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COUNCIL ON GOVERNMENTAL RELATIONS

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July 14, 2008

Mr. Ernest Woodson
Procurement Analyst
General Services Administration
Regulatory Secretariat (VIR)
1800 F Street, NW, Room 4035
Washington, D.C. 20405

Subject: FAR Case 2007—006
Contractor Compliance Program and Integrity Reporting
Second Proposed Rule

Dear Mr. Woodson:

The Council on Governmental Relations (COGR) is an association of more than 175 research universities and their affiliated academic medical centers and research institutes that focuses on the influence of federal regulations and policies on the performance of research and other sponsored activities conducted at its member institutions. We commented previously on the rule proposed in FAR Case 2007—006 as well as the predecessor rule in FAR Case 2006—007. As expressed in our previous comments, we support the objective of assuring the highest standards of integrity in federal government contracting. However, we believe this should be done through a clear and consistent policy that is established across the entire government. We are concerned that the FAR Councils appear to be moving ahead with these proposed rules without first giving full consideration to all relevant issues, as is acknowledged in the Federal Register discussion of the second proposed rule in FAR Case 2007—006.

We write again to reiterate our strong reservations expressed in the February 2008 comment letter concerning the implementation of the proposed rule and urge the FAR Councils to consider an alternative performance-based standard and implementing clause for educational institutions conducting Federally supported research and development.

In January 2008, COGR recommended that the final rule at 48 CFR Part 3, Subpart 3.10 be withdrawn until the completion of the current inter-agency initiative being conducted by the National Science and Technology Council's (NSTC) Committee on Science to develop voluntary compliance guidelines for recipients of federal research funding from all agencies across the federal government. As an alternative, COGR proposed that educational and research institutions be granted the same exemption currently afforded small businesses by making the clause requirements for formal training and/or awareness programs and internal control systems inapplicable to educational and research institutions [52.203-13(c)].

Subsequently, a more appropriate approach for research institutions could be developed, if warranted, in coordination with the NSTC.

If the FAR Councils elect not to withdraw or exempt educational and research institutions from the final rule, in our January letter we also proposed the creation of an alternate clause for contracts that fund, in whole or in part, research and development with an educational or research institution. Academic institutions are highly heterogeneous and often decentralized. As a consequence, any compliance requirement imposed must provide flexibility for implementation rather than a single, centralized “top-down,” approach. A “one size fits all” requirement, as reflected in the final rule and in the proposed rule, fails to recognize such distinctions. Most importantly, a single code of conduct is likely to be less effective in most areas in which universities and nonprofit research institutions already have separate, performance based codes of conduct. Research universities would need to interpret the regulation as permitting multiple separate business conduct policies to be considered together to satisfy the requirement for a code of business conduct. We believe this should be made explicit in the regulation.

The second proposed rule essentially expands the rule proposed in FAR Case 2007—006 in three ways: by 1) extending the application of the proposed rule to contracts performed outside the United States; 2) extending the proposed rule to contracts and subcontracts for acquisition of commercial items; and 3) adding a new cause for suspension or debarment for a knowing failure to timely disclose civil False Claims Act violation in connection with the award or performance of any government contract or subcontract.

The new proposed changes that extend the requirements for a code of conduct, hotline posters, etc., to contracts and subcontracts performed outside the U.S. will likely have a significant and negative effect on academic institutions’ ability to engage international partners. Whether or not it is reasonable to expect U.S. organizations to meet the proposed requirements, we believe it is inappropriate and impractical to expect our international partners to do business in the same way as U.S. organizations. Many foreign academic institutions are instrumentalities of foreign governments and are subject to their own laws and regulations. Furthermore, foreign institutions often have very different processes for meeting monitoring, reporting and record-keeping requirements. While U.S. universities take seriously the need to ensure that their international collaborators satisfy appropriate performance standards, flexibility is necessary or it will be impossible to pursue the international research and education initiatives that current federal policies seek to foster and facilitate.

The extension of the proposed rule for commercial acquisitions raises a number of questions and will be difficult for academic institutions to implement. Is it the FAR Council’s intent to apply this requirement to all vendors universities may do business with in relation to an affected Federal contract? Presumably vendors that provide routine laboratory supplies used in the performance of research under federal contracts would not be covered unless the individual items provided meet the threshold requirements. However, the business practices of a commercial vendor who has no direct contractual relationship with the Federal government appears of questionable relevance to assuring proper stewardship of Federal funds. The proposed rule does not address these types of issues, and the discussion glosses over the types of difficulties that academic institutions will face in implementing this requirement.

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The portion of the new rule that includes a new cause for suspension or debarment of an institution for a knowing failure to timely report a civil False Claims Act or federal criminal law violation is vague. It does not clearly define timeliness, nor does it establish reasonable criteria to determine when an institution should have reason to believe there has been a violation of the False Claims Act or a Federal criminal law. Academic institutions work effectively with their federal funding agencies and auditors to ensure that changes to awards are properly adjusted to correct any mistakes prior to closure of an award. A requirement to report these routine reviews and adjustments is unnecessary and will only serve to call into question corrections that are done according to federal standards.

Before another rule is adopted, adequate consideration must be given to these issues. For these reasons, we again urge that the proposed rule be withdrawn pending further government-wide discussion and coordination and/or that an alternative clause be developed that is more appropriate to educational and research institutions.

We appreciate the opportunity to comment.

Sincerely,

Anthony P. DeCrappeo

