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February 20, 2001

VIA HAND DELIVERY

General Services Administration
FAR Secretariat (MVRS)
1800 F Street, N.W.
Room 4034
Washington, D.C. 20405

Attn: Laurie Duarte

Re: FAR Case 1999-614
Federal Supply Schedule Order Disputes and Incidental Items
65 Fed. Reg. 79702 (December 19, 2000)

Dear Ms. Duarte:

On behalf of the Section of Public Contract Law (the "Section") of the American Bar Association ("ABA"), I am submitting comments on the above-referenced matter. The Section consists of attorneys and associated professionals in private practice, industry, and Government service. The Section's governing Council and substantive committees contain members representing these three segments to ensure that all points of view are considered. In this manner, 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 ABA'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.¹

The purpose of the proposed rule is to (i) set forth the policy requirements for acquiring so-called “incidental supplies or services” on a Federal Supply Schedule (“FSS”) order, (ii) revise the Federal Acquisition Regulation (“FAR”) to permit contracting officers in an ordering office to issue final decisions regarding disputes pertaining solely to schedule orders, and (iii) delete the requirement for contracting officers to notify the General Services Administration (“GSA”) when an FSS contractor refuses to accept an order under a schedule placed by an authorized Government contractor. 65 Fed. Reg. 79702. Although the Section generally agrees with the goals sought to be achieved by FAR Case 1999-614, we recommend the following changes to better implement the proposed rule.

1. Open-Market Items

To clarify the intent of the proposed change regarding the incorporation of incidental supplies or services on a schedule order, the Section recommends the following addition to proposed FAR 8.401(d)(1) (suggested change in bold):

(1) All applicable acquisition regulations **pertaining to the purchase of open market items** have been followed . . . ,

Further, none of the “Numbered Notes” used in the Commerce Business Daily (“CBD”) apply to the unique circumstance of acquiring open-market, non-schedule items on an FSS order. Accordingly, to ensure that the synopsis requirements of the FAR are meaningful in this circumstance, the Section recommends the addition of the following to the Numbered Notes of the CBD:

29. The proposed contract action is for open-market supplies or services that the [ordering office]* intends to acquire on Order No.* _____ under GSA

¹ Mary Ellen Coster Williams, an Officer of the Public Contract Law Section, did not participate in the Section’s consideration of these comments, and she abstained from voting to approve and send this letter.

Schedule No.* _____. All proposals for the open-market items that are received by the [ordering office] within 10 days after the publication of this synopsis will be considered for award of the open-market items.

- * The ordering contracting officer must provide this information when the synopsis is sent to the Commerce Business Daily for publication.

2. Disputes

With respect to the proposed changes to FAR 8.405-7, "Disputes," the Section is concerned that the proposed rule will unintentionally create technical and jurisdictional hurdles to the resolution of disputes relating to schedule orders. We welcome the efforts to empower contracting officers in ordering agencies to issue decisions that primarily concern the ordering agency. Most frequently, it is the ordering agency that has the most knowledge of the dispute and the most interest in its outcome. We also recognize the objective of ensuring the schedule agency's involvement in disputes that may have effects beyond the order involved.

To satisfy these two objectives, the proposed rule distinguishes between two types of disputes. It authorizes ordering contracting officers to issue final decisions that relate only to disputes arising from "performance" of the FSS order. In contrast, all disputes relating to "contract terms and conditions" must be referred to the schedule contracting officer for final decision. The Section is concerned that disputes relating to performance and disputes relating to contract terms and conditions are not easily distinguished and, thus, could add confusion and foster unnecessary jurisdictional litigation. In practice, there is no bright-line distinction between disputes relating to performance and disputes relating to terms and conditions. Moreover, any such distinctions are fast becoming even more difficult to maintain in the current context of the FSS Program. For example, it is now common practice for ordering agencies to issue Blanket Purchase Agreements and orders containing terms and conditions that supplement and in some cases might override those contained in the underlying schedule contract.

Nevertheless, the Section agrees with the apparent intent of the proposed rule to limit the effect of final decisions issued by ordering contracting officers to performance-related matters on orders issued by the agency. In this regard, the Section suggests that this result could be better achieved by removing the distinction between “performance” disputes and “contract terms and conditions” disputes and replacing it with a distinction between disputes relating solely to the orders issued by the ordering agency and all other disputes.

The Section believes there may be any number of ways to solve these issues. Regardless of the approach taken in the Final Rule, we urge that the commentary to the Final Rule explain these potential issues and why the approach that is finally adopted was chosen. This would give important guidance without encumbering the regulation itself.

Consistent with all of the above, the Section recommends the following specific changes to proposed FAR 8.405-7 to clarify the scope of a contractor’s appeal rights and ensure that timely appeals are not dismissed on technical or jurisdictional grounds. We believe that these changes would not adversely impact the Government’s ability to address the subject disputes (suggested changes in bold):

(a)(1) Under the Disputes clause of the schedule contract, an ordering contracting officer may issue final decisions on disputes relating solely to orders issued by the ordering agency. All other disputes must be referred to the schedule contracting officer for issuance of a final decision, with contemporaneous written notification to the schedule contractor of such referral.

(2) The ordering contracting officer must notify the schedule contracting officer promptly of any final decision.

(b) The schedule contracting officer and the ordering contracting officer may consult with each other prior to issuance of any final decision and may transfer a dispute from one to the other for issuance of a final

decision, depending upon the nature of the dispute. If a contracting officer transfers a dispute, he or she shall contemporaneously notify the schedule contractor in writing of such transfer. Any such consultation and transfer between the schedule contracting officer and the ordering contracting officer shall not extend the time period within which the appropriate contracting officer must make a final decision, or affect the date from which interest runs.

(c) Appeals. Contractors may appeal final **decisions of the ordering contracting officer or the schedule contracting officer** to either the Board of Contract Appeals servicing the agency **In the event that a Board finds an appeal to be timely but more appropriately decided by another Board of Contract Appeals, the first Board may transfer the appeal to the appropriate Board.**

We believe these changes will help eliminate costly and unnecessary litigation over which contracting officer should issue a final decision, whether the choice of the proper Board is a jurisdictional prerequisite, and other consequences that detract from addressing the merits of the dispute between the parties. The transfer authority is consistent with (i) the authority of the Administrator of OFPP and Agency Heads to arrange for other agency Boards of Contract Appeals to decide appeals under Section 8 of the Contract Disputes Act, 41 USC 607, (ii) the definition of "Contracting Officer" in FAR 2.101 and 41 U.S.C. § 601, and (iii) the powers of the FAR Council. Absent these changes, the division of authority between the ordering and schedule contracting officers could lead to procedural litigation that would disrupt the contracting process with no corresponding benefit.

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

Very truly yours,

General Services Administration
February 20, 2001
Page 6

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Chair

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General Services Administration
February 20, 2001
Page 7

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