflicts_003.pdf

conform their conduct to the law. The privilege facilitates self-investigation into past conduct to identify shortcomings and remedy problems, to the benefit of corporate institutions, the investing community and society-at-large. The work product doctrine underpins our adversarial justice system and allows attorneys to prepare for litigation without fear that their work product and mental impressions will be revealed to adversaries.

The ABA strongly supports the preservation of the attorney-client privilege and the work product doctrine and opposes governmental policies, practices and procedures that have the effect of eroding the privilege or doctrine. In addition, the ABA believes that it is equally important to protect employees' constitutional and other legal rights—including the right to effective counsel and the right against self-incrimination—when a company or other organization is under investigation. Unfortunately, both the vague "reasonable grounds to believe" mandatory disclosure standard and the "full cooperation" requirement of the proposed rule threaten to undermine these fundamental rights in different ways.

Problems with the Proposed "Reasonable Grounds to Believe" Mandatory Disclosure Standard

The revised proposed FAR rule requires contractors to notify the Office of the Inspector General and the Contracting Officer of the relevant federal agency in writing "whenever the Contractor has reasonable grounds to believe that a principal, employee, agent, or subcontractor of the Contractor has committed a violation of the civil False Claims Act...or a violation of Federal criminal law in connection with the award or performance of any Government contract performed by the Contractor or a subcontract thereunder." *See* 73 Fed. Reg. 28409 (May 16, 2008). Although the term "reasonable grounds to believe" is not defined in the revised proposed rule, any knowing failure to timely disclose this information is cause for debarment or suspension of the contractor, a draconian penalty that could make the contractor ineligible to receive further government contracts.

The ABA is concerned that the vague nature of the "reasonable grounds to believe" disclosure standard in the revised proposed rule will undermine the confidential relationship between contractors and their attorneys. Under existing federal statutes and regulations governing federal procurement—as well as broad criminal statutes such as the False Claims Act and the False Statements Act—virtually any noncompliance in connection with a federal government contract *may,* depending on the circumstances, constitute a violation of federal criminal law. On the other hand, these same procurement rules are complex and often esoteric, giving rise to defenses against allegations of non-compliance or criminal conduct.

As a result, the revised proposed rule will often require contractors to seek and rely upon the legal advice of their counsel in order to make the judgments necessary to comply with the rule's notification requirement. At the same time, the rule will often require contractors to disclose the results of their counsel's legal advice—or the legal advice itself—resulting in waiver of the attorney-client privilege. In addition, once the contractor is forced to disclose its legal advice, the disclosure is likely to be followed by a demand from the Office of Inspector General for all underlying information, including information that is protected by the attorney-client privilege and/or the work product doctrine.

Even in those instances in which a contactor determines that disclosure is not required under the revised proposed FAR rule, the contractor still may be forced to waive its attorney-client privilege and work product protections if the government disagrees with the contractor's determination and decides to initiate a suspension or debarment action. In order to justify the "reasonableness" of its determination that certain conduct did not meet the reporting threshold of the law, the contractor may need to disclose the basis for its determination. In many such cases, the contractor may be required to disclose information protected by the attorney-client privilege or work product doctrine, including communications between company counsel and employees and the actual legal advice that the contractor received.

Compounding this problem is the procedural fact that a suspension may occur without any opportunity for a contractor to be notified in advance. Since the mere act of suspension can start a chain reaction of contract cancellations and consequent adverse impact on the value of the contractor's stock, the rule as proposed would subject a contractor to immense pressure to waive the privilege rather than risk being second guessed and penalized.

For all of these reasons, the vague "reasonable grounds to believe" disclosure standard in the revised proposed FAR rule is likely to seriously erode the contractor's attorney-client privilege and work product protections regardless of whether the contractor discloses or declines to disclose possible violations under the rule. Therefore, the ABA urges the Councils to delete the mandatory disclosure provisions from the proposed rule, as shown in the attached suggested amendments. If the Councils decide not to remove that requirement from the final FAR rule in its entirety, then the ABA recommends that the "reasonable grounds to believe" standard be replaced with an "actual knowledge that a civil False Claims Act or Federal criminal law violation has occurred" standard.

