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August 12, 2004

**Via E-Mail and First-Class Mail**

General Services Administration  
Regulatory Secretariat (MVA)  
1800 F Street, NW, Room 4035  
ATTN: Laurie Duarte  
Washington, D.C. 20405

**Re: Proposed Rule on Share-in-Savings Contracting, FAR Case  
2003-008, 69 Fed. Reg. 40514 (July 2, 2004)**

Dear Ms. Duarte:

On behalf of the Section of Public Contract Law of the American Bar Association ("the Section"), I am submitting comments on the above-referenced matter.<sup>1</sup> The Section consists of attorneys and associated professionals in private practice, industry, and Government service. The Section's governing Council and substantive committees have members representing these three segments to ensure that all points of view are considered. By presenting their consensus view, the Section seeks to improve the process of public contracting for needed supplies, services, and public works.

The Section is authorized to submit comments on acquisition regulations under special authority granted by the Association's Board of Governors. The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, therefore, should not be construed as representing the policy of the American Bar Association.

<sup>1</sup> The Honorable Mary Ellen Coster Williams, Daniel I. Gordon, and Robert A. Burton, Council members of the Public Contract Law Section, did not participate in the Section's consideration of these comments, and they abstained from voting to approve this letter.

As described in the proposed rule:

Section 210 of the E-Government Act amends the Armed Services Procurement Act and the Federal Property and Administrative Services Act to address the use of SIS contracts for IT. Share-in-Savings is an innovative, performance-based concept that is intended to help an agency leverage its limited resources to improve or accelerate mission-related or administrative processes to meet strategic goals and objectives and lower costs for the taxpayer. Under an SIS contract, the contractor finances the work and then shares with the agency in the savings generated from contract performance. In general, agencies would agree to pay the contractor for services performed only if savings are realized and, in such cases, only a portion of the total savings realized.

69 Fed. Reg. 40514 (July 2, 2004).

The proposed rule referenced above appears to be a faithful implementation of the statutory requirement (Section 210 of the E-Government Act of 2002). We recognize that this is a new concept, and that the rule can, and should, be modified or expanded after Contracting Officers gain some experience in its application. The Section, however, believes that some minor changes and additional guidance before the final rule is promulgated would facilitate the use of share-in-savings contracting.

#### **I. Definitional Comments**

For some time, share-in-savings has been used successfully in federal and other governmental energy-savings contracts, but this is a new concept to the Federal Government in the IT area. Thus, terminology may be unfamiliar and definitions are correspondingly important. It appears to the Section that the proposed rule needs some clarification and additional definitions. "Benefit Pool," "Current Baseline," "Projected Baseline," and "Savings" are critical terms and are defined but "quantifiable baseline" used in Proposed 48 C.F.R. § 39.309 is not. "Quantifiable baseline" comes from the E-Government Act, which states:

Contracts awarded pursuant to the authority of this section shall include a provision containing a quantifiable baseline that is to be the basis upon which a savings share ratio is established that

governs the amount of payment a contractor is to receive under the contract. Before commencement of performance of such a contract, the senior procurement executive of the agency shall determine in writing that the terms of the provision are quantifiable and will likely yield value to the Government.

10 U.S.C. §2332(a)(4).

It appears that the statutory term is equivalent to the “Current Baseline” but that is an interpretation that should be made clear -- ideally the same term should be used as we propose below.

We are also concerned about some lack of clarity in the definitions of the proposed rule and the possibility of confusion arising from the interplay of these terms. The “current baseline” is defined as “the estimated total cost to the Government *to implement an information technology project through other than a Share-in-Savings contract*. It includes all costs of ownership, including procurement, management, operation, maintenance, and administration.” Proposed 48 C.F.R. § 39.301 (emphasis added). This definition thus appears to be based on the assumption that there will be some IT contracts implemented without the share-in-savings provision. A better scenario is one in which the agency does not have the upfront budget to implement an IT project, and without the share-in-savings provision, would continue to operate inefficiently out of year-to-year funding. This is the scenario in many of the energy savings contracts where an agency lacked funding to replace windows, thermostats, and HVA systems, but expected annual funding to continue at levels sufficient to pay for the inefficient operating costs. Thus, once the contractor paid for the system’s improvements, the savings were paid out of the old operating funding levels. If the agency had assumed it would undertake the improvements, no savings would be realized and it would not have gotten the improvements because it lacked those capital type funds. In a perfect world, the agency could justify and obtain such capital funding.

The proposed regulation could lead to confusion of the cost and benefit concepts also because it does not clearly distinguish between their use in evaluating competing proposals and their use in paying out the winning contractor’s share of the realized savings. Conceptually, in the evaluation process, the agency uses an estimate of future costs based on its experience with the current systems to establish a baseline and then, if necessary, adjusts the contractor’s estimates of savings generated by implementation of its proposal. After award, the contractor is paid based on actual costs saved (and if agreed and implemented, quantified

quality improvements) compared to the agreed baseline. We would anticipate that at the time of award, the baseline for payment might be adjusted somewhat to better align it with the contractor's proposal than the baseline used in evaluating the competing proposals. As written, the definitions do not address this distinction unless that is what is meant to be conveyed by the parenthetical "new" in the definition of Benefit Pool:

*Benefit Pool*--Savings realized based on the net difference between the current baseline costs and the projected (new) baseline costs derived from the implementation of the new project or program.

