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December 13, 2005

**VIA E-MAIL AND FIRST CLASS MAIL**

Ms. Laura Auletta  
Designated Federal Officer  
c/o General Services Administration  
Advisory Panel on Acquisition  
Laws and Regulations  
1800 F Street, N.W., Room 4006  
Washington, D.C. 20405

**Re: Statutory and Regulatory Authority for Government-Wide  
Acquisition Contracts and Multi-Agency Contracts**

Dear Ms. Auletta:

On behalf of the Section of Public Contract Law of the American Bar Association (the "Section"), this letter provides an analysis of the statutory and regulatory authority for Government-Wide Acquisition Contracts ("GWACs") and Multi-Agency Contracts ("MACs").<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 of the Section 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 pleased to submit this analysis to the Advisory Panel on Acquisition Laws and Regulations created by Section 1423 of the Services

<sup>1</sup> This analysis only addresses the concepts of MAC's and GWACs as defined herein. It does not cover the statutory authority of the General Services Administration's Multiple Award Schedule ("MAS") Program. Also, it does not address the definition of "commercial item" and its coverage. Finally, it does not discuss the "overlap" between MAC's and GWACs and when an agency should use one or the other (the law in this area is unclear).

Acquisition Reform Act of 2003 (SARA)<sup>2</sup> (the “1423 Panel”), which requested the Section provide an analysis of the statutory and regulatory authority for GWACs and MACs.<sup>3</sup> This analysis describes the status of existing statutes and regulations and does not recommend any changes. 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.

### EXECUTIVE SUMMARY

Although the government contracting community often uses the terms GWAC and MAC interchangeably, it appears that GWACs are limited to the interagency acquisition of information technology (“IT”) products and services, while MACs are used for the interagency acquisition of IT products and services, as well as other non-IT items.<sup>4</sup> The statutory and regulatory authority for GWACs flowed initially from the now-repealed Brooks Act,<sup>5</sup> but currently resides in section 5112(e) of the Clinger-Cohen Act.<sup>6</sup> The statutory authority for MACs, as we know

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<sup>2</sup> SARA comprises Title XIV of the National Defense Authorization Act for Fiscal Year 2004, Pub. L. 108-136 (Nov. 24, 2003).

<sup>3</sup> There has been some controversy regarding the exact wording that these acronyms represent. Various federal agencies and practitioners often use alternative wording such as “government-wide agency contract,” “multiple acquisition contract,” and “Multiple Award Contract.” Section 2.101 of the FAR defines the terms GWAC and MAC as they are used in this report, but such definitions are relatively new to the FAR. In 2002, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council agreed on a final rule adding the definitions “to clarify the difference between the terms and the purpose of each contract vehicle.” Federal Acquisition Regulation; Task-Order and Delivery-Order Contracts, 67 Fed. Reg. 56117, 56118 (Aug. 20, 2002).

<sup>4</sup> See Cheryl L. Sander and Mary I. Snyder, *Multiple Award Task and Delivery Order Contracting: A Contracting Primer*, 30 PUB. CONT. L.J. 461, 475 (2001); *The Multiagency/GWAC Program Managers Compact*, 68 FED. CONT. REP. (BNA) No. 9, at D-24 (Sept. 15, 1997).

<sup>5</sup> 40 U.S.C. § 759 (repealed 1996) (a part of the Federal Property and Administrative Services Act of 1949) (FPASA)). Congress enacted the Brooks Act to bring fiscal savings of taxpayer money, to improve acquisition practices, and to bring more effective and efficient management of the Government’s automatic data processing (“ADP”) resources. H.R. Rept. No. 1005, 99<sup>th</sup> Cong., 2d Sess. 771-78 (1986); H.R. Rept. No. 802, 89<sup>th</sup> Cong., 1st Sess. (1965). The Brooks Act made the General Services Administration (GSA) the central authority for procurement of ADP.

