



2004-2005

CHAIR

Patricia H. Wittie
Ste 1100
818 Connecticut Ave, NW
Washington, DC 20006
(202) 496-3493

CHAIR-ELECT

Robert L. Schaefer
12333 W Olympic Blvd
Los Angeles, CA 90064-1021
(310) 893-1609

VICE-CHAIR

Michael A. Hordell
Hamilton Square 6th Fl
600 14th St, NW
Washington, DC 20005-2004
(202) 220-1232

SECRETARY

Patricia A. Meagher
311 California St, 10th Fl
San Francisco, CA 94104-2695
(415) 956-2828

BUDGET AND FINANCE OFFICER

Carol N. Park-Conroy
7404 Rippon Rd
Alexandria, VA 22307-1944
(703) 681-8507

**SECTION DELEGATE AND
PREVIOUS PAST CHAIR**

Mary Ellen Coster Williams
717 Madison Pl, NW, Ste 612
Washington, DC 20005-1086
(202) 219-9574

IMMEDIATE PAST CHAIR

Hubert J. Bell, Jr.
Ste 2600 Harris Tower
233 Peachtree St, NE
Atlanta, GA 30303-1530
(404) 582-8027

COUNCIL MEMBERS

Peter D. Balch
PO Box 1027, MS 108-108
Moorestown, NJ 08057-0927

Ross W. Branstetter, III
7100 Defense Pentagon
Washington, DC 20301-7100

Robert A. Burton
725 17th St, NW, Ste 9013
Washington, DC 20503

Mark D. Colley
2099 Pennsylvania Ave, NW, Ste 100
Washington, DC 20006-6800

David C. Ehrhart
99 A Duncan St
Bolling AFB, DC 20031-7460

Helaine G. Elderkin
3170 Fairview Pk Dr, MC 203A
Falls Church, VA 22042-4516

Paul B. Haseman
16800 CentreTech Pkwy
Aurora, CO 80011

Thomas E. Hill
3100 Bk of Amer Plz, 901 Main St
Dallas, TX 75202-3714

Karen L. Manos
1299 Pennsylvania Ave, NW, 5th Fl
Washington, DC 20004-2400

John J. Pavlick, Jr.
575 7th St, NW, Concourse Level
Washington, DC 20004

Richard P. Rector
1200 19th St, NW, 6th Fl
Washington, DC 20036-2412

Angela B. Styles
655 15th St NW, Ste 900
Washington, DC 20005-5799

**EDITOR, PUBLIC CONTRACT
LAW JOURNAL**
Carl L. Vacketta
Washington, DC

EDITOR, THE PROCUREMENT LAWYER
Mark E. Langevin
Los Angeles, CA

BOARD OF GOVERNORS LIAISON
Pamela J. Roberts
Columbia, SC

SECTION DIRECTOR

Marilyn Neforas
321 N Clark St
Chicago, IL 60610-4714
(312) 988-5596
Fax: (312) 988-6033

August 10, 2005

VIA E-MAIL AND FIRST CLASS MAIL

General Services Administration
Regulatory Secretariat (VIR)
1800 F Street, N.W., Room 4035
Washington, DC 20405

Attention: Laurieann Duarte

**RE: Interim Rule with Request for Comments, FAC 2005-04, FAR
Case 2004-035, 70 Fed. Reg. 33659 (June 8, 2005); Submission of
Cost or Pricing Data on Noncommercial Modifications of
Commercial Items**

Dear Ms. Duarte:

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 Section consists of attorneys and associated professionals in private practice, industry, and Government service. The Section's governing Council and substantive committees have 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 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.

The June 8, 2005 interim rule amends the Federal Acquisition Regulation ("FAR") to implement section 818 ("Section 818") of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Public Law 108-375 (the

“Act”), amending 10 U.S.C. § 2306a. 10 U.S.C. § 2306a(b) contains an exception to the requirement to submit certified cost or pricing data when a commercial item is being acquired. Section 818 limits that exception so that it “does not apply to cost or pricing data on noncommercial modifications of a commercial item that are expected to cost, in the aggregate, more than \$500,000 or 5 percent of the total price of the contract, whichever is greater.” 10 U.S.C. § 2306a(b)(3). The Section has two comments on the interim rule implementing Section 818.

First, the Section recommends that “\$500,000” be changed to “\$550,000” where it appears in the interim rule in FAR 15.403-1(c)(3)(ii)(B) and (C). Section 818 does use the \$500,000 figure to amend 10 U.S.C. 2306a(b). But 10 U.S.C. § 2306a also contains a subsection (a)(7), which provides for adjustments every five years in the \$500,000 threshold. That threshold is currently adjusted to be \$550,000, and to simplify matters and avoid confusion, other FAR sections use the adjusted threshold number of \$550,000. *See, e.g.*, FAR 15.403-4. The Section recommends that a similar approach be taken here also.

Second, the Section is recommending a change to the FAR language describing the threshold to avoid the possibility that the FAR might be misconstrued and implemented in a way that would prove impracticable.

Section 818 was included in the Act in large part because of Congressional concern that the Air Force did not have access to cost or pricing data on noncommercial modifications in connection with a contract for the KC-767A Tanker Aircraft. *See* Senate Report 108-260, at 355-56. The Senate Committee on Armed Services, citing Department of Defense Inspector General’s Report D-2004-064, noted that “less than one-third of the dollar value of the contract negotiated by the Air Force was for the ‘green’ commercial aircraft.” *Id.* at 356.

Section 818 establishes a limitation to the cost or pricing data exception (for DOD, NASA, and the Coast Guard) when the noncommercial modifications are expected to “cost” more than \$500,000 or 5 percent of the total “price” of the contract. The Section believes that “expected to cost” in this context means cost to the Government, which is the price charged by the contractor. Because a component of the threshold is the percentage attributable to the noncommercial modifications, and the denominator in determining that percentage is the price of the contract, it is only logical that the numerator in determining that percentage be the price of the noncommercial modifications. The Section believes that such an approach is consistent with the language of Section 818, consistent with the Congressional concern cited above, and makes common sense.

Nevertheless, the Section is concerned that the current FAR language might be construed by some to refer not to cost to the Government (i.e., price), but cost to the contractor as measured by FAR Part 31. This could require a contractor that typically provided commercial items to develop and implement a capability to determine costs per FAR Part 31 merely to determine if it was within the dollar and percentage thresholds of the exception.

The Section believes this concern can be alleviated by simply adding the words "to the Government" after "total cost" to the wording of FAR 15.403-1(c)(3)(ii)(B) and (C).

The Section recommends that FAR 15.403-1(c)(3)(ii) (B) and (C) be revised to read as follows, so as to incorporate both of the above recommendations:

(B) For acquisitions funded by DoD, NASA, or Coast Guard, the modifications are exempt from the requirement for submission of cost or pricing data provided the total cost to the Government of the modifications does not exceed the greater of \$550,000 or 5 percent of the total price of the contract.

(C) For acquisitions funded by DoD, NASA, or Coast Guard where the total cost to the Government of the modifications exceeds the greater of \$550,000 or 5 percent of the total price of the contract and no other exception or waiver applies, the contracting officer must require submission of cost or pricing data.

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

Sincerely,



Robert L. Schaefer
Chair, Section of Public Contract Law

cc: Michael A. Hordell
Patricia A. Meagher
Michael W. Mutek

Carol N. Park-Conroy
Patricia H. Wittie
Hubert J. Bell, Jr.
Mary Ellen Coster Williams
Council Members
Co-Chairs and Vice-Chairs of the Commercial
Products and Services Committee
David Kasanow