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United States Senate

COMMITTEE ON SMALL BUSINESS

WASHINGTON, DC 20510-6350

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August 29, 2000

Ms. Laurie Duarte
General Services Administration
FAR Secretariat (MVR)
1800 F Street NW, Room 4035
Washington, D.C. 20405

By Facsimile: (202) 501-4067

Re: FAR Case 1999-010; Contractor Responsibility; 65 Fed. Reg. 40830 (June 30, 2000); originally proposed at 64 Fed. Reg. 37360

Dear Ms. Duarte:

Although the Federal Acquisition Regulatory Council (the FAR Council, Council) re-proposed rule seeks to respond to the criticisms received by the first proposal (64 Fed. Reg. 37360, July 9, 1999), it fails to correct the central problems of unfairness to small contractors and violation of due process that characterized the first attempt at this rulemaking. Current regulations already give contracting officers sufficient authority and guidance to protect the governments' interest in contracting only with responsible contractors. These revisions are thus unnecessary and distorting. For these and other reasons, this rulemaking should be terminated and the re-proposed rule withdrawn.

In my comments on the first proposal, I criticized the Council's decision not to conduct an Initial Regulatory Flexibility Analysis (IRFA). One adjustment the FAR Council made from its original proposal was to conduct an IRFA. It is clear that this rule will have a "significant economic impact on a substantial number of small entities" merely through the fact that contracting officers are being instructed to give great weight to many types of evidence relating to a contractor's integrity and business ethics. This is likely to disqualify a certain proportion of small businesses along with larger businesses, in particular those small businesses who may not have sufficient resources to contest citations and complaints which will be considered by contracting officers in determining whether a contractor is responsible.

Accordingly, I am pleased that the Council has reconsidered its decision to conduct an IRFA, but unfortunately, in doing so, it has misconstrued the requirements of the Regulatory Flexibility Act. The Act does not require an agency to find that a regulation will not have "a significant economic impact on a substantial number of small entities" as the FAR Council concludes in the summary of the IRFA included in the preamble (65 Fed. Reg. 40832). That threshold is used to determine whether an agency is required to conduct an IRFA at all. If an agency can certify, with a factual explanation, that such an impact will not result it can avoid

having to conduct the IRFA. The point of the IRFA is not to determine whether this threshold has been met as the FAR Council seems to suggest. Rather it is to identify the impact of the regulation and discuss any possible alternatives in a public analysis that can then be reviewed and commented on.

Unfortunately when reviewed against that standard, the FAR Council's IRFA leaves many questions unanswered. In identifying the number of small entities to which the proposed rule will apply, the FAR Council states that "approximately 171,000 small entities will be affected by this rule." (IRFA, page 1.) Unfortunately, there is no breakout of what type of companies or entities comprise this number, which SIC codes these companies are in, exactly what the nature of the impact will be on them, or the methodology the FAR Council used to come up with this number. Without these details, the FAR Council's response raises more questions than it answers and greatly diminishes the value of the IRFA.

Also, the FAR Council's response to the question of whether this rule duplicates or overlaps with any other federal law is incorrect. The FAR Council answered that "the proposed rule does not duplicate, overlap or conflict with any other Federal law." (IRFA, page 2.) However the language proposed for FAR § 9.104-3 (c)(1) has been taken directly from the language on Causes for Debarment that is currently codified at FAR § 9.406-2. Therefore, this duplicates another Federal law. Both uses of this language would serve the same interest: protect the government from contracting with an irresponsible contractor. However the debarment section contains critical safeguards and due process protections which this proposal does not (see below). By using the same language as the section on debarment, but not including the essential protections of that section, the FAR Council has both duplicated another law and proposed a conflict with that same law. Thus the proposal is both unnecessary and injurious to contractors.

Finally, the FAR Council failed to consider an obvious alternative under the question of significant alternatives that could minimize any significant economic impact on small entities. The obvious alternative, and the preferable one, is to maintain the status quo. Even the FAR Council admits that the proposed rule "does not change the current responsibility standard." (IRFA, page 2.) In fact, the Council fails to establish why this rulemaking was undertaken at all. There is no evidence offered of a need for the clarification which this proposal purports to offer or any suggestion that the current language is not adequately clear. Contracting officers already have the authority and discretion under the language of § 9.104 generally, and § 9.104-1(d) and § 9.104-3 specifically to disqualify a contractor whose record of integrity and business ethics is substandard. Under these sections, contracting officers also have the flexibility and discretion to determine whether a citation or other action should be accorded sufficient weight to disqualify a contractor. Under the proposed new sections, that discretion is reduced and virtually removed, as contracting officers are instructed in § 9.104-3(c) to "give greatest weight" to a wide variety of decisions and judgments that could have arisen in the previous three years.

Indeed, the only impact of this proposed rule (as well as its predecessor) would be to

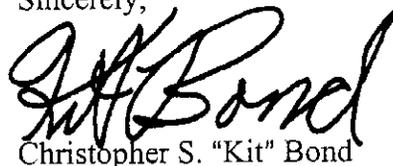
Ms. Laurie Duarte
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undermine a potential contractor's rights in legal due process. By instructing contracting officers to "consider all relevant credible information" and then indicating that the contracting officers are to give "greatest weight" to such intermediary levels of judgment as decisions by administrative law judges, complaints issued by boards such as the National Labor Relations Board, or citations from agencies such as OSHA or EPA, this regulation would deny contractors the benefit of their right to a full legal appeal and due process before suffering consequences. Even if a contractor is able to get a favorable ruling, or overturn a decision, the proposed regulation stipulates that contracting officers are to give greatest consideration to decisions if they happened within three years preceding the offer. This means that the contracting officer could disqualify a contractor because they were cited by an agency or had a complaint brought against them by a board, even though that action could later have been dismissed or overturned. There is no stipulation that the final determination control. This is an absurd possibility and is reason enough for this proposal to be withdrawn.

The trampling on a contractor's right to due process is made even clearer when this proposal is compared to the current section on debarment (FAR § 9.406) which gives the contractor the right to contest a debarment decision. No such opportunity to contest a disqualification based on responsibility considerations is provided. The debarment section also allows the contracting officer to consider "the seriousness of the contractor's acts or omissions and any remedial measures or mitigating factors" as well as an extensive list of specific circumstances that could weigh in the contractor's favor. (FAR § 9.406-1(a).) No such flexibility or requirement to consider the totality of the circumstances surrounding a judgment or legal decision is included in this proposal. Without this full consideration, this proposed section becomes more restrictive than the debarment section and thus unacceptable.

The interests of the government in contracting only with responsible contractors should not overtake the fundamental principle of due process and the right of a party to exhaust their remedies before they are considered guilty or liable, or suffer consequences as a result of the action. This proposed rule would do just that. The federal government must consistently and fairly enforce its regulations and laws, but by eroding the presumption of innocence and the ability to challenge a judgment or citation, this regulation would undue fundamental principles of law and fairness on which this country was founded. This proposed regulation must be withdrawn and the concept of such a regulation must be abandoned.

Sincerely,



Christopher S. "Kit" Bond