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March 31, 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: FAR Case 2000-305
Advance Notice of Proposed Rulemaking:
Commercially Available Off-the-Shelf Items
68 Fed. Reg. 4874 (Jan. 30, 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.¹ 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.

¹ 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.

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.

The Advance Notice of Proposed Rulemaking ("ANPR") published on January 30, 2003 is a follow-on to the ANPR first published in response to passage of the Federal Acquisition Reform Act of 1996 ("FARA"), Pub. L. No. 104-106. *See* 61 Fed. Reg. 22010, May 13, 1996. As we did in our comments on the 1996 ANPR, the Section generally commends the FAR Council's recommendations concerning the laws that should not be applicable to purchases of Commercial-Off-The-Shelf ("COTS") items. We have comments, however, in three areas: (1) an endorsement of the decision to include the Buy American Act within the list of laws inapplicable to acquisitions of COTs; (2) a recommendation that the Trade Agreements Act also be included on the list; and (3) an expression of concern regarding the ANPR's change in the definition of COTS. We address each of these issues below.

1. **Buy American Act**

The Section commends as particularly appropriate the Government's proposal to include 41 U.S.C. § 10 and the "Buy American Act – Supplies" clause (FAR 52.225-3) in the list of inapplicable laws and clauses. The purpose of section 4203 of FARA was to permit the Government to purchase COTS items under commercial marketplace terms, thereby eliminating "Government-unique requirements" that increase the cost of these items to the Government. Clearly, the Buy American Act ("BAA") is such a Government-unique requirement.

In order to ascertain that their products comply with the BAA, offerors must perform detailed analyses of the origin of each product and its components. In today's increasingly internationalized marketplace, it is becoming more difficult and expensive for manufacturers and their suppliers to know precisely where their products' components were manufactured. Contractors wishing to comply with the BAA are forced to rigorously trace the origin of their components, as well as segregate their Government inventory from commercial inventory that does not qualify under the BAA, thereby adding unnecessary expense for COTS items sold to the Government.

In sum, exempting COTS purchases from the BAA will almost assuredly reduce inefficiencies in Government procurement as well as the price of items sold to the Government, while increasing the variety of available supplies. Accordingly, we strongly endorse the exemption.

2. Trade Agreements Act

The Section recommends that, in addition to the other identified laws, COTS purchases also should be exempt from the Trade Agreements Act, Pub. L. No. 96-39 ("TAA"), and its implementing FAR clauses, 52.225-5 and 52.225-6. These clauses require offerors to certify that each end product is a "U.S.-made, designated country, Caribbean Basin country, or NAFTA country end product," as those terms are specifically defined in the clauses.

In order to execute certifications under the TAA clauses, offerors often perform a component analysis of their COTS items to determine whether the products qualify as "U.S.-made end products." In addition, in connection with this determination, offerors frequently must undertake the onerous process of determining whether their products have been "substantially transformed" in one of the countries covered by the TAA. Thus, compliance with the TAA provision can be even more burdensome than compliance with the BAA for manufacturers. Because the TAA, like the BAA, has no counterpart in the commercial marketplace, it drives up the cost of all covered goods. In fact, because relatively few COTS items purchased by the Government are covered by the BAA alone, and most such items in procurements over the current threshold of \$169,000 are covered by the TAA, most suppliers of COTS items routinely perform their foreign content analyses under the TAA and not only the BAA.

The Section understands that the FAR Council may have been concerned that the United States might be in violation of its international trade agreements if COTS procurements were exempted from TAA coverage. The Section knows of no basis for such concern. The principal purpose of the TAA, and the international Agreement on Government Procurement that it implemented, was "to discourage discrimination against foreign suppliers," by permitting the President to waive provisions of the BAA that discriminated against foreign purchases by use of price preferences for domestic items. *See* S. Rep. No. 96-249, 96th Cong., 1st Sess. 129 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 515. If the BAA itself, with its price preferences, does not apply to a particular class of procurements, the TAA provisions no longer are needed to discourage discrimination against foreign suppliers.

Although the TAA also prohibits the procurement of goods in TAA-covered procurements from nondesignated countries that are not signatories to any trade agreement with the United States, this prohibition is not required by the Agreement on Government Procurement or any other international agreement. Moreover, this prohibition, which appears in section 302 of the TAA (19 U.S.C. § 2512(a)), is applicable only to procurements in which a waiver of the BAA, under section 301 of the TAA (19 U.S.C. § 2511(a)), takes effect. If the BAA does not apply to procurements, there will be no waiver under Section 301 of the TAA, and the prohibition under section 302 of the TAA would not come into play.


Thus, the inclusion of a TAA exemption for COTS procurements would have the same salutary effect on efficiency and cost-effectiveness in Government procurement as would the currently proposed BAA exemption, without violating any international trade agreement or statute.

3. Definition of COTS

Finally, the Section is concerned with the change in the definition of COTS in the current ANPR. The provisions of FARA that created the statutory waiver authority for COTS defined COTS as an item that: (a) is a commercial item (as defined in 41 U.S.C. § 403(12)(A)); (b) is sold in substantial quantities in the commercial marketplace; and (c) is offered to the Government, without modification, in the same form in which it is sold in the commercial marketplace. *See* 41 U.S.C. § 431(c). The 1996 ANPR tracked this statutory definition of COTS. Nevertheless, the current ANPR inappropriately replaces the reference to the definition of commercial item with the undefined and vague phrase: "is of a type customarily used by the general public for nongovernmental purposes." The Section recommends that the definition of COTS in the current ANPR be revised to track the statutory definition of COTS.

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

Sincerely,


Hubert J. Bell, Jr.
Chair-Elect, Section of Public Contract Law

Regulatory Secretariat
March 31, 2003
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cc: Mary Ellen Coster Williams
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