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January 5, 2004

Via Electronic Mail

U.S. Department of Homeland Security
Office of Chief Procurement Officer
Acquisition Policy and Oversight
Attn: Ms. Kathy Strouss
245 Murray Drive, Bldg. 410 (RDS)
Washington, DC 20528

**Re: Interim Rule: Docket Number USCG-2003-16571, Department of
Homeland Security Acquisition Regulation, 68 Fed. Reg. 67868
(Dec. 4, 2003).**

Dear Ms. Strouss:

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 have 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 ABA'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 Department of Homeland Security (the "Department" or "DHS") has issued an interim rule with request for comments that establishes the Homeland

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Security Acquisition Regulation (“HSAR”). The Section supports the Department’s effort to establish a uniform, department-wide acquisition policy and regulation. As requested, the Section below offers general and specific comments on the interim rule, as well as identifying several textual errors. Please note also that the Section’s comments on the SAFETY Act implementing regulations, which we submitted to the Department by letter dated December 15, 2003, provide further thoughts relevant to the HSAR with respect to the procurement process and Pub. L. No. 85-804.

General Comments

The opportunity to provide meaningful comments on the interim rule was inhibited by the lack of certain information in the Federal Register notice, as well as by the short, 30-day comment period (over the year-end holidays). In particular, the notice, including the Discussion section, failed to provide an explanation as to why the Department chose to include any of the specific provisions in the interim rule. We recognize that the Department incorporated a significant number of provisions from the Department of Transportation Acquisition Regulation (“TAR”), in many cases without substantive change. Although using the TAR as a starting point for the promulgation of the HSAR may have been a reasonable approach, we have difficulty understanding why certain provisions of the TAR were carried forward to the HSAR. As a result, some of our specific comments seek such explanation to assist us in understanding the Department’s intentions. In addition, the interim rule refers to and cites various departmental documents (e.g., the Homeland Security Acquisition Manual, DHS Directives, and HSIF Forms). We have been unable to locate these documents on the Department website or elsewhere. Accordingly, our comments do not reflect consideration of all pertinent information.

To remedy these shortcomings, we request that the Department: (i) post to its website or otherwise make available all documents cited and referenced in the interim rule; (ii) publish a notice providing an additional 60-day comment period before issuing the final rule; and (iii) in that notice, provide its explanation as to why the Department chose to include the specific provisions included in the interim rule.

Specific Comments

HSAR Section 3001.104(c) Should Be Revised To Explicitly Provide A Forum For Resolution Of NAFI Contract Disputes.

As currently written, the interim rule permits the parties to a contract with a Department Nonappropriated Fund Instrumentality (“NAFI”) to agree to the Board of Contract Appeals as a forum. Specifically, HSAR section 3001.104(c) reads:

For nonappropriated fund contracts the FAR and HSAR will be followed to the maximum extent feasible excluding provisions determined by counsel not to apply to Nonappropriated Fund institutions [sic] (NAFIs). *Contracting terms may provide for mutual agreement as to the Board of Contract Appeals jurisdiction but this policy will not confer court jurisdiction concerning NAFIs that does not otherwise exist.*

(emphasis added.) Based on the current state of the law with respect to an available forum to address NAFI contract disputes, it is likely that absent a contractual provision, a contractor would be without any remedy for such a dispute. *See, e.g., Core Concepts of Florida, Inc. v. United States*, 327 F.3d 1331 (Fed. Cir. 2003); *Pacrim Pizza Co. v. Pirie*, 304 F.3d 1291 (Fed. Cir. 2002); *Furash v. United States*, 252 F.3d 1336 (Fed. Cir. 2001).

Accordingly, we recommend that the language at issue be revised to require that Department NAFI contracts include a provision establishing the Department of Transportation Board of Contract Appeals (“DOTBCA”) as the forum to hear any disputes arising under or related to such contracts. We suggest that the final sentence of HSAR section 3001.104(c) be revised to read:

Each Department of Homeland Security NAFI contract shall include a provision specifying that the DOTBCA shall be the forum for the resolution of all disputes arising under or related to that contract.

HSAR Provisions Related to Employee Qualifications and Access to Sensitive Information Should Be Revised and Clarified.

HSAR 3052.237-70 and 3052.237-71 impose certain restrictions on contractor employees in services contracts that require contractor employees “to have recurring access to Government facilities, sensitive information, including proprietary data or resources.” HSAR 3037.110-70. Although the Department unquestionably must safeguard national security and take appropriate measures to ensure that certain information does not fall into the wrong hands, the interim rule appears overly broad to accomplish this objective. Our specific comments are set forth below.

First, the definition of “sensitive information” in HSAR 3052.237-70(a) is so broadly written that it could be applied to virtually any information associated with Department operations. Application of such a sweeping definition could unnecessarily add significant costs to contract performance in the same way as the well-known “security surcharge” phenomenon associated with classified contracts. We recommend clarifying the phrase “could adversely affect the national interest, [and] the conduct of Federal programs” so as to more specifically identify what risks are being identified and what consequences are intended to be avoided. We further recommend that, for each contract in which access to “sensitive” information would be required, the Department explicitly identify the types of information under each such contract that would be considered “sensitive” in light of the specific scope of work. This approach could avoid unnecessary performance costs by enabling contractors to identify the appropriate classes of employees for whom authorization should be sought and for whom training must be provided.

