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December 31, 2007

**VIA FACSIMILE AND U.S. MAIL**

General Services Administration  
Regulatory Secretariat (VIR)  
Attn: Ms. Laurieann Duarte  
1800 F Street, N.W.  
Room 4035  
Washington, D.C. 20405

**Re: FAR Case 2005-014, SmartBUY  
72 Fed. Reg. 61603 (Oct. 31, 2007)**

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. By presenting their consensus view, the Section seeks to improve the process of public contracting for needed supplies, services, and public works.<sup>1</sup>

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

<sup>1</sup> Mary Ellen Coster Williams, the Section of Public Contract Law's representative to the ABA House of Delegates, did not participate in the consideration of these comments and abstained from voting to approve and send this letter.

Board of Governors of the American Bar Association and, therefore, should not be construed as representing the policy of the American Bar Association.<sup>2</sup>

### **Comments**

The Section is thankful for the opportunity to provide comments on the proposed rule adding a new Subpart 8.9 to the Federal Acquisition Regulation (“FAR”) and making the Government-wide Enterprise Software Program, referred to as the SmartBUY program, the required source of supply for commercial software and related services, including maintenance, to the extent such a contract, known as an enterprise software agreement (“ESA”) or SmartBUY agreement, has been put in place with a software provider. The Section offers the following comments and suggestions regarding the proposed rule.

1. The Section Recommends that the Award Procedures and Eligibility Requirements for Obtaining a SmartBUY Agreement Be Explicitly Stated in the Final Rule.

The Section’s review of the proposed rule finds that it does not specify the procedures for awarding the SmartBUY agreement, what contract terms are to be included, or the competitive process to be used. It therefore gives no guidance regarding which contractors are eligible, how contractors might obtain a SmartBUY agreement, or what the evaluation and award criteria are. Since the SmartBUY program is being administered by GSA, presumably the FAR Council intends that GSA will award the ESAs as Blanket Purchase Agreements (“BPAs”) under the contractors’ GSA Schedule contracts. Indeed, GSA’s website makes that clear. *See* [www.gsa.gov/smartbuy](http://www.gsa.gov/smartbuy). The Section’s understanding is that most, if not all, of the SmartBUY agreements already in place have been awarded in this manner. The proposed rule, however, does not make this explicit. Accordingly, the Section recommends that the proposed rule be revised to include guidance on the award process for SmartBUY agreements and further to specify that the contracts are required to be BPAs issued under existing GSA Schedule contracts, if that is the intent.<sup>3</sup> The Section further recommends that the final rule clarify whether contractors that meet established eligibility requirements are entitled to

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<sup>2</sup> This letter is available in pdf format at: <http://www.abanet.org/contract/Federal/regscomm/home.html> under the topic “Commercial Items.”

<sup>3</sup> We note that some commercial enterprise software vendors may find the GSA’s “Terms And Conditions Applicable To Term Software Licenses (Special Item Number 132-32), Perpetual Software Licenses (Special Item Number 132-33) And Maintenance (Special Item Number 132-34) Of General Purpose Commercial Information Technology Software” inconsistent with their commercial license agreements.

receive a SmartBUY agreement or whether GSA has sole discretion to determine which contractors are eligible for award.

2. The Section Recommends that the Final Rule Clarify the Competition Requirements Among SmartBUY Agreement Holders, or State That an Exemption From Competition Applies.

Second, and perhaps more important, it is unclear how the proposed rule would comport