



PROFESSIONAL SERVICES COUNCIL

May 21, 2004

Defense Acquisition Regulation Council
Attn: Ms. Teresa Brooks
OUSD(AT&L)DPAP(DAR) IMD 3C132
3062 Defense Pentagon
Washington, D.C. 20301-3062

Ref: DFARS Case 2003-D097

Dear Ms. Brooks:

The Professional Services Council (PSC) is pleased to submit the following comments on the DFARS interim rule, published and effective on March 23, 2003 (69 Fed. Reg. 13478), that implements Section 843 of the fiscal year 2004 National Defense Authorization Act. Section 843 provides that the contract period of a task or delivery order contract awarded pursuant to 10 U.S.C. 2304a may not cover a total of more than five years.

The Professional Services Council is the leading national trade association representing the professional and technical services industry doing business with the federal government. PSC's approximately 165 member companies perform billions in contracts annually with the federal government and other entities, from information technology to high-end consulting, engineering, scientific and environmental services. Most of our companies provide services under task and delivery order contracts that are covered by this rule.

We are disappointed that the Department rushed to implement this statute; given the clear intent of Congress to modify the underlying statute, as evidenced by the pending House and Senate revisions to the fiscal year 2005 DoD Authorization Act, we believe the Department was well within its authority to delay implementation pending congressional clarification.

Moreover, the interim rule provides only the barest of regulatory coverage. While consistent with the statute, we believe the Department could have provided more clear and comprehensive coverage. On February 18, 2004, the Director of Defense Procurement and Acquisition Policy issued a memorandum to the Department's contracting community regarding the impending regulatory coverage of the Act. She indicated that the limitations of Section 843 will "become effective for solicitations issued on or after the effective date of the DFARS interim rule..." and she urged departmental activities "not to issue separate written guidance (on implementation) as it may unnecessarily result in inconsistency within the Department."

In addition to the interim DFARS rule, the Director published a Q&A related to implementation of the statute. This Q&A uses terms that are not in the regulation (such as the term “total period”) and provides implementation guidance that is not addressed in the statute or regulation (such as that there are no waivers). Furthermore, there is important implementing information regarding the prospective application of the rule to new solicitations that is included only in the Q&A document and the Regulatory Flexibility Act portion of the Federal Register notice accompanying the interim rule -- but is not included in the background information of the rule or the actual regulatory coverage. As such, contracting officers and our member companies are confused by the various implementing guides and the incomplete coverage.

Despite this February guidance and the supplemental Q&A, we are aware of, and troubled that, several of the military departments unilaterally implemented the five-year limitation on existing IDIQ contracts or chose to impose the limitation when issuing new solicitations prior to the effective date of the interim rule.

Therefore, in the development of any final rule on this matter, we urge the Department to incorporate key elements from the Q&A into the regulations, and explicitly include in the background information on the rule a clear statement that the statutory limitation is applicable only to contracts that result from solicitations first issued by the Department on or after March 23, 2004. We also recommend that the Department clarify the appropriate ordering period for task orders under contracts subject to this limitation.

PSC strongly opposed the enactment of Section 843 in the fiscal year 2004 National Defense Authorization Act, as did the Defense Department. In preparation for congressional consideration of the fiscal year 2005 National Defense Authorization Act, both PSC and the Defense Department have proposed differing alternatives to revise Section 843.¹ To its credit, the House of Representatives adopted a provision eliminating any ceiling on the period of performance of these task order contracts,² while the Senate Armed Services Committee adopted a modification of the Department’s recommendation by establishing an eight-year period unless the head of the agency finds unusual circumstances requiring a longer period of performance.³ PSC will continue to work with the Congress to find an early and appropriate revision to the current Section 843 limitation.

Pending any final rule and change to the statute, we also urge the Department to carefully monitor the military departments’ implementation of the statute and the interim rule.

¹ See Section 828 of H.R. 4200, as introduced by request, includes the Department’s recommended change.

² See Section 803 of H.R. 4200, as passed by the House of Representatives May 19, 2004.

³ See Section 812 of S. 2400, as reported by the Senate Armed Services Committee on May 11, 2004.

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Thank you for the opportunity to submit these comments. PSC is also joining in on separate comments to be submitted by the Council on Defense and Space Industries Association, of which PSC is a member and for which I served as the project officer for this case. If you have any questions or need any additional information, please do not hesitate to let us know. I can be reached at (703) 875-8148 or at Chvotkin@pscouncil.org.

Sincerely,

A handwritten signature in black ink, appearing to read "Alan Chvotkin". The signature is fluid and cursive, with the first name "Alan" being more prominent than the last name "Chvotkin".

Alan Chvotkin, Esq.
Senior Vice President and Counsel