

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),

