

1200 19th Street, N.W.
Washington, D.C. 20036
Tel: (202) 861-6416
Fax: (202) 223-2085
gregory.smith@piperrudnick.com

February 26, 2001

VIA HAND DELIVERY

General Services Administration
FAR Secretariat (MVRS)
1800 F Street, N.W.
Room 4035
Washington, D.C. 20405

Attn: Laurie Duarte

**Re: FAR Case No. 2000-014
Signing and Retention of High Technology Workers
65 Fed. Reg. 82876 (Dec. 28, 2000)**

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 contain 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.¹

Although the Section agrees with the intent to confirm the allowability of costs critical to the recruitment and retention of contractor personnel, we believe that the proposed revisions to FAR 31.205-34, "Recruitment and Retention Costs," do not fully achieve that intent. We also are concerned that the proposed rule is not fully responsive to the recent recommendation of the Defense Science Board (DSB) regarding these costs and may, in fact, have the unintended effect of limiting the allowability of such costs.

The stated intent of the DSB's recommendation was to support industry's need to attract and retain "top quality management and technology personnel by revising FAR guidelines related to cost reasonableness of recruitment and retention to ensure that they reflect current market conditions and personnel recruiting and retention practices in competing industries and regions." DSB Task Force, *Preserving a Healthy and Competitive U.S. Defense Industry to Ensure Our Future National Security*, Final Briefing (November 2000), at 28 (emphasis added) Importantly, it should be recognized that recruitment and retention bonuses are presently allowable, and the DSB's objective was only to *ensure* that these costs continue to be considered allowable.

The language of the proposed rule, however, tends to create the misimpression that (1) recruiting and retention bonuses were unallowable prior to the changes, and (2) allowability of such bonuses might be contingent, in all cases, upon satisfaction of a number of limiting factors (e.g., "critical skills," "periodic retention bonuses," "needed to retain employees"). The payment of signing and retention bonuses in the future will continue to be market-driven, and the Section is concerned that such limiting factors may be misinterpreted to restrict contractors' ability to respond to legitimate market pressures.

In addition, the proposed rule may create the misimpression that bonuses are only allowable for technology personnel, because it twice cites "scientists and

¹ Mary Ellen Coster Williams, an Officer of the Public Contract Law Section, did not participate in the Section's consideration of these comments, and she abstained from voting to approve and send this letter.

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engineers in fields like software and systems integration” as the type of employee for whom a bonus may be appropriate. As the DSB recognized in its recommendation, signing and retention bonuses may be appropriate for both technology *and* management personnel.

Accordingly, in lieu of the proposed changes, the Section recommends the issuance of policy guidance to field personnel (including those with audit responsibility) indicating that deference ought to be given to contractor practices and procedures to recruit and retain personnel, as long as the practices and procedures are regularly applied in a non-discriminatory manner.

Thank you for the opportunity to respond to this proposed rule. The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.

Sincerely,

Gregory A. Smith
Chair

cc: Norman R. Thorpe
Mary Ellen Coster Williams
Hubert J. Bell, Jr.
Patricia A. Meagher
Marshall J. Doke Jr.
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