Problems with the "Full Cooperation" Requirement of the Proposed FAR Rule

Although the proposed FAR rule does not specifically require contractors to waive their attorney-client privilege, work product, or employee legal protections during investigations, the ABA is concerned that the rule's requirement that contractors establish an internal control system and give "full cooperation...(to) any Government agencies responsible for audit, investigation, or corrective actions" could be read to require waiver of these protections. *See* 72 Fed. Reg. 64023 (November 14, 2007). In addition, we are concerned that the "full cooperation" language in the proposed rule could embolden agencies to demand such waiver from companies.

The ABA believes that a broad interpretation of the "full cooperation" language in the proposed FAR rule, like the more explicit waiver policies adopted by the Justice Department, the Securities and Exchange Commission (SEC), and other agencies[2], could lead to a number of profoundly negative consequences.

[2] The Justice Department's cooperation standards—outlined in the 1999 "Holder Memorandum," 2003 "Thompson Memorandum," and 2006 "McNulty Memorandum"—pressure companies to waive attorney-client privilege and work product protections in many cases in return for receiving cooperation credit during investigations. The Justice Department standards also pressure companies to take certain punitive actions against their employees in many cases—such as not sharing information with them, terminating them, or in certain "rare" cases, not paying their attorneys fees—in return for such credit. Similar policies also have been adopted by the SEC, the EPA, HUD, and other agencies, and these materials are available at http://www.abanet.org/poladv/priorities/privilegewaiver/acprivilege.html.

First, the ABA believes that this language in the proposed rule could lead to the routine compelled waiver of attorney-client privilege and work product protections. Although the proposed rule does not explicitly state that waiver is required in every situation, the sweeping "full cooperation" language in the proposal is likely to encourage federal agency staff, directly or indirectly, to pressure contractors to waive their privileges on a regular basis as a condition for receiving cooperation credit during investigations. From a practical standpoint, contractors will have no choice but to waive when encouraged or requested to do so because the risk of being labeled as "uncooperative" will have a profound effect not just on the federal agencies' enforcement action decisions, but on the contractor's public disclosure obligations, credit worthiness, stock price, and image. In this way, the broad "full cooperation" language of the proposed rule will likely exacerbate the "culture of waiver" problem caused by the existing Justice Department, SEC, and other federal agency policies.[3]

Second, the ABA is concerned that the broad "full cooperation" language in the proposed rule, like the similar policies adopted by the Justice Department and other federal agencies, will further weaken the attorney-client privilege between contractors and their lawyers, erode the work product doctrine, and undermine the contractors' internal compliance programs. By making the privilege uncertain in the corporate context, these policies discourage contractors from consulting with their lawyers, thereby impeding the lawyers' ability to effectively counsel compliance with the law. In addition, by creating an environment in which contractors are expected to waive their work product protections, these policies discourage the contractors from conducting internal investigations that are designed to quickly detect and remedy misconduct. The ABA believes that federal officials can obtain the information they need from a cooperating contractor without pressuring it to waive these protections. For all these reasons, the ABA believes that the proposed rule will undermine, rather than enhance, compliance with the law.

Third, the ABA is concerned that the broad "full cooperation" language of the proposed rule—like the cooperation standards adopted by the Justice Department, the SEC, and other federal agencies—could erode employees' constitutional and other legal rights by pressuring contractors to not pay their employees' legal fees during investigations in violation of the employees' Sixth Amendment right to counsel, to fire them for not waiving Fifth Amendment right against self-incrimination, or to take other punitive actions against the employees long before any guilt has been established.[4] By pressuring contractors to punish their employees long before any guilt has been shown, the proposed rule will weaken the presumption of innocence, overturn basic corporate governance principles, and violate the Constitution.

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[3] According to a March 2006 survey of over 1,200 corporate counsels, almost 75% believe that a "culture of waiver" has evolved in which federal agencies believe that it is reasonable and appropriate for them to expect a company under investigation to broadly waive attorney-client or work product protections. The detailed survey results are available at http://www.acc.com/Surveys/attyclient2.pdf. Although the Justice Department revised its waiver policy in December 2006 as part of the "McNulty Memorandum," prosecutor demands for waiver have continued unabated. Numerous specific examples of post-McNulty demands for waiver are outlined in the September 2007 Report of former Delaware Chief Justice Norman Veasey, available at http://www.abanet.org/poladv/priorities/privilegewaiver/acprivilege.html

[4]For a full discussion of the Justice Department and other federal agency cooperation standards that erode employees' constitutional and other legal rights, please see the ABA's September 18, 2007 statement to the Senate Judiciary Committee, pgs. 11-15, available at http://www.abanet.org/poladv/priorities/privilegewaiver/20070918_mcnulty.pdf

Finally, "full cooperation" may be interpreted by the government to include an admission of guilt or liability when in fact there may be substantial legal and factual reasons not to do so. Yet, for a contractor to try to raise potentially dispositive defenses may be regarded as less than "full cooperation" and thus subject the contractor to the extreme risks inherent in suspension and debarment.

