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July 16, 2001

**VIA HAND DELIVERY**

General Services Administration  
FAR Secretariat (MVRS)  
1800 F Street, N.W., Room 4035  
Washington DC 20405

Attn: Laurie Duarte

**Re: FAR Case No. 1997-304, Item 1,  
Federal Acquisition Regulation  
Electronic Commerce in Federal Procurement,  
66 Fed. Reg. 27407 (May 16, 2001)**

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 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.<sup>1</sup>

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<sup>1</sup> Mary Ellen Coster Williams, an Officer of the Public Contract Law Section, did not

*(footnote continued to next page)*

The Section appreciates the FAR Council's efforts in designating a single government-wide point of entry and believes that this represents an important step forward in federal electronic commerce. We also appreciate the revisions made to the second interim rule, in response to comments on the proposed rule. Nonetheless, we continue to believe that the rule could facilitate e-commerce more effectively by specifically permitting third-party postings on the Government-wide Point of Entry ("GPE") on behalf of government buyers. Furthermore, we are concerned that the rule may not adequately ensure the retention of records related to those documents posted on the GPE.<sup>2</sup> Each of these concerns is addressed below.

**A. Third Party Postings**

**1. Permitting Government Buyers to Use Commercial Solutions to Submit Information for Posting to the GPE**

Although the interim rule serves the stated objectives of the Office of Procurement Policy ("OFPP"), several improvements could result from a few minor changes. The first would be to expressly permit postings by third-party service providers, acting on behalf of and at the request of government buyers. This idea would be consistent with OFPP's stated objectives:

Follow the commercial lead. Leverage the investment made by the private sector, benefit from the market-driven economies and innovation that commercial tools offer, and accommodate different commercial electronic means for acquiring information.

65 *Fed. Reg.* 50, 872 (August 21, 2000).

Similarly, the explanatory comments to the second interim rule note that:

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*(footnote continued from  
previous page)*

participate in the Section's consideration of these comments, and she abstained from voting to approve and send this letter.

<sup>2</sup>

In addition to the issues outlined below, proposed FAR 5.102(a)(1) might give examples of the "other pertinent information" that should be posted on the GPE if "determined necessary by the contracting officer." Examples could include responses to questions related to a solicitation or the agency's procurement timetable.

GSA and the agencies using FedBizOpps have sought to shape FedBizOpps to take advantage of electronic tools that have widespread commercial acceptance and interface with sellers' electronic tools, and can adapt new tools as they gain commercial acceptance.

66 *Fed. Reg.* 27,407 (May 16, 2001).

Notwithstanding its stated goal of using and adapting commercial tools, the interim rule does not directly address the significant commercial investment that continues to be made in the development of procurement and logistics software and applications by the commercial marketplace—tools that are being and will continue to be made available to government buyers. Commercial entities, such as internet market exchanges, reverse auction web-sites, logistics, financial, and procurement software providers, and other application solutions and service providers that address various components of the procurement cycle (hereafter referred to as “Commercial Solutions Providers”), maintain and are developing capabilities that can be applied to federal procurements.

Commercial Solutions Providers have developed a host of procurement-related solutions that can readily be integrated into a single point of service. These existing services could be expanded to include submitting postings to the GPE on behalf of government buyers who choose to make use of the services. As currently written, the interim rule appears to recognize and permit the posting of procurement information only by government buyers directly or by government prime contractors with subcontracting opportunities. The Section believes that by modifying the interim rule to expressly permit the use of Commercial Solutions Providers to perform administrative tasks associated with submitting information and synopses for posting, the interim rule would further facilitate the development of e-commerce and would provide additional flexibility for government buyers in managing their procurements.

The Section acknowledges that the interim rule does not expressly prohibit a Commercial Solutions Provider from submitting information on behalf of government buyers. Nonetheless, unless the interim rule expressly permits this alternative, the rule may be perceived to raise questions of permissibility that could unnecessarily hamper innovation by government procurement officials who wish to take advantage of commercial procurement solutions. A clear statement in this regard would be a positive

step to facilitate the development and availability of commercial e-commerce solutions, as well as better meet the stated goals and objectives of the proposed rule.<sup>3</sup>

The functionality to permit commercial entities to submit procurement information through the GPE is viable and readily available. Moreover, under current regulations, a prime government contractor may post procurement information in the Commerce Business Daily (“CBD”), and, under the interim rule, prime contractors will be able to submit information through the GPE. Thus, there appears to be no technical limitation on extending access to Commercial Solutions Providers. Any conceptual limit—that is, the notion that access for posting purposes must be limited to only government entities—has already been bridged by providing access to prime contractors.