<sup>6</sup> 40 U.S.C. § 1412(e). The Clinger-Cohen Act is actually comprised of Sections D (the “Federal Acquisition Reform Act of 1996”) and E (the “Information Technology Management Reform Act of 1996”) of the National Defense Authorization Act for Fiscal Year 1996 (Pub. L. 104-106 (Feb. 10, 1996)). The new title for the combined legislation was added by Public Law 104-208 (the “Omnibus Consolidated Appropriations Act of 1996”), which amended Public Law 104-106.

them, flows from the Task and Delivery Order (“TO/DO”) authority under the Federal Acquisition Streamlining Act of 1994<sup>7</sup> (“FASA”) used in conjunction with the Economy Act of 1932.<sup>8</sup> Additionally, section 5124(a) of the Clinger-Cohen Act authorizes the use of MACs for certain IT procurements.<sup>9</sup> Notwithstanding the foregoing authorities, an analysis of the statutory and regulatory authority for GWACs and MACs would be incomplete without examining the origins of the Indefinite Delivery/Indefinite Quantity (“ID/IQ”) contract type used by both GWACs and MACs.

## **STATUTORY AND REGULATORY ORIGINS OF GWACS AND MACS**

### **I. Indefinite Delivery/Indefinite Quantity (ID/IQ) Contracts**

ID/IQ contracts allow the government to acquire an indefinite quantity, within stated limits, of products and services during a fixed period with delivery or performance placed directly with a participating contractor.<sup>10</sup> Under the terms of an ID/IQ contract, the government must order, and the contractor must deliver, a stated minimum quantity of supplies or services.<sup>11</sup> Any additional orders may not exceed a stated maximum quantity.<sup>12</sup> For the contract to be enforceable, the stated minimum quantity must be more than nominal, but should not exceed the amount that the government is fairly certain to order.<sup>13</sup> ID/IQ contracts may also specify the minimum or maximum quantities that the government may order under each task or delivery order, and the maximum that it may order during a specific period of time.<sup>14</sup>

ID/IQ contracts are one of three different types of “indefinite delivery contracts”, with the others being “requirements contracts” and “definite quantity contracts”.<sup>15</sup> Indefinite delivery contracts arose out of a need by federal agencies

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<sup>7</sup> Pub. L. 103-355.

<sup>8</sup> FAR 2.101.

<sup>9</sup> 40 U.S.C. § 1424(a)(2).

<sup>10</sup> FAR § 16.504(a).

<sup>11</sup> *Id.* § 16.504(a)(1).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* § 16.504(a)(2).

<sup>14</sup> *Id.* § 16.504(a)(3).

<sup>15</sup> *Id.* § 16.501. See also John A. Howell, *Governmentwide Agency Contracts: Vehicle Overcrowding on the Procurement Highway*, 27 Pub. Cont. L.J. 395, 397 (1998) (Winter 1988);

(footnote continued on next page)

that were unable to forecast their long-term needs with definiteness, particularly for maintenance, services, and consumable office supplies.<sup>16</sup> To address such uncertainties, such agencies promoted the concept of indefinite delivery contracts, which the agencies preferred because such contracts allowed them to avoid over-purchasing and/or stockpiling supplies that were not required immediately, and to order supplies only when necessary.<sup>17</sup>

Origin of the ID/IQ contract type can be traced to the early days of the Armed Services Procurement Regulation (“ASPR”)<sup>18</sup>. By 1957, the ASPR featured a specific section that described the three types of indefinite delivery contracts available for use when an agency was unable to determine the exact time of delivery as of the award date.<sup>19</sup> The regulations cautioned that requirements and indefinite quantity contracts were generally appropriate for use only in commercial products and services procurements, and only when the need was expected to recur.<sup>20</sup> During the late-1970s and 1980s, indefinite delivery contracts gained wide acceptance as legitimate service contract vehicles, despite the dearth of statutory authority expressly providing for their existence.<sup>21</sup>

Such extensive use, however, did not go unnoticed by Congress, which, towards the end of the 1980s, sought to clarify the patchwork quilt of federal procurement laws governing ID/IQ contracts. Congress’ most significant effort was its creation of a DoD Acquisition Law Advisory Panel as a part of the Fiscal

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*(footnote continued from previous page)*

Karen DaPonte Thornton, *Fine-Tuning Acquisition Reform’s Favorite Procurement Vehicle, the Indefinite Delivery Contract*, 31 Pub. Cont. L.J. 383 (2002) (Spring 2002).

<sup>16</sup> Thornton, *supra* note 13 at 387.

<sup>17</sup> *Id.*

<sup>18</sup> In 1947, the Armed Services Procurement Act (10 U.S.C.) established authority for the Department of Defense (“DOD”) to contract for the acquisition of property and services necessary for the national defense, and to write regulations to implement the Act. DOD subsequently issued the Armed Services Procurement Regulation (“ASPR”). In 1978, the DOD changed the name of the ASPR to the Defense Acquisition Regulation (“DAR”).

