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March 17, 2010

VIA EMAIL AND U.S. MAIL

Mr. Shay D. Assad
Director, Defense Procurement and Acquisition Policy
Office of the Under Secretary of Defense
U.S. Department of Defense
3060 Defense Pentagon
Room 3B855
Washington, D.C. 20301-3060

**Re: Class Deviation 2010-O0004 to Implement Additional
Contractor Requirements and Responsibilities Restricting the
Use of Mandatory Arbitration Agreements**

Dear Mr. Assad:

On behalf of the Section of Public Contract Law of the American Bar Association ("the Section"), I am submitting comments on the above-referenced Class Deviation, issued by the Office of the Under Secretary of Defense on February 17, 2010.¹ 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. By presenting their consensus view, the Section seeks to improve the process of public contracting for needed supplies, services, and public works.

¹ The Honorable Thomas C. Wheeler, a member of the Section's Council, did not participate in the Section's consideration of these comments and abstained from the voting to approve and send this letter.

2009-2010

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The Section is authorized to submit comments on acquisition regulations under special comment 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.²

I. INTRODUCTION

The Section recognizes that the Department of Defense ("DoD") was obligated to implement Section 8116 of the Defense Appropriations Act for Fiscal Year ("FY") 2010, known as the "Franken Amendment," which prohibits the use of FY 2010 funding on certain contracts unless contractors agree not to use arbitration procedures for Title VII claims. The Section further recognizes that the Franken Amendment was adopted late in the appropriations process and, therefore, is not accompanied by a clear record reflecting legislative intent. For these reasons, the Section supports the DoD effort to provide critical interpretative guidance in its February 17, 2010, Class Deviation ("Deviation"). Nevertheless, the Section is concerned that the Deviation, as presently issued, lacks some important clarity and precision. With these comments, the Section seeks to assist DoD with clarifying the requirements for compliance so that DoD can include such clarifications in its forthcoming interim rule.

As discussed below, the Section recommends clarification of the Deviation and adoption of language in a new DFARS clause to clarify contractors' obligations regarding the specific subcontractor level of certification required. The Section also recommends including a definition for "covered subcontract," "covered subcontractor" and "covered contract" to clarify the parties subject to the requirements of the rule. The Section recommends guidance on the intent of waiver authority of the Secretary of Defense under the Franken Amendment and how such authority will be used. The Section further recommends clarification on the exemption from the prohibitions of the DFARS clause of "a contractor's or subcontractor's agreements with employees or independent contractors that may not be enforced in a court in the United States." The Section recommends that these clarifications in the interim rule be made effective as of the date of the Deviation.

² This comment letter is available in pdf format at <http://www.abanet.org/contract/federal/regscomm/home.html> under the topic "Subcontracting and Teaming."

The Section commends and supports DoD's exemption of the acquisition of commercial items or commercially available off-the-shelf items ("COTS") and urges that DOD retain this exemption in the interim and final rules. Finally, consistent with the Section's comments regarding other DoD Class Deviations,³ the Section believes that DoD has not complied with applicable requirements of the Office of Federal Procurement Policy Act concerning public notice and comment for Class Deviations. Accordingly, the Section encourages DoD to expeditiously follow this Deviation with its announced intent to initiate the standard rulemaking process administered by the Defense Acquisition Regulations Council and Civilian Agency Acquisition Council ("Councils").

II. BACKGROUND

The Franken Amendment, section 8116 of the Defense Appropriations Act for Fiscal Year 2010, prohibits the expenditure of the funds appropriated or made available under the Act ("FY10 Funds") for any federal contract for an amount in excess of \$1 million that is awarded more than sixty days after the effective date of the Act (February 17, 2010), unless the contractor agrees not to: (i) enter into any agreement with any of its employees or independent contractors that requires, as a condition of employment, that the employee or independent contractor agree to resolve through arbitration any claims under Title VII of the Civil Rights Act or any tort related to or arising out of sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision, or retention; or (ii) take any action to enforce any provision of an existing agreement with an employee or independent contractor that mandates that the employee or independent contractor resolve through arbitration any such claim.

The Franken Amendment also prohibits the expenditure of any FY 2010 Funds for any federal contract awarded more than 180 days after the effective date of the Act (June 17, 2010) unless the contractor certifies that it requires each covered subcontractor to agree not to enter into, and not to take any action to enforce any provision of, any agreement described in the above paragraph with respect to any employee or independent contractor performing work related to the subcontract. The Franken Amendment defines a "covered subcontractor" for purposes of this provision as "an entity that has a subcontract in excess of

³ See, e.g., Section of Public Contract Law of the American Bar Association Letter re: Class Deviation, Additional Requirements and Responsibilities Relating to Alleged Crimes by or Against Contractor Personnel in Iraq and Afghanistan (Mar. 2, 2010).

\$1,000,000 on a contract” that is subject to the above described requirements of the amendment.