## **2. Proposed Contract Actions Between \$10,000 and \$25,000**

As currently written, the interim rule permits posting of notices of proposed contract actions between \$10,000 and \$25,000 by displaying the notice in a public place or “by any appropriate electronic means.” FAR 1.01(a)(2). For the reasons discussed above, the Section recommends that this provision be amended so that it expressly permits posting of these notices on electronic bulletin boards and otherwise through third-party Commercial Solutions Providers.

## **3. Specific Changes to the Interim Rule**

Consistent with the above discussion, the Section suggests two changes in the rule, as well as an additional change to existing FAR 5.302. None of these proposed changes impose additional responsibilities on FedBizOpps, which will perform the same functions whether a posting is forwarded by the government buyer responsible for the procurement or forwarded by a commercial entity that the buyer has chosen to facilitate his or her procurement.

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<sup>3</sup> The Section is not suggesting that Commercial Solutions Providers be permitted to provide an alternative posting service in lieu of submitting information or synopses to the GPE. The point is that government procurement officials may choose to use a Commercial Solutions Provider to accomplish the required posting in much the same way that some agencies currently rely on third parties to maintain their web sites.

- a. Revise proposed FAR 5.206 to read as follows:<sup>4</sup>

5.206 Notices by ~~of subcontracting opportunities~~ Non-Governmental Entities

- (a) The following entities may transmit a notice to the GPE, the CBD, or both:

- (1) A value-added network or other service provider on behalf of the contracting officer, or

(2) ~~¶~~To seek competition for subcontracts, to increase participation by qualified HUBZone small business, small, small disadvantaged, and small women-owned business concerns, and to meet the established subcontracting plan goals:

~~(1)~~(i) A contractor awarded a contract exceeding \$100,000 that is likely to result in the award of any subcontracts;

~~(2)~~(ii) A subcontractor or supplier, at any tier, under a contract exceeding \$100,000, that has a subcontracting opportunity exceeding \$10,000; or

(iii) A value added network or other service provider on behalf of a prime contractor or subcontractor pursuant to (i) or (ii) above.

- (b) For purposes of paragraph (a)(2), ~~¶~~the notice must describe—

(1) The business opportunity, following the standard ~~CDBBD~~ format for items 7, 10, 11, and 17 in 5.207(b)(4);

(2) Any prequalification requirements; and

(3) Where to obtain technical data needed to respond to the

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<sup>4</sup>

Underlined passages indicate recommended changes or additions to the FAR provisions. Strikethroughs indicate recommended deletions.

requirement.

- b. Revise existing FAR 5.302 to read as follows:

5.302 Preparation and transmittal of synopses of awards.

Contracting officers, or other entities as described in 5.206(a), shall transmit synopses of contract awards in the same manner as prescribed in 5.207.

- c. Revise the first paragraph of proposed FAR 5.101(a)(2) to read as follows:

(2) For proposed contract actions expected to exceed \$10,000, but not expected to exceed \$25,000, by displaying in a public place, including on an electronic bulletin board, a value added network or another site provided by a service provider, or by any other appropriate electronic means, an unclassified notice of the solicitation or a copy of the solicitation satisfying the requirements of 5.207(d) and (g). The notice must include a statement that all responsible sources may submit a quotation which, if timely received, must be considered by the agency. Such information must be posted not later than the date the solicitation is issued, and must remain posted for at least 10 days or until after quotations have been opened, whichever is later.

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The Section recognizes that implementation procedures may need to be created to ensure that postings by Commercial Solutions Providers on behalf of government buyers are proper. These procedures could follow any number of alternative approaches. The Section notes, however, that the FAR does not currently address procedures for postings of subcontracting opportunities by government prime contractors; the Section is not proposing that any specific procedures should or must be adopted with regard to postings by Commercial Solutions Providers.

**B. Record Retention**

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The rule does not address the manner in which electronic postings are retained for future reference, although FAR 5.102(b)(iii) requires contracting officers to retain copies of solicitations and other documents when they are not made available through the GPE. Nevertheless, web pages—including those where solicitations and other notices are posted—are regularly removed or amended and are not always retrievable for future reference. This is particularly true where an initial solicitation is issued electronically and then “disappears” when it is amended later because the agency simply substitutes an entirely new version incorporating the amendment. Retention of paper copies should not be necessary, but the Section recommends that retention of each iteration of all postings in a secure format (presumably electronic) be required.

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

Sincerely,

Gregory A. Smith  
Chair, Section of Public Contract Law

cc: Norman R. Thorpe  
Mary Ellen Coster Williams  
Hubert J. Bell, Jr.  
Patricia A. Meagher  
Marshall J. Doke, Jr.  
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Council Members  
Chairs and Vice Chairs of the R&D and  
Electronic Commerce Committee  
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