<sup>19</sup> See Armed Services Procurement Regulation (1955 ed.), rev. no. 20 (Mar. 26, 1957) (adding ASPR ¶ 3-405.5).

<sup>20</sup> See ASPR 3-409 (March 15, 1962).

<sup>21</sup> Thornton, *supra* note 13 at 387 (citing Peter J. Ritenberg, *Task Order Contracts: Popular But Are They Legal?*, 22 Nat’l Cont. Mgmt. J. 33, 34-36 (Summer 1988)).

Year 1991 National Defense Authorization Act (the “Section 800 Panel”).<sup>22</sup> The Section 800 Panel considered the use of task order contracts as a part of its review of ways to streamline procurement. The Section 800 Panel report discussed the use of indefinite delivery contracts as a means of avoiding statutory competition requirements, rather than focusing on their use to enhance cost savings and contractor performance through multiple levels of competition and partnering. As a result, the Section 800 Panel recommended that Congress enact a new statutory provision identifying procedures for awarding indefinite quantity contracts through competitive negotiations.<sup>23</sup> In 1992, the Office of Management and Budget (“OMB”) established a more limited civilian agency version of the Section 800 Panel, known as the SWAT Team on Civilian Agency Contracting (the “SWAT Team”). The SWAT Team focused its efforts on reforming management controls for cost-reimbursement contracts, and again discussed indefinite delivery contracts with both support and caution.<sup>24</sup>

In 1994, Congress passed FASA<sup>25</sup> to promote competition under task order contracts and delivery order contracts.<sup>26</sup> Under its so-called TO/DO authority, FASA authorized the use of multiple award task order contracts<sup>27</sup> and delivery order contracts,<sup>28</sup> allowing the heads of agencies to award such contracts to multiple

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<sup>22</sup> National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510 § 800, 104 Stat. 1485 (1990).

<sup>23</sup> DoD Acquisition Law Advisory Panel Report, Streamlining Defense Acquisition Laws § 1-51 (1993).

<sup>24</sup> See Office of Management and Budget, Summary Report of the SWAT Team on Civilian Agency Contracting; Improving Contracting Practices and Management Controls on Cost-Type Federal Contracts (Dec. 3, 1992).

<sup>25</sup> Pub. L. No. 103-355, 108 Stat. 3243 (1994) (codified as amended in scattered sections of 10, 40, and 41 U.S.C.). FASA essentially implemented the recommendations of the Section 800 Panel.

<sup>26</sup> A major reason for FASA is expressed in the accompanying Senate Governmental Affairs Committee Report, which notes that “[t]he indiscriminate use of task order contracts for broad categories of ill-defined services unnecessarily diminishes competition and results in the waste of taxpayer dollars.” S. REP. NO. 103-258 (1994), reprinted in 1994 U.S.C.C.A.N. 2561, 2563.

<sup>27</sup> A task order contract is a “contract for services that does not procure or specify a firm quantity of services (other than a minimum or maximum quantity) and that provides for the issuance of orders for the performance of tasks during the period of the contract.” 41 U.S.C. § 253k(1); 48 C.F.R. § 16.501-1.

<sup>28</sup> A delivery order contract is “a contract for property that does not procure or specify a firm quantity of property (other than a minimum or maximum quantity) and that provides for the issuance of orders for the delivery of property during the period of the contract.” *Id.*

sources for the same or similar products or services.<sup>29</sup> Orders placed against such contracts must clearly specify all of the tasks to be performed or the property to be delivered, and agencies placing orders must ensure, except under very narrow circumstances, that each of the multiple awardees has a fair opportunity to be considered.<sup>30</sup> The authorized exceptions to this general requirement exist when: (1) the agency's need for supplies or services is unusually urgent; (2) the agency's needs are so unique or specialized that only one contractor can provide the required quality; (3) placing the order on a sole-source basis will promote economy and efficiency because the order is a logical follow-on to a previous order issued competitively; or (4) the order must be placed with a particular contractor to satisfy a required minimum guaranteed amount.<sup>31</sup> The FASA TO/DO authority is silent as to the interagency use of task and delivery order contracts.