On February 17, 2010, the Office of the Under Secretary issued the Deviation to implement the provisions of the Franken Amendment, announced that it will publish an interim DFARS rule, and stated that it will consider comments received within two weeks after the date of the Deviation in formulating the interim rule.

III. COMMENTS

A. DoD Should Ensure That The Interim Rule Includes a Definition of “Covered Contract”

The Office of Under Secretary of Defense Memorandum (“the Memorandum”) accompanying the Deviation clause directs that “[e]ffective immediately, contracting officers shall use the attached clause in covered contracts, when using funds appropriated or otherwise made available for use by the Defense Appropriations Act for Fiscal Year 2010 (FY 10) (Pub. L. 111-118).” The Memorandum further states that the Deviation prohibits the use of FY10 Funds for any contract (including task or delivery orders and bilateral modifications) in excess of \$1 million that is awarded after February 17, 2010, unless the contractor complies with the requirements of the deviation. The Section recommends that in drafting the interim DFARS rule, DoD add the following definition of “covered contract”:

“Covered contract,” as used in this clause, means any contract (including task or delivery orders under, and bilateral modifications adding new work to, an existing contract) in excess of \$1 million that is awarded after February 17, 2010 and uses Fiscal Year 2010 funds, except for contracts (including task or delivery orders under, and bilateral modifications adding new work to, an existing contract) for the acquisition of commercial items or commercially available off-the-shelf items.

The Section also recommends that DoD amend the text in the Deviation prescribing the use of the new DFARS clause, DFARS 252.222-7999 ADDITIONAL REQUIREMENTS AND RESPONSIBILITIES RESTRICTING USE OF MANDATORY ARBITRATION AGREEMENTS (DEVIATION) (FEB 2010) (the “DFARS Clause”), as follows:

Use the following clause in all contracts (including task or delivery orders under, and bilateral modifications adding new work to, existing contracts) in excess of \$1 Million utilizing funds appropriated by the Fiscal Year 2010 Defense Appropriations Act (Pub. L. 111-118) that are awarded after February 17, 2010, except in contracts (including task or delivery orders and bilateral modifications) for the acquisition of commercial items or commercially available off-the-shelf items.

The Section further recommends that DoD amend paragraph (b)(2) of the DFARS Clause by replacing the text “by signature of the contract, for contracts awarded after June 17, 2010” in the first line with the text “by signature of any covered contract awarded after June 17, 2010.”

B. The Interim Rule Should Clarify the Applicability of the Rule to Subcontractors

1. The Interim Rule Should Clarify that Prime Contractors Are Required to Certify Only Their First-Tier Subcontractors’ Compliance With the Rule

The Section recommends that DoD’s interim rule clarify that the contractors’ obligation to certify their subcontractors’ compliance with the rule applies only to the contractors’ first-tier subcontractors. The Deviation appears to support this interpretation by its failure to require contractors to flow down the DFARS Clause to subcontractors at any tier, which the Section notes is the customary way such requirements are flowed to lower subcontractor tiers. While the DFARS Clause does not explicitly mandate a flow down to subcontractors, the language is not clear because the Deviation and the DFARS Clause require the contractor to certify that it requires each “covered subcontractor” to agree to comply with the Deviation’s prohibitions against entering into agreements, or enforcing any provision of an existing agreement, with its employees or independent contractors. Neither the Deviation nor the DFARS Clause defines “covered subcontractor.” Nevertheless, the DFARS Clause defines “covered subcontract” as “any subcontract, except a subcontract for the acquisition of commercial items or commercially available off-the-shelf items, that is in excess of \$1 million and uses Fiscal Year 2010 funds.”

The Section notes that Senator Franken, the sponsor of the Franken Amendment, has advised DoD of his view that “covered subcontract,” and

presumably a “covered subcontractor,” includes subcontracts and subcontractors at any tier.⁴ If the term “covered subcontract” means a subcontract at any tier, the DFARS Clause in effect requires the prime contractor to flow down the clause to subcontractors at all tiers so that the prime contractor is able to certify that it has required its subcontractors at all tiers to comply with the Deviation. This requirement would present a significant compliance challenge for prime and higher-tier contractors in terms of relying on the certifications of subcontractors below the first tier to ensure compliance of all lower-tier subcontractors with the rule.

It is also unclear whether a “covered subcontract” means only a subcontract awarded under the specific prime contract subject to the Deviation (“covered contract” as defined in Section III.A above) and not all of the prime contractor’s subcontracts under other contracts that may or may not be “covered contracts.” For the above stated reasons, the Section recommends that a “covered subcontract” be defined in the DFARS Clause as follows:

“Covered subcontract,” as used in this clause, means any first tier subcontract under a covered contract, except a subcontract, purchase order or other supply agreement for the acquisition of commercial items or commercially available off-the-shelf items, that is in excess of \$1 million and uses Fiscal Year 2010 funds.

