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March 24, 2003

**VIA HAND DELIVERY  
& ELECTRONIC MAIL**

General Services Administration  
Regulatory Secretariat (MVA)  
1800 F Street, N.W.  
Room 4035  
Washington, DC 20405  
Attn: Ms. Laurie Duarte

**Re: GSAR Case No. 2002-G505  
Proposed Rule: State/Local Use of Federal Supply Schedule  
68 Fed. Reg. 3220 (January 23, 2003)**

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 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 Association's Board of Governors. The views expressed herein have not been approved by the House of Delegates or the Board of

<sup>1</sup> The Honorable Mary Ellen Coster Williams, Chair of the ABA Section of Public Contract Law, has recused herself on this matter, did not participate in the Section's consideration of these comments, and abstained from voting to approve and send this letter. Similarly, Council Member Daniel I. Gordon recused himself on this matter and did not participate in either the preparation or approval of these comments.

**2002-2003**

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Governors of the American Bar Association and, therefore, should not be construed as representing the policy of the American Bar Association.

### **Background**

Section 211 of the E-Government Act of 2002 (Pub. Law 107-347) authorizes the Administrator of the General Services Administration (“GSA”) to provide for use by state and local governments of its Federal Supply Schedule (“FSS”) for automated data processing equipment (ADPE), software, supplies, support equipment, and services (as contained in the FSS Group 70 schedule). This procurement vehicle could be of major assistance to state and local governments, particularly in light of the economic and budgetary strictures they currently face. Not only can they realize the economies of scale available through FSS acquisitions, they also can realize administrative savings.

At the same time, the proposed rule implementing Section 211 of the E-Government Act appears to state that the Federal Government is not a party when a state or local agency uses the FSS Group 70 contract (hereafter “FSS contract” or “Schedule contract”) as the basis for contracting with an IT vendor. The proposed rule provides that an order will create a new, separate contract between the user agency and the FSS vendor, expressly excluding the Federal Government as a contract party.

The proposed rule further provides that use of a Schedule contract by a state or local agency is wholly voluntary; and schedule contractors are permitted to decide whether or not they will accept orders from state and local agencies under these contracts. The proposed rule explains that state and local use of federal schedules will be on terms and conditions identical to those that apply to a Schedule contract, with a few limited exceptions. Thus, the proposed rule expressly prohibits modifying the Schedule contract terms and conditions (proposed Section 552.238-79(a)(1)), but it excludes the federal “Disputes” clause and instead provides that disputes in performance of the state and local orders “may be litigated in any State or Federal court with jurisdiction over the parties, using principles of Federal procurement law and the Uniform Commercial Code, as applicable.” *Id.*

The Section has three principal areas of concern with the proposed rule:

- (i) a lack of clarity regarding the interface between the enabling statute and the implementing regulations, on the one hand, and the law of public contracting applicable to state and local agencies, on the other;
- (ii) the potential ambiguity of the phrase “principles of Federal procurement law” in proposed Section 552.238-79(a)(1); and

(iii) the failure of the proposed rule to address or provide for administrative dispute resolution procedures.

Each of these concerns is addressed in detail below.

### **State and Local Organic Law**

The E-Government Act authorizes the Administrator to allow state and local use of FSS Group 70 schedule contracts, but it does not grant contracting authority to state and local agencies. Thus, use of the FSS contracts may be contrary to the existing procurement laws of certain state or local agencies, or may be subject to other constraints. For example, a state or local agency that is required by charter or ordinance to award purchase contracts on the basis of the lowest bid meeting the quality requirements of the agency may still be required to comply with such provisions when selecting among FSS contractors.

Accordingly, to avoid confusion on this important issue, the Section recommends that the proposed rule make clear that the E-Government Act's authority to allow state and local agencies to use FSS Group 70 contracts does not, in and of itself, provide those agencies with independent authority to use such contracting vehicles, nor does it preempt the requirements of applicable state and local law.

Notably, if a state has adopted Article 10 of ABA Model Procurement Code ("MPC") for State and Local Governments verbatim and applied it to local agencies, then agencies in that state could use the FSS schedule without further legislative authorization because GSA is an External Procurement Activity under §10-101(2), and § 10-201(1) authorizes this type of cooperative purchasing. This cooperative purchasing authority, however, is conditioned on the existence of a formal agreement between the local agency and GSA. Moreover,

All Cooperative Purchasing conducted under this Article shall be through contracts awarded through full and open competition, including use of source selection methods substantially equivalent to those specified in Article 3 (Source Selection and Contract Formation) of this Code.

MPC § 10-201(2). Thus, in this hypothetical state, the local agency would have to: (i) determine that the GSA schedule award met the local agency's source selection requirements (much as FAR 8.404 does at the federal level); and/or (ii) institute procedures for placing orders that would comply with the local source selection

requirements. Local agencies in this hypothetical state also would be prohibited from using GSA's schedule to circumvent procurement requirements. MPC § 10-207.