Second, the requirement in HSAR 3052.237-70(e) that each employee of the contractor shall be a U.S. citizen or permanent resident alien is unnecessarily onerous. For example, this provision would prohibit companies with operations in foreign countries and employing foreign nationals from serving as contractors even if the foreign employees would not perform any work on the contract. We recommend that this subsection be revised to state “Each employee of the Contractor working directly on this contract shall be . . .”.

Third, the blanket prohibition against foreign nationals in HSAR 3052.237-70(e) is an unrealistic scattergun approach that is not in the best interests of the Department. Many commercial information technology companies that provide database support or hosting, help desk, or similar services use offshore operations or non-citizens to perform such commodity-type work. The interim rule would deny the Department the benefit of the lower costs that such companies may offer for these types of commercial services and require that such services be specially

configured for government contracts. We recommend that this provision be revised to reflect that the contracting officer may waive strict application of the prohibition in circumstances where (i) the scope of contract work can be segregated so as to make unnecessary any access to sensitive information by foreign nationals, or (ii) other safeguards can be implemented to accomplish the necessary security goals.

HSAR Section 3052.209-72 Should Be Eliminated Because It Is Unnecessary.

The DHS-specific organizational conflict of interest provisions of the interim rule should be eliminated because they are unnecessary. In HSAR 3052.209-72, the interim rule requires the offeror to disclose a broad range of detailed information regarding its interests with any organization “whose interests may be substantially affected by Departmental activities, and which is related to the work under th[e] solicitation.” FAR Subpart 9.5 and decisions by the U.S. General Accounting Office, however, already provide substantial guidance regarding determination of conflicts of interest. Here, as in other instances noted above, the interim rule departs from the FAR, adding contractor burdens, without any explanation why the particular additional measures in HSAR 3052.209-72 are necessary or appropriate for DHS contracting.

The interim rule provides at HSAR 3009.507 that the contracting officer shall “ensure the conditions enumerated in” FAR 9.507-2 “warrant inclusion” of 3052.209-72. FAR 9.507-2 pertains to circumstances where the Contracting Officer identifies a potential conflict of interest and the nature of the proposed restraint upon future contractor activities. By contrast, HSAR 3052.209-72 requires disclosure of a potentially broader range of interests that may not be relevant to address the contracting officer’s concerns. In addition, a contractor may not be aware of how “departmental activities” may be affected by the work under the solicitation, and thus may not be able to discern the appropriate interests to disclose. Because a failure to disclose may result in disqualification (HSAR 3052.209-72(e)), the rule may encourage offerors to over-disclose a broad and burdensome range of organizational and similar information that may have little bearing on the Department’s concerns. This over-disclosure could impede the contracting officer’s ability to review and assess the relevant information. Companies that are not publicly held may view this information as sensitive and request that it be accorded confidential treatment.

Accordingly, we recommend deleting HSAR Subpart 3009.5 and HSAR 3052.209-72 in their entirety.

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HSAR Section 3046.705 Should Be Revised To Reflect The Department's Mission.

Proposed Section 3046.705 provides certain restrictions applicable to all DHS contracts. The third restriction states:

(a)(3) Any warranty obtained shall specifically exclude coverage of damage in time of war or national emergency.

Because of its specific mandate to secure and protect the United States, a significant part of DHS' mission focuses on terrorism and defense against possible terrorist attacks. This proposed regulation, apparently adopted from pre-existing Department of Transportation regulations, recognizes that warranties provided by contractors should not apply in times of war or national emergency. Given DHS' specific mission, the Section recommends that this limitation be expanded to include damages resulting from acts of terrorism which -- as the events of September 11 demonstrate -- do not necessarily occur in times of war or national emergency.

Accordingly, the Section recommends that subparagraph (a)(3) be amended to read as follows:

(3) Any warranty obtained shall specifically exclude coverage of damage in time of war or national emergency, as well as damages caused by, due to or resulting from an act of terrorism as defined in Pub. L. 107-295, § 865 and 6 CFR §25.9.

Errata

The Section recommends that the following provisions be revised to correct the noted textual errors:

3002.101 Definitions: In the definition of "Simplified acquisition threshold," change "December 30, 2007" to "September 30, 2007." See Pub. L. 107-296, § 833 (a)(1).

3009.104-72 Definitions: In the definition of "Inverted Domestic Corporation," change "the Act" to the "Homeland Security Act of 2002, Pub. L. 107-296."

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3009.104-73 Special rules: In subsection (b), change “this Act” to the “Homeland Security Act of 2002, Pub. L. 107-296.” In subsection (e), change “the Act” to the “Homeland Security Act of 2002, Pub. L. 107-296.”

3009.470-4 Contract Clause: Change clause citation from “3052.3009-71” to “3052.209-71.”

3031.205-32 Precontract costs: In subsection (a), delete the word “can.”

3052.237-72 Contractor personnel screening for unclassified information technology access: The first sentence of subsection (a) is incomplete.

3052.242-70 Dissemination of information--educational institutions: Change cited prescription provision from “3042.203-70(a)” to “3042.202-70(a).”

3052.242-71 Dissemination of contract information: Change cited prescription provision from “3042.203-70(b)” to “3042.202-70(b).”

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

Sincerely,



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Chair, Section of Public Contract Law

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