March 18, 2015

The Honorable Anne Rung
Administrator for Federal Procurement Policy
Office of Management and Budget
Eisenhower Executive Office Building – Room 263
1650 Pennsylvania Avenue, NW
Washington, DC 20503

Dear Madam Administrator:

Pursuant to Sections 1302 and 1303 of Title 41, United States Code, we, on behalf of the members of the signatory associations, request that you initiate a modification to Part 36 (Construction and Architect-Engineer Contracts) and Part 52 (Forms), specifically FAR 52.243-4 (Changes), of the Federal Acquisition Regulation (FAR) to make explicit that before ordering a change to a construction contract the Contracting Officer must conform with the requirements of FAR 43.105 (Availability of Funds), relating to funds being available to pay a construction contractor for the additional work being ordered.

Our members are facing increasing numbers of instances in which a Contracting Officer will direct a change in the scope of work on a construction project, lacking funds available to pay for the increased costs being imposed upon the contractor. In practical reality, the vast majority of directed changes are made by representatives of the Contracting Officer on the construction job site. Most of these directions are made in other than a written form, as reflected in FAR Part 52.243-4 (b). Neither the current text of FAR Subpart 36 (Construction and Architect-Engineer Contracts) nor FAR Part 52.243.4, the Changes Clause applicable to construction, impose any obligation on the Contracting Officer, or the representatives of such officer, to ascertain that funds are currently available, despite the clear requirements of FAR Part 43.105 (Availability of Funds) and prohibitions of 31 U.S.C. § 1341 (commonly referred to as the Anti-Deficiency Act).
In testimony delivered in May 2014, the General Accountability Office reported that it had identified 77 instances of violations of the Anti-Deficiency Act by the Department of Defense between 2007 and 2013, totaling $1.24 billion. GAO further noted that “[T]he number of violations and dollar amounts reported may not be complete because of weaknesses in DOD’s funds control and monitoring processes that may not have allowed all violations to be identified or reported.”¹ Our associations concur with GAO’s finding that “the number of violations and dollar amounts reported may not be complete ….”

We would recommend the following FAR changes to make explicit that funds must be available to pay for additional costs to be incurred by a construction contractor for undertaking the additional work directed pursuant to the Changes Clause:

**Modification to FAR Subpart 36.5 (Contract Clauses)**

Add at the end of FAR Subpart 36.5, a new provision as follows:

“**FAR 36.524 Availability of Funds for Change Orders.**
Before issuing a Change Order pursuant to the clause at 52.243.4, the Contracting Officer shall take the actions required by FAR Part 43.105 (Availability of Funds) as well as the requirements of 31 U.S.C. § 1341 (commonly referred to as the Anti-Deficiency Act).”

**Amendment to FAR Part 52.243.4 (Changes)**

The text of the Changes Clause applicable to construction contracts, FAR Part 52.243.4 is amended to read as follows:

“(a) The Contracting Officer may, at any time, without notice to the sureties, if any, by written order designated or indicated to be a change order, make changes in the work within the general scope of the contract, **but only if funds are available to pay the costs of such changes**, including changes.”

[remaining text of FAR Part 52.243.4 is unchanged]

On behalf the members of our respective associations, we earnestly request that you, as Chair of the Federal Acquisition Regulatory Council, initiate a FAR Case to seek public comment on our proposal.

Respectfully submitted,

Steve Hall  
Vice President, Government Affairs  
American Council of Engineering Companies  

E. Colette Nelson  
Chief Advocacy Officer  
American Subcontractors Association  

Jimmy Christianson  
Director, Government Affairs, Federal & Heavy Construction Division  
Associated General Contractors of America  

Louis J. Jenny  
Vice President, Advocacy and Outreach  
Design-Build Institute of America  

John Mc Nerney  
General Counsel  
Mechanical Contractors Association of America  

Mark McCallum  
Chief Executive Officer  
National Association of Surety Bond Producers  

Thomas J. Soles  
Executive Director, Member Services and Market Sectors  
Sheet Metal and Air Conditioning Contractors’ National Association  

Lynn M. Schubert  
President  
Surety and Fidelity Association of America  

**For more information, contact:**  
E. Colette Nelson  
cnelson@asa-hq.com  
(703) 684-3450, Ext. 1310