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September 11, 2009

**VIA FEDERAL RULEMAKING PORTAL, EMAIL
AND FACSIMILE**

Defense Acquisition Regulations System
Attn: Ms. Angie Sawyer
OUSD (AT&L) DPAP (DARS)
IMD 3D139
3062 Defense Pentagon
Washington, D.C. 20301-3062

**Re: DFARS Case 2008-D011, Acquisition of Commercial Items,
74 Fed. Reg. 34263 (July 15, 2009)**

Dear Ms. Sawyer:

On behalf of the Section of Public Contract Law of the American Bar Association ("the Section"), I am submitting comments on the above-referenced Defense Federal Acquisition Supplement ("DFARS") interim rule issued with a request for comments by the Defense Acquisition Regulations System on July 15, 2009.¹ 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

¹ The Honorable Thomas C. Wheeler, a member of the Section's Council, did not participate in the Section's consideration of or voting on these comments.

2009-2010

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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.²

I. BACKGROUND

The Department of Defense (“DoD”) reported and published an Interim Rule (“Interim Rule”) amending the DFARS in order to implement Sections 805 and 815 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. No. 110–181) (“the Act”). Section 805 specifies the types of commercial item acquisitions for which time and materials and labor-hour contracts may be used. Section 815 addresses the situations under which major weapon systems, subsystems of major weapon systems, and components and spare parts for major weapon systems may be acquired using procedures established for the acquisition of commercial items. Section 815 also requires DoD to modify its regulations to clarify that the terms “general public” and “nongovernmental entities,” with regard to sales of commercial items, do not include the federal government or a state, local, or foreign government.

The following comments address the aspects of the Interim Rule implementing the portions of Section 815 with respect to commercial items acquired under major weapon systems contracts. The Section has no comments with respect to the portion of the Interim Rule implementing Section 805.

II. COMMENTS

The Section appreciates DoD’s efforts to implement the Interim Rule in accordance with the statutory requirements of the Act. The Section is concerned, however, that the portion of the Interim Rule implementing the provisions of Section 815 with respect to commercial items acquired under major weapons systems contracts is not clear as to the extent to which it applies to subcontracts placed by prime contractors. Section 234.7002(c) refers to “subcontract[s] under a prime contract,” but the Interim Rule does not otherwise mention subcontracts. Specifically, Section 234.7002(c)(2) of the Interim Rule states that subparagraph (c) shall apply only to components and spare parts that are acquired by DoD through a prime contract or a modification to a prime contract, or through “a subcontract under a prime contract or modification to a prime contract on which the prime contractor adds no, or negligible, value.”

² This letter is available in pdf format at: <http://www.abanet.org/contract/regscmm/home.html> under the topic “Commercial Items.”

For the reasons discussed below, the Section recommends that the Interim Rule be clarified to provide that the rule does not apply to subcontracts other than as specified in Section 234.7002(c). For example, Section 234.7004(b) pertaining to subsystems should state that it applies only to subsystems purchased directly by DoD from the subsystem contractor. Further, as discussed in Section B below, the Interim Rule, including Section 234.7004(c), should not apply to subcontracts beyond the first tier of subcontracts.

If DoD intends to apply this rule to subcontracts other than those specified in Section 234.7002(c) of the Interim Rule, the Section believes significant revisions and additions would be required to make the clause workable. To the extent the Interim Rule applies to subcontracts, the Section believes it should be modified to address the issues discussed in D and E below, at a minimum.

A. Definition of Key Terms

Several key terms used in the Interim Rule are not defined. Failure to provide definitions is likely to result in disparate interpretations and confusion in the administration of the rule. In particular, the term “subsystem” is not defined in the Interim Rule, or elsewhere in the definitions section of the FAR or DFARS. Neither is the term “component” defined for purposes of the clause. If the intent is to adopt the definition of “component” in FAR 2.101, the Section recommends that the rule so state. If not, the rule should include a definition of the term “component.” Without definition of the terms “component” and “subsystem,” it is unclear where the line should be drawn between components, subassemblies, and discrete parts of subsystems. This lack of clarity could lead to interpretations that subsystems could be made up of a series of smaller subsystems, or alternatively, that smaller subsystems are intended to constitute components for the purposes of the rule.

The rule should also clarify the term “no, or negligible, value” as used in Section 234.7002(c) of the Interim Rule. The Section notes that DoD has dealt with this concept in a different context in addressing the subject of excessive pass-through of subcontract costs. *See* DFARS 252.215-7004. There, DoD included definitions of “added value” and “no or negligible value” that could be adapted to this rule to clarify what is meant by “no, or negligible, value” as used in Section 234.7002(c).

B. No Application Below First-Tier Subcontracts

Although perhaps unnecessary depending upon how DoD addresses the definition of terms used in the Interim Rule, the Section believes that the rule should not apply beyond the first tier of subcontracts awarded directly by the prime

contractor. Applying the rule at lower tiers would be impracticable and could cause significant delays in the negotiation and award of subcontracts throughout the supply chain that could adversely impact performance of the prime contract.

C. Potential Conflict with DFARS Part 244

DFARS 244.402(a) states in part: “*Contractors shall determine whether a particular subcontract item meets the definition of a commercial item.*” If the Interim Rule applies to subcontracts, it would conflict with the quoted language to the extent that (i) the subsystems, components, or spare parts being acquired are not commercial off-the-shelf items; and (ii) the associated prime contract is for acquisition of a major weapon system or subsystem of a major weapons system that is not being and has not been acquired as a commercial item, as defined in FAR 2.101.

D. Specifying Procedures for Applying the Rule

To the extent that the Interim Rule applies to subcontracts, the Section believes that it has the potential to disrupt the process of selecting, negotiating, and awarding subcontracts if specific guidelines for implementing the rule are not established. To the extent possible, determinations whether items procured under subcontracts are commercial items should be made prior to award of the prime contract. In a number of cases, however, this will not be possible because (i) all subcontractors may not be identified at that time or (ii) new or different subcontractors may be introduced throughout the period of performance. To avoid potential problems with administering the Interim Rule, the Section recommends the following:

- For procurements constituting a major weapon system subject to the rule, DoD should include a solicitation and contract clause that informs the contractor that the rule applies.
- Contracting officers and contractors should be encouraged to address the requirements of the rule prior to award of the prime contract to the extent practicable.
- Contracting officers should be instructed to respond promptly to requests for determination whether a proposed item is a commercial item. If the contracting officer does not agree that the item submitted constitutes a commercial item, the contracting officer should provide the reasons therefore to the contractor to assist in the resolution of the matter.

- Contracting officers should investigate whether DoD has determined that a proposed item is a commercial item, and if so, afford that item the same treatment when it is purchased by prime contractors.

E. Reliance on Determinations

Once a determination has been made that a commercial item is being provided under a subcontract, the Section recommends that the final rule prohibit the contracting officer from changing the determination, unless there is a substantial change in the nature of the work performed by the subcontractor such that the item no longer meets the FAR definition of a commercial item. Additionally, with the above exception, once the contracting officer has made a commercial item determination with respect to an item, the contractor should not be required to reapply for determinations with respect to future procurements of the same item.

III. CONCLUSION

The Section recognizes that DoD seeks to develop the rule in accordance with the requirements of the Act. The Section believes, however, that the intended scope of the Interim Rule should be clarified so that it does not apply to subcontracts other than as specified in Section 234.7002(c). To the extent the Interim Rule applies to subcontracts placed by prime contractors, it should be modified to provide additional guidance to ensure that it does not unnecessarily delay and disrupt the contracting process.

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

Sincerely,



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Chair, Section of Public Contract Law

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