The ABA Task Force on Attorney-Client Privilege has prepared suggested changes to the revised proposed FAR rule that would preserve fundamental attorney-client privilege, work product, and employee legal protections during investigations while ensuring federal agencies' continued ability to obtain the important factual information that they need to effectively enforce the law.

The proposed amendment to the proposed FAR rule enclosed herewith would accomplish these objectives by: (1) preventing federal agencies and their staff from seeking privilege waiver from contractors during audits, investigations, or corrective actions; (2) preserving the agencies' ability to request important factual information from contractors as a sign of full cooperation without implicating broader privilege waiver concerns; (3) clarifying that a waiver of privilege should not be considered when assessing whether the contractor provided full cooperation; and (4) recognizing that full cooperation credit can be given for providing factual information. The proposed amendment also would clarify that while federal agencies and their staff may consider a contractor's reasonable efforts to secure its employees' cooperation as a factor in determining whether the contractor has fully cooperated during an audit, investigation, or corrective action, the contractor should not be asked or expected to punish any employee who chooses to assert his or her legal rights.

We believe that the proposed amendment, if adopted by the Councils, would strike the proper balance between effective law enforcement and the preservation of essential attorney-client privilege, work product, and employee legal protections, and we urge you to consider it.

If you or your staff have any questions or need additional information about this vital issue, please ask your staff to contact me at (404) 527-4650 or Larson Frisby of the ABA Governmental Affairs Office at (202) 662-1098.

Thank you for considering the views of the American Bar Association on this subject, which is of such vital importance to our system of justice.

Sincerely,

R. William Ide III

R. William Ide, III, Chair
ABA Task Force on Attorney-Client Privilege

enclosure

cc: Patricia A. Meagher, Chair, ABA Section of Public Contract Law
Thomas M. Susman, Director, ABA Governmental Affairs Office
R. Larson Frisby, Senior Legislative Counsel, ABA Governmental Affairs Office

PROPOSED AMENDMENT TO REVISED PROPOSED FAR RULE TITLED "CONTRACTOR COMPLIANCE PROGRAM AND INTEGRITY REPORTING," FAR CASE 2007-006, 72 FED. REG. 64019 AND 73 FED. REG. 28407

PREPARED BY THE AMERICAN BAR ASSOCIATION TASK FORCE ON ATTORNEY-CLIENT PRIVILEGE

(Excerpts of the proposed FAR rule are reprinted below to provide context; proposed additions are underlined in blue; proposed deletions are struck through in red

JUNE 20, 2008

PART 3—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

…3.1002 Policy.

~~(c) A contactor may be suspended and/or disbarred for knowing failure to timely disclose a violation of the civil False Claims Act or Federal criminal law in connection with the award or performance of any Government contract performed by the contractor or a subcontract awarded thereunder (see 9.406-2(b)(1)(v) and 9.407-2(a)(7)).~~

PART 9—CONTRACTOR QUALIFICATIONS

…4. Amend section 9.406—2 by revising the introductory text of paragraph (b)(1) and adding paragraph (b)(1)(v) to read as follows:

9.406—2 Causes for debarment

* * * * *

(b)(1) A contractor, based upon a preponderance of the evidence, for any of the following—

* * * * *

~~(v) Knowing failure to timely disclose —~~
~~(A) An overpayment on a Government contract; or~~
~~(B) Violation of the civil False Claims Act (31 U.S.C. 3729-3733) in connection with the award or performance of any Government contract or subcontract; or~~
~~(C) Violation of Federal criminal law in connection with the award or performance of any Government contract or subcontract.~~

…5. Amend section 9.407—2 by adding paragraph (a)(7) to read as follows:

9.407—2 Causes for suspension

(a)* * *

~~(7) Knowing failure to timely disclose—~~
~~(i) An overpayment on a Government contract; or~~
~~(ii) Violation of the civil False Claims Act (31 U.S.C. 3729-3733) in connection with the award or performance of any Government contract or subcontract; or~~
~~(iii) Violation of Federal criminal law in connection with the award or performance of any Government contract or subcontract.~~

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

7. Amend section 52.203—13 by—
a. Revising the date of clause;
~~b. Adding paragraph (b)(3);~~
c. Revising the introductory text of paragraph (c) and (c)(2)(ii);
~~d. Adding paragraph (c)(2)(ii)(F);~~ and
e. Revising paragraph (d).