Proposed 48 C.F.R. § 39.301. In the context of SIS contractor payments, the benefit pool, *current* baseline, and *projected* baseline definitions assign definitions that are counterintuitive - the *current* baseline is the *estimates* of out-year costs that would have been incurred but for the SIS contract made at the time of the contract award, while the *projected* baseline is *actual* costs incurred to meet the same needs during contract performance. One could also argue that these costs do not constitute the baseline.

We therefore suggest the following changes to the defined terms:

1. Change "Projected Baseline" to "Projected SIS Costs," defined as the "estimated total cost to the Government to meet the same needs covered in the current evaluation baseline through a Share-in-Savings information technology project - exclusive of savings to be paid the contractor."
2. Change "Current Baseline" to "Current Evaluation Baseline," defined as "the estimated total cost to the Government to continue meeting the needs described in the performance based work statement as currently forecast without a Share-in-Savings contract. It shall include all costs of ownership, including procurement, management, operation, maintenance, and administration."
3. Add a new term, "Evaluation Benefit Pool," defined as "the difference between the Current Evaluation Baseline and the Projected SIS Costs plus anticipated, quantified quality improvements, if any, for each offeror."
4. Add a new term, "Savings Pool," defined as "the difference between the Contractual Baseline, that is the Current Evaluation Baseline as adjusted in the awarded contract to reflect the SIS project being undertaken, and actual costs incurred by the

Government to meet the needs covered by the contractual baseline plus agreed payments for meeting or exceeding defined objectives to reflect the quantified quality improvements used in evaluating the winning proposal. This is the “quantifiable baseline” required by the E-Government Act of 2002.

Based on these definitional changes, we would suggest “savings pool” be substituted for “quantifiable baseline” in 48 C.F.R. § 39.309(a)(1). We would likewise suggest that 48 C.F.R. § 39.309(a)(2) read as follows:

(2) Before award of a Share-in-Savings contract, the agency senior procurement executive shall determine in writing that the savings pool established in the contract quantifies with reasonable accuracy the value the share-in-savings award will likely yield to the Government.

## **II. General Comments**

We also suggest the following additional areas for your consideration:

1. The definition of “cancellation” in proposed section 39.301 states that cancellation results when the contracting officer fails to notify the contractor that the funds are available for performance of the succeeding program year requirement. We see no reason to leave the contractor in doubt and have cancellation occur by default. The contracting officer should be required to give written notification to the contractor in all cases.
2. The definition of “Share-in-Savings contract” in this same section emphasizes quantifiable savings by not including explicitly the notion of quantifiable benefits from the savings definition. We envision that at least some if not many of the improvements in information technology may be qualitative and could greatly improve mission performance, but still not be readily quantifiable in dollar savings, or at least not precisely. Some flexibility to establish objective criteria to reward the contractor in such situations might be considered.
3. Solicitation of Proposals. The guidance in proposed Subpart 39.306-4 is fairly sketchy. Would offerors be responding to a broad statement of need, a requirement for a specific IT capability, or anything between these extremes? The solutions and thus the risks

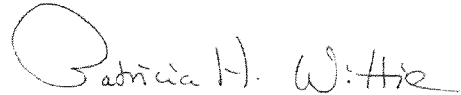
could be different for every offeror in responding to a performance-based solicitation, further complicating the identification of evaluation criteria and selection of “best value.” The proposed rule may not be the place to include an example to illustrate how this process will work, but some consideration should be given to making such additional guidance available on the GSA Share-in-Savings website or elsewhere.

4. There is no mention of risk of loss prior to completion of contract performance. Share-in-Savings contracts often contemplate that the Government will obtain IT assets at the end of performance; indeed, obtaining the assets is often one of the reasons for using a Share-in-Savings approach. Often, however, these assets will be located in a Government facility. Thus, there may be situations in which it would be appropriate for the Government to share or assume the risk of certain types of loss prior to contract completion (e.g., if a Government building that houses the Contractor's assets should be destroyed). Because the manner in which risk allocation should be addressed may not be obvious (and is apparently not addressed by standard FAR clauses), the contract should address explicitly which party bears the risk of loss during contract performance. This allocation may, in fact, differ depending upon which proposal is accepted because asset use and importance to the Government may differ depending on the approach chosen.
5. There is no mention of intellectual property rights, either with respect to hardware or software that offerors may develop. Is it assumed that what the successful contractor delivers is a proprietary commercial item and the Government only acquires the offeror's standard commercial rights or limited rights? The rule should note that because the contractor is financing the work, the typical presumption should be that the contractor owns all the intellectual property. Regardless of whether the final regulation reflects this suggestion, it should require the contract to expressly and clearly address the IP issue to avoid many questions later and to ensure both parties understand the implications of the SIS contract for these important rights. *See Data Enterprises of the Northwest v. General Services Administration*, GSBCA No. 15607, 2004 WL 323922 (Feb. 4, 2004); *Ervin and Associates, Inc. v. United States*, 59 Fed. Cl. 267, (2004); 18 *Nash & Cibinic Report* ¶¶ 19, 20 & 21 (May 2004).

Ms. Laurie Duarte  
August 12, 2004  
Page 7

The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.

Sincerely,

A handwritten signature in black ink that reads "Patricia H. Wittie". The signature is written in a cursive style with a large initial "P".

Patricia H. Wittie  
Chair, Section of Public Contract Law

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