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March 2, 2010

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Re: February 17, 2010 Class Deviation to Implement Franken Amendment; DARS Tracking Number 2010-00004

Dear Mr. Assad:

I write in response to your request for comments on the Class Deviation referred to above. This Firm represents a number of defense and aerospace companies that will be affected by the Franken Amendment and your Class Deviation.

One material aspect of the Class Deviation is flatly inconsistent with the text of the Franken Amendment and with established principles of government contracting. Congress expressly limited application of the Franken Amendment only to "any Federal contract for an amount in excess of $1,000,000 that is awarded more than 60 days after the effective date of this Act." The Deviation, however, purports to prohibit "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." (emphasis added). Task and Delivery Orders, and contract modifications, are not new contracts, but are by definition issued under pre-existing contracts. Your enlargement of the coverage of the new rule to include task or delivery orders and bilateral modifications on preexisting contracts awarded before the effective date of the statute is improper, and should be abandoned in the final rule.

First, "task" and "delivery orders" are not separately "awarded" contracts but are issued under existing contracts. "Delivery order means an order for supplies placed against an established contract" FAR 2.101 (emphasis added); "Task order means an order for services placed against an established contract." *Id.* (emphasis added). Task and delivery orders are thus not new contracts and should not be considered as such for purposes of the Franken Amendment. The regulations effectively preclude application of the Franken Amendment to task or delivery orders issued under established contracts awarded before February 17, 2010, because they are not contracts "awarded" after the effective date of the statute.

Second, bilateral modifications are likewise issued under established contracts. *See* FAR 43.103. A bilateral modification modifies the terms of an existing contract. FAR 43.103(a)(3),

and thus obviously does not constitute not a new contract. Thus, bilateral modifications issued under contracts awarded before the effective date of the Franken Amendment are not covered by its terms.

Third, retroactive application of any newly-enacted law or regulation to an existing contract is highly disfavored and should be done only when Congress clearly so provides. *See, e.g. CCA Associates v. United States*, 2010 WL 374516, at 15-16 (Fed. Cl. Jan. 28, 2010), citing *Landgraf v. USI Film Prods*, 511 U.S. 244, 265 (1994). Here, Congress presumably included language applying the Franken Amendment prospectively only to avoid any of the formidable legal obstacles raised by retroactive application of the statute, and to permit contractors with existing contracts time to prepare for the new requirements. Your office is not free to ignore established rules of federal contracting, especially where the mandate from Congress is to the contrary.

As Winstar and its progeny make clear, the government's contractual obligations may not change to reflect new statutes unless specifically agreed by the parties. *See, e.g., United States v. Winstar Corp.*, 518 U.S. 839, 868 (1996), *Mobil Oil Exploration v. United States*, 530 U.S. 604, 616-17 (2000). Nor may the government "amend the terms of [a contract] *sua sponte* and without separate consideration evidencing acceptance of new terms." *CCA Associates*, 2010 WL 374516, at 15-17 (citations omitted). To do so would be to create an illusory promise, and a void contract.

Your Class Deviation recognizes the incongruity of shoe-horning the new clause into existing contracts by adding guidance on how contracting officers are to insert the new clause in such contracts. The guidance directs contracting officers to modify these visiting contracts "on a bilateral basis, in accordance with FAR 1.108(d)(3)," and warns that a contractor refusing to accept such a modification will simply be ineligible for receipt of FY10 funds. The cited FAR provision, however, permits contracting officers to include regulatory changes in any existing contract only "with appropriate consideration." FAR 1.108(d)(3). Apparently your view is that the "adequate consideration" requirement is satisfied by the bare threat that if the contractor fails to accept the new clause in existing contracts, it simply won't get new orders. A more cynical use of the DoD's market power is hard to imagine. *See also, CCA*, 2010 WL 374516, at 16 ("If one reads the amendment clause as giving [the federal agency] the ability to unilaterally amend the regulations to the [contractor's] detriment, then the contract is illusory").

In sum, the Franken Amendment is to apply prospectively. We urge you to reconsider, for purposes of the forthcoming Final Rule, this unauthorized extension of the Franken Amendment to task and delivery orders and bilateral modifications issued under existing contracts.

Sincerely,

David A. Churchill