GSA has no existing contractual or other relationship with state or local agencies that might choose to access the FSS schedule contracts, and the proposed rule does not contemplate any type of formal agreements between GSA and those agencies. The Section recommends that use of such agreements – under standard terms – be made a requirement under the proposed rule. Otherwise, GSA will have no means of managing state and local agencies' use of the Schedule contract or knowing which agencies are using the authority – a result that clearly would be contrary to current efforts to make FSS use more, not less, transparent.

The Section does not contemplate GSA taking any more active role in the administration of individual orders than the proposed rule contemplates; such administration would still be the responsibility of the vendor and state or local agency. Nonetheless, an FSS contract is a GSA vehicle that GSA needs to manage. Without an agreement between GSA and a state or local agency, GSA's ability to manage the underlying vehicle will be much less clear. Also subject to debate will be the proposed rule's ability to bind nonfederal entities absent their agreement, a question that could be raised in litigation -- to which GSA would not be a party -- between the vendor and the nonfederal agency. Requiring such an agreement is also consistent with the cooperative agreement process provided in Article 10 of the MPC.

### **Uniform Procurement Principles**

As currently written, the proposed rule states that disputes will be litigated “using principles of Federal procurement law” and the Uniform Commercial Code, as applicable. To ensure uniformity when state and local government agencies use Schedule contracts, the Section recommends that the phrase “principles of Federal procurement law” be clarified by including a reference to “applicable federal acquisition statutes, regulations, and case law.” This will minimize possible ambiguities concerning which “principles” may apply, as well as avoid circumstances in which the contract of a single FSS contractor is interpreted or administered by various jurisdictions under different legal rules.

Applying Federal procurement law to contracts involving state or local entities is not unusual. Most state and local government agencies receive federal money through grants and, as such, must comply with many of the same federal procurement laws. States generally have specific authority to receive such grants and to comply with applicable federal law. *See, e.g.*, MPC § 11-301. Thus, the Section recommends that the last sentence of Section 552.238-79(a)(1) be revised to read as follows:

“Disputes that cannot be resolved by the parties to the new contract may be litigated in any State or Federal court with jurisdiction over the parties, applying Federal procurement law, including statutes, regulations and case law, and, if pertinent, the Uniform Commercial Code.”

### **Administrative Dispute Resolution Procedures**

Under the proposed rule, the standard FSS “Disputes” clause is expressly exempted from the terms and conditions applicable to state and local use of the schedules. Instead, the proposed rule suggests that all disputes must be resolved through formal litigation, either in state or federal court. The regulations do not provide for administrative dispute resolution procedures for either bid protests or contract disputes.

Use of administrative dispute resolution procedures can avoid substantial time and expense for all parties. Such procedures are widely available under existing state and federal procurement laws. In fact, MPC § 10-301 provides for an administrative dispute resolution process specifically tailored to cooperative purchasing of the type used in FSS contracts.

Appropriate administrative dispute resolution procedures should include at least minimal due process requirements such as notice, fair opportunity to be heard, and written administrative decisions. Many state and local governmental entities have already adopted such procedures for both pre-award and post-award disputes. Permitting them to apply those procedures to controversies arising under orders placed against Schedule contracts would not appear to impose a significant burden. For those states and local governmental entities that do not have such procedures, allowing them to adopt appropriate procedures within these broad guidelines is both appropriate and necessary to ensure that FSS vendors accepting orders from state and local governmental entities can use an administrative remedy without resort to formal litigation.

The Section recommends that the proposed rule include a modified Disputes clause applicable to orders by state or local entities, which would allow the state or local agency to elect to have either the General Services Board of Contract Appeals (“GSBCA”) or another administrative forum resolve disputes. That is, the regulation would delete the Disputes clause from those exempted under Section 552.238-79(a)(1) and revise proposed regulation 538.7003 to add: “(q) 552.233-1, Disputes.” This will permit substituting “ordering activity” for “Government” where it appears in the clause. Additionally, subsection (a) should be deleted because the Contract Disputes Act applies only to the Federal Government, and subsection (f) should be modified to specify appeal to either the GSBCA or other administrative forum.

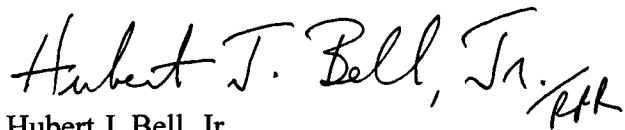
The Section also recommends adding the following to proposed regulation 552.238-79:

“(c) The ordering activity shall be solely responsible for resolving all contractual and administrative issues arising out of any work order, including source evaluation, source selection, protests, disputes, and claims. The ordering activity shall provide in writing a quasi judicial administrative procedure to handle and resolve disputes concerning or arising out of its work order contract, which shall incorporate an impartial and independent review body with no interest in the outcome of the procurement and the members of which are secure from external influence during the term of appointment.”

This provision will foster a parity in remedies and procedures for federal and non-federal schedule transactions. *See* MPC §10-301 (containing similar provisions).

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 "Hubert J. Bell, Jr." followed by a stylized monogram "HJB".

Hubert J. Bell, Jr.

Chair-Elect, Section of Public Contract Law

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