## II. Multi-Agency Contracts

The FAR defines a MAC as a:

[T]ask-order or delivery-order contract established by one agency for use by Government agencies to obtain supplies and services, consistent with the Economy Act (see 17.500(b)). Multi-agency contracts include contracts for information technology established pursuant to section 5124(a)(2) of the Clinger-Cohen Act, 40 U.S.C. 1424(a)(2).

FAR 2.101.

During the Great Depression, Congress was examining ways to curtail government expenses. One of those ways eventually took the form of the Economy Act of 1932,<sup>32</sup> which was the first government-wide statutory authorization for federal agencies to provide products or services to other federal agencies on a

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<sup>29</sup> 41 U.S.C. § 253h(d) (providing that “[t]he head of an executive agency may . . . award separate task or delivery order contracts for the same or similar services or property to two or more sources.”).

<sup>30</sup> 41 USC §§ 253j(b), (c).

<sup>31</sup> *Id.* § 253j(b).

<sup>32</sup> 31 U.S.C. §§ 1535 *et seq.*

reimbursable basis.<sup>33</sup> Although the advantages of interagency dealings had long been apparent, their widespread use had been discouraged by the well-established rule that one government activity may not be reimbursed for services performed for another except to the extent that it is shown that increased costs have been incurred.<sup>34</sup> Furthermore, there was discomfort with the concept of the government

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<sup>33</sup> Congress did not cut the Economy Act from whole cloth. In 1920, Congress had previously authorized ordering agencies to transfer appropriations to performing agencies for direct expenditure. *See* Act of May 21, 1920, ch. 194, § 7, 41 Stat 607, 613. *See also* 4 Comp. Gen. 674 (1925); 27 Comp. Dec. 684 (1921); 27 Comp. Dec. 106 (1920); A-31068, March 25, 1930. Other agency-specific statutes that embraced similar action also existed. *See* Department of Navy Appropriations Act of May 21, 1926, ch. 355, 44 Stat. 591, 605 (directing agencies ordering services or materials from the Navy to pay the actual cost to the Navy's working fund, either in advance or by reimbursement). *See also* 10 Comp. Gen. 275, 277 (1930) (discussing the Navy Appropriations Act).

Shortly before the enactment of the Economy Act, Representative Burton French sponsored legislation in 1930 to provide general authority for reimbursable interagency transactions. The purpose of the legislation was "to permit the utilization of facilities and personnel belonging to one department by another department or establishment and to enact a simple and uniform procedure for effecting the adjustment of appropriations involved." *Interdepartmental Work: Hearings on H.R. 10199 before the Committee on Expenditures in the Executive Departments, 71 Cong. 2d Sess. 3* (1930), quoted in 57 Comp. Gen. 674, 678 (1978). The House Committee on Expenditures echoed this purpose in its report:

The purpose of this bill is to permit the utilization of the materials, supplies, facilities, and personnel belonging to one department by another department or independent establishment which is not equipped to furnish the materials, work, or services for itself, and to provide a uniform procedure so far as practicable for all departments.

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Your committee also believes that very substantial economies can be realized by one department availing itself of the equipment and services of another department in proper cases. A free interchange of work as contemplated by this bill will enable all bureaus and activities of the Government to be utilized to their fullest and in many cases make it unnecessary for departments to set up duplicating and overlapping activities of [their] own.

H.R. Rep. No. 71-2201, at 2-3 (1931). The bill was not passed that year, but upon reintroduction the following year, it received a favorable reporting from the Committee. *See* H.R. Rep. No. 72-1126, at 15-16 (1932). Ultimately the bill became law as section 601 of the Legislative Branch Appropriation Act for 1933, ch. 314, 47 Stat. 382, 417 (1932), which in turn almost immediately became popularly known as the Economy Act.