52.203—13 Contractor Code of Business Ethics and Conduct

As prescribed in 3.1004, insert the following clause:

CONTRACTOR CODE OF BUSINESS ETHICS AND CONDUCT (DATE)

…(b) *Code of business ethics and conduct.* …

~~(3) The Contractor shall notify, in writing, the agency Office of the Inspector General, with a copy to the Contracting Officer, whenever the Contractor has reasonable grounds to believe that a principal, employee, agent, or subcontractor of the Contractor has committed a violation of the civil False Claims Act or a violation of Federal criminal law in connection with the award or performance of this contract or any subcontract thereunder…~~

…(c) *Business ethics awareness and compliance program and internal control system.* …The Contractor shall establish the following within 90 days after contract award, unless the contracting officer establishes a longer time period—

…(2) An internal control system.

…(ii) At a minimum, the Contractor's internal control system shall provide for the following:

…~~(F) Timely reporting, in writing, to the agency Office of the Inspector General, with a copy to the Contracting Officer, whenever the~~

~~Contractor has reasonable grounds to believe that a principal, employee, agent, or subcontractor of the Contractor has committed a violation of the civil False Claims Act (31 U.S.C. 3729-3733) or a violation of Federal criminal law in connection with the award or performance of any Government contract performed by the Contractor or a subcontract thereunder; and~~

…~~(G)~~(F) Full cooperation with any Government agencies responsible for audit, investigation, or corrective actions, subject to the conditions established in subsection (iii) below.

(iii) Protection of Attorney-Client Privilege, Work Product, and Employee Legal Rights.

(A) Staff of Government agencies responsible for audit, investigation, or corrective actions ("Agency staff") shall not take any action or assert any position that directly or indirectly demands, requests or encourages a contractor or its attorneys to waive its attorney-client privilege or the protections of the work product doctrine.

(B) In assessing a contractor's cooperation, Agency staff shall not draw any inference from the contractor's preservation of its attorney-client privilege and the protections of the work product doctrine. At the same time, the voluntary decision by a contractor to waive the attorney-client privilege and/or the work product doctrine shall not be considered when assessing whether the contractor provided effective cooperation. Agency staff may consider, however, in assessing whether a contractor has provided effective cooperation, the degree to which the contractor has provided factual information to the Agency staff in a manner, to be worked out by the contractor and the Agency staff, that preserves the protections of the attorney-client privilege and work product doctrine to the fullest extent possible.

(C) Notwithstanding the general rule set forth in subsection (iii)(B) above, Agency staff may, after obtaining in advance the approval of their respective agency's Director of Enforcement or his/her designee, seek materials otherwise protected from disclosure by the attorney-client privilege or the work product doctrine if the contractor asserts, or indicates that it will assert, an advice of counsel defense with respect to the matters under investigation. Moreover, Agency staff also may seek materials respecting which there is a final judicial determination that the privilege or doctrine does not apply for any reason, such as the crime/fraud exception or a waiver. In circumstances described in this subsection (iii)(C), Agency staff shall limit their requests for disclosure only to those otherwise protected materials reasonably necessary and which are within the scope of the particular exception.

(D) Although Agency staff may consider whether a contractor has asked its current or former officers, directors, employees, or agents ("Employees") to

cooperate with Agency staff and/or whether the contractor has made reasonable efforts to secure such cooperation as factors in determining the contractor's degree of cooperation, a contractor should not be asked or expected to take any of the following punitive actions against its Employees in return for cooperation credit:

(i) terminating or otherwise sanctioning an Employee who exercised his or her Fifth Amendment rights against self-incrimination in response to a government request for an interview, testimony, or other information;

(ii) declining to provide counsel to an Employee or pay for such counsel;

(iii) declining to enter into or ceasing to operate under a joint defense, information sharing and common interest agreement with an Employee or other represented party with whom the contractor believes it has a common interest in defending against the investigation; or

(iv) declining to share its records or other historical information relating to the matter under investigation with an Employee.