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August 4, 2003

General Services Administration
FAR Secretariat (MVA)
1800 F Street, NW
Room 4035
Washington, DC 20405

Attention: Ms. Laurie Duarte

**Re: FAR Case 2001-031
Proposed Rule: – Deferred Compensation and Postretirement Benefits
Other Than Pensions
68 Fed. Reg. 33326, June 3, 2003**

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.¹ 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

¹ The Honorable Mary Ellen Coster Williams, Chair of the ABA Section of Public Contract Law, has recused herself on this matter, did not participate in the Section's consideration of these comments, and abstained from voting to approve and send this letter. Similarly, Council Member Daniel I. Gordon recused himself on this matter and did not participate in either the preparation or approval of these comments.

expressed herein have not been approved by the House of Delegates or the Board of Governors to the American Bar Association and, therefore, should not be construed as representing the policy of the American Bar Association.

The Section applauds the FAR Council's efforts to improve the formatting of the subject FAR subsection but has substantive concerns regarding the proposed FAR 31.205-6(o)(3). Relevant portions of the proposed rule are excerpted below:

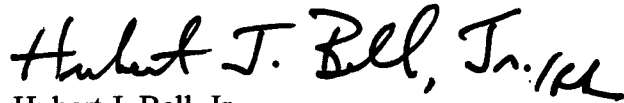
The Government shall receive an equitable share of any amount of previously funded PRB costs which revert or inure to the contractor. Such equitable share shall reflect the Government's previous participation in PRB costs through those contracts for which cost or pricing data were required or which were subject to subpart 31.2. The contractor shall credit the equitable share to the Government either as a cost reduction or by cash refund at the option of the Government.

The Section's concerns are summarized as follows:

- The proposed revision does not define what is meant by "any amount of previously funded PRB costs which revert or inure to the contractor."
 - The provision should explicitly state that the Government is entitled to an equitable share of previously funded costs only when the costs are ultimately reduced. The provision should not apply when benefits are reduced, but total costs are not. In the present environment, contractors may be required to reduce benefits to simply keep retiree health costs from increasing at an unsustainable level.
 - The provision is one-sided in entitling the Government to share in any proceeds resulting from overfunding, but shielding the Government from liability in the event of underfunding. The Section recommends that the provision should also provide for the Government to receive a pro rata share of the unfunded liability that exists at the time of a segment closing, plan termination, or curtailment of benefits.
- The last sentence of the proposed revision is unduly prescriptive. By explicitly dictating the required alternative methods of adjustment, it reduces the flexibility to negotiate an equitable adjustment that considers the unique facts relating to a particular situation.

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

Sincerely,

A handwritten signature in black ink that reads "Hubert J. Bell, Jr." with a stylized flourish at the end.

Hubert J. Bell, Jr.
Chair-Elect, Section of Public Contract Law

cc: Mary Ellen Coster Williams
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