In addition, the Section recommends that the DFARS Clause include a definition of “covered subcontractor” as follows:

“Covered subcontractor,” as used in this clause means any first tier subcontractor under a covered subcontract, except a subcontractor or supplier supplying or furnishing commercial items or commercially available commercial-off-the-shelf items.

⁴ Letter of Senator Al Franken to Mr. Shay D. Assad, Director, Defense Procurement and Acquisition Policy, Department of Defense (March 2, 2010). Post-enactment “statements of legislators on legislative intent have been disapproved” by some courts. 1A Norman J. Singer & J.D. Shambie Singer, *Sutherland on Statutes and Statutory Construction* § 48:20 (7th ed. 2009).

2. If a “Covered Subcontractor” is Defined as a Subcontractor at Any Tier, the Rule Should Require Contractors to Certify Only Their First Tier Subcontractors’ Compliance With the Rule

If the intent of the Franken Amendment is to define “covered subcontractor” as a subcontractor at any tier, the interim rule should clarify that the requirement for the contractor to certify as to its covered subcontractors’ compliance applies only with respect to its first tier covered subcontractors. Such an implementation of the Franken Amendment is consistent with its policy goals and the principles of integrity, fairness and openness under the Guiding Principles for the Federal Acquisition System.⁵ The burdens of requiring prime contractors and higher tier subcontractors to monitor the compliance of lower tier subcontractors (with whom the prime or higher tier subcontractors might not be in privity of contract) would appear to outweigh the additional benefits (if any) that could be achieved through the customary approach of including a flow down requirement in the DFARS clause.

3. If the Intent is to Require Prime Contractors to Certify Subcontractor Compliance at All Subcontractor Tiers, then the Rule Should Require the Flow Down of the DFARS Clause to All Subcontractor Tiers

If DoD’s intent is to require prime contractors to certify the compliance with the rule of subcontractors at all tiers, then the DFARS Clause should be amended to require flow down of the clause in each covered subcontract. In such event, a prime contractor would be in a position to require its subcontractors at every tier to flow down the DFARS clause to the next lower-tier subcontractor in order to support the prime contractor’s certification of the compliance of its subcontractors at every tier. The interim rule should also provide that contractors fulfill their responsibility to ensure their covered subcontractors’ compliance with the rule by flowing down the DFARS Clause to their subcontractors at all tiers and by obtaining from their first tier covered subcontractors certifications as to their compliance with the rule.

⁵ See FAR 1.102-2 (c).

C. **The Interim Rule Should Clarify the Circumstances When Prime Contractors are Required to Certify Their Subcontractors' Compliance**

There is some ambiguity in the Deviation and DFARS Clause that should be clarified. The Memorandum states that “[t]he clause provided by this deviation also requires after June 17, 2010, no FY10 Funds may be *expended* unless the contractor certifies that it requires each covered subcontractor to agree not to enter into, and not take any action to enforce any provision of any agreement, as described in the previous sentence, with respect to any employee or independent contractor performing work related to the such subcontract.” (Emphasis added). The Memorandum also states that “Contracting Officers shall modify on a bilateral basis, in accordance with FAR 1.108(d)(3), existing contracts, if FY10 funds will be used for bilateral modifications or orders that exceed \$1 million and are issued after the effective date of this deviation.” The DFARS Clause requires the prime contractor to certify as to its covered subcontractors only “for contracts awarded after June 17, 2010.”

The Memorandum uses the term “expended,” which suggests that even if no modification is made to an existing contract in excess of \$1 million, the prime contractor would need to certify as to its subcontractors after June 17, 2010 if the existing contract is merely funded with FY10 Funds after June 17, 2010. Yet, the DFARS Clause suggests this requirement only applies to contracts *awarded* after June 17, 2010. The Section recommends that the interim rule resolve the conflict between the DFARS Clause and the Memorandum by clarifying that the prime contractor is required to certify its covered subcontractors’ compliance with the rule only for covered contracts, as defined herein, that are awarded after June 17, 2010.

IV. **CONCLUSION**

The Section recommends that DoD expeditiously issue the anticipated interim rule and that DoD incorporate the clarifications addressed in these comments in that interim rule. The incorporation of these definitions and the adoption of the Section’s other recommended amendments of the Deviation and the DFARS Clause will clarify the obligation of prime contractors to certify as to their subcontractors’ compliance with the interim rule. The Section supports DoD’s exemption of the acquisition of commercial items and COTS and urges DoD to retain this exemption in the interim and final rules. Finally, the Section recommends that the interim rule provide guidance on the intent of waiver authority of the Secretary of Defense under the Franken Amendment and how such authority will be used, as well as the intent of the exemption from the rule’s

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prohibitions of contractor agreements with employees and independent contractors that may not be enforced in a court in the United States.

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

Sincerely,



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Chair, Section of Public Contract Law

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