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VIA HAND DELIVERY
AND ELECTRONIC MAIL

General Services Administration
FAR Secretariat (MVR)
1800 F Street, N.W.
Room 4035
Washington, D.C. 20405

Attn: Ms. Laurie Duarte

Re: FAR Case 1999-303
Proposed Rule: Task-Order and Delivery-Order Contracts
66 Fed. Reg. 44517

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. 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 American Bar 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.¹

According to the notice in the Federal Register, the purpose of the above-referenced proposed rule is five-fold: (i) to draw greater attention to the capital planning requirements of the Clinger-Cohen Act; (ii) to ensure greater deliberation before orders are placed under Government-Wide Acquisition Contracts (“GWACs”), task- and delivery-order contracts, and Multiple Award Schedule (“MAS”) contracts; (iii) to increase attention to modular contracting principles; (iv) to facilitate exchanges between the Government and awardees of multiple-award Task-Order (“TO”) and Delivery-Order (“DO”) contracts as part of the “fair opportunity” process; and (v) to revise the documentation required for the award of sole-source TOs/DOs when justified as a “logical follow-on” to orders previously issued by an agency. *See* 66 Fed. Reg. 44518.

Although the Section generally supports the proposed rule, we believe that it can be improved by the following revisions: (i) adding a definition of “Federal Supply Schedule contract” to Federal Acquisition Regulation (“FAR”) 2.101; (ii) changing the proposed rule to require that, if a draft Statement of Work (“SOW”) is provided to one prospective awardee, it must be provided to all awardees; and (iii) requiring contracting officers to justify in writing the basis for all down-select decisions made pursuant to proposed FAR 16.505(b)(5)(ii). Each of these recommendations is addressed below.

A. Add a Definition for Federal Supply Schedule Contracts.

Under the proposed rule, FAR 2.101 will be amended to include the following definition:

Order means an order placed under a task-order contract or delivery-order contract awarded by another agency (i.e., a Federal Supply Schedule contract, Government-wide acquisition contract, or multi-agency contract).

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.

See 66 Fed. Reg. 44519. Thus, the proposed rule recognizes that there are three separate and distinct types of TO/DO contracts – Federal Supply Schedule (“FSS”) contracts, GWACs, and multi-agency contracts.² Nevertheless, without explanation, the proposed rule only plans to add definitions in FAR 2.101 for two of the three types of contracts: GWACs and multi-agency contracts. *Id.* at 44518 (proposing to add definitions for GWACs and multi-agency contracts to the definitions in FAR 2.101).

The Section believes that, for both consistency and clarity, a definition of “Federal Supply Schedule contract” should be added to FAR 2.101 as follows:

Federal Supply Schedule contract means indefinite delivery contracts (including requirements contracts) established under the authority of the Administrator of General Services through which Federal agencies can place orders directly with commercial firms to obtain supplies and services at stated prices for given periods of time. The Economy Act does not apply to orders under a Federal Supply Schedule contract.

The addition of this definition will ensure that all TO/DO-type contracts that can be used by multiple agencies are specifically defined in the FAR.

B. Draft Statements of Work.

According to the proposed revision to FAR 16.505(b)(1)(iii)(A)(5), the Government may provide advance copies of SOWs to some, but not all, potential TO/DO competitors before placing orders under multiple award contracts:

² The Section notes that the definition of “multi-agency contract” appears to adopt the position of the Conference Report to the Clinger-Cohen Act of 1996 that multi-agency contracts for information technology established pursuant to section 5124(a)(2) of that act are subject to the Economy Act. It is not clear whether the conference language is sufficient to overcome the presumption that section 5124(a)(2) on its face constitutes a specific statutory authority for interagency acquisitions that renders the Economy Act inapplicable. *See, e.g.*, 55 Comp. Gen. 1497 (1976) (Economy Act does not apply where other statutory authority for interagency acquisitions exists). Further, the Section believes that it is inconsistent to conclude that interagency acquisitions under section 5112(e) of the Clinger-Cohen Act -- which merely authorizes the Director of the OMB to designate one or more “executive agents” for governmentwide acquisitions of information technology -- are not subject to the Economy Act, but that multi-agency contracts under the specific language of section 5124(a)(2) are subject to the Economy Act.

(iii) The contracting officer should consider the following when developing the procedures [to ensure a fair opportunity among awardees]:

....

(A)(5)(i) seeking comments from two or more contractors on draft statements of work; . . .

66 Fed. Reg. 44520. *See Property Management Services Corp.*, B-278727, March 6, 1998, 98-1 CPD 88 (“it is fundamental that the contracting agency must treat all offerors equally; it must evaluate offers evenhandedly against common requirements and evaluation criteria.”).

Providing advance copies of a SOW to selected offerors for their review and comment may provide those offerors with an unfair competitive advantage which, in a complex procurement, could be outcome-determinative. Accordingly, to ensure that all awardees receive a fair opportunity to be considered for the award of each order, the Section recommends a change to proposed FAR 16.505(b)(1)(iii)(A)(5)(i) that would encourage agencies to provide draft SOWs to all awardees for review and comment. Specifically, the provision would be changed as follows:

(iii) The contracting officer should consider the following when developing the procedures [to ensure a fair opportunity among awardees]:

....

(A)(5)(i) *seeking comments from all awardees on draft statements of work; . . .*

66 Fed. Reg. 44520 (recommended change in italics).

C. Justification of Down-Selection Decisions.

One of the stated purposes of the proposed rule is to revise “existing documentation requirements to address the issuance of sole-source orders as logical follow-ons to orders already issued under the contract.” 66 Fed. Reg. 44518. The Section supports this proposed requirement, as it believes that -- as stated in FAR Part 6 -- limitations on competition should be justified, regardless of whether the

limitation occurs in the context of an original procurement or in the selection of a TO/DO awardee.

Nevertheless, the proposed rule at FAR 16.505(b)(1)(iii)(A)(5)(ii) also proposes the use of a "multiphased approach" to the award of a task or delivery order when the effort required by a potential order "may be resource intensive." 66 Fed. Reg. 44520. Awardees could be down-selected based on "rough [price] estimates," conceptual approach, past performance, or other considerations. *Id.* Furthermore, according to the proposed rule, only the awardees "most likely to submit the highest value solutions" will be allowed to participate in the competition for the task or delivery-orders. *Id.*

Although this approach clearly may result in limited competition for task and delivery orders, there is no express requirement for the contracting officer to justify the down-select decision. Accordingly, to ensure that the record reflects the basis for limiting competition through the down-selection process, the Section recommends the following addition as a last sentence in proposed FAR 16.505(b)(4):

If the agency chooses to use the multiphased approach of 16.505(b)(1)(iii)(A)(5)(ii), then the rationale must explain both the basis for excluding awardee at each step in the chosen multiphased approach and the basis for concluding that the remaining awardees are most likely to submit the highest value solutions.

The Section believes that the addition of this documentation requirement in a selection process that is already virtually immune from review by third parties will promote confidence in the "fair opportunity" promise of this FAR provision.

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

Sincerely,



Norman R. Thorpe
Chair, Section of Public Contract Law

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