<sup>34</sup> A-31040, May 6, 1930.

contracting with itself.<sup>35</sup> In 1942, Congress amended the Economy Act to allow military servicing agencies the authority to contract in aid of the requesting agency,<sup>36</sup> and extended such contracting authority to civilian agencies through a subsequent amendment in 1984.<sup>37</sup>

The Economy Act authorizes one government agency to place orders for goods and services with another government agency, when the head of the ordering agency determines that it is in the best interest of the Government, and also decides that such goods and services cannot be provided as conveniently or cheaply by contract with a commercial enterprise.<sup>38</sup> In practice, government agencies should not call upon the private sector to perform services that other government agencies can perform “as expeditiously and for less money.”<sup>39</sup> At the same time, government agencies should not use the Economy Act to avoid full and open competition.<sup>40</sup> In general, the Economy Act applies when more specific statutory authority does not exist.<sup>41</sup>

### **III. Government-Wide Acquisition Contracts**

The FAR defines a GWAC as a:

Task-order or delivery-order contract for information technology established by one agency for Governmentwide use that is operated—

(1) By an executive agent designated by the Office of Management and Budget pursuant to section 5112(e) of the Clinger-Cohen Act, 40 U.S.C. 1412(e); or

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<sup>35</sup> See, e.g., 26 Comp. Dec. 1022, 1023 (1920); 22 Comp. Dec. 684, 685 (1916).

<sup>36</sup> Act of July 20, 1942, ch. 507, 56 Stat. 661, 662.

<sup>37</sup> Pub. L. No. 98-216 § 1(2), 98 Stat. 3 (1984). The Economy Act originally occupied section 601 of the Legislative Branch Appropriation Act for 1933, but due to the 1982 recoding of Title 31 of the United States Code, is now found at sections 1535 and 1536.

<sup>38</sup> 31 U.S.C. § 1535(a). See also FAR Subpart 17.5

<sup>39</sup> See H.R. Rep. No. 1126, 72d Cong., 1<sup>st</sup> Sess. 1, 16 (1932).

<sup>40</sup> See FAR § 6.002.

<sup>41</sup> *Id.* § 17.500(a). Cf. *Techniarts Engineering v. United States*, 51 F.3d 301 (D.C. Cir. 1994) (declining to apply Economy Act where TV Marti Act offered specific and applicable requirements).

(2) Under a delegation of procurement authority issued by the General Services Administration (GSA) prior to August 7, 1996, under authority granted GSA by the Brooks Act, 40 U.S.C. 759 (repealed by Pub. L. 104-106). The Economy Act does not apply to orders under a Governmentwide Acquisition Contract.

FAR 2.101. An operational efficiency of GWACs is the elimination of the determination and finding requirement, unlike transactions pursuant to Economy Act authority.

Apparently to resolve any doubt regarding the inapplicability of the Economy Act to GWACs,<sup>42</sup> the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council added the final sentence “[t]he Economy Act does not apply to orders under a Governmentwide acquisition contract” to the

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<sup>42</sup> Four sources submitted comments in response to the proposed rule adding the definitions for GWAC and MAC (66 Fed. Reg. 44518 (August 23, 2001)). One of these comments came from the ABA Section of Public Contract Law. In a letter to GSA dated December 3, 2001, the Section noted the following:

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.

*Id.* at n. 2.

In response to the comments received, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council revised the definition of MAC by adding a reference to FAR 17.500(b), which expressly provides that the Economy Act is not applicable if an interagency acquisition is authorized under a more specific statutory authority. Thus, use of more specific authority, if it exists, would still be “consistent with” the Economy Act. 67 Fed. Reg. at 56117-18.

end of the definition of GWAC,<sup>43</sup> and revised the proposed definition of MAC to make it clear that the Economy Act governed their use.<sup>44</sup>

#### **IV. The Multiagency/GWAC Program Managers Compact**

The 3-page Multiagency/GWAC Program Managers Compact (“Mayflower Compact”) of September 9, 1997,<sup>45</sup> sets forth implementing guidelines to leverage the government’s buying power and satisfy requirements using contractual vehicles issued by other agencies. The compact includes definitions and the structure of MACs and GWACs along with operating principles related to accepting tasks from requesting agencies, processing orders, administering orders, re-competing or establishing new multiagency contracts, and forming a program managers council.

The Section appreciates the opportunity to be of assistance to the Panel and would welcome requests for further assistance should the need arise.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert L. Schaefer", written in a cursive style.

Robert L. Schaefer  
Chair

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<sup>43</sup> FAR § 2.101.

<sup>44</sup> *Id.*

<sup>45</sup> See Multiagency/GWAC Program Managers Compact, A Consensus on Principles Applicable to the Acquisition of Services under Multiagency Contracts and Governmentwide Acquisitions (Sept. 9, 1997).

Ms. Laura Auletta  
December 13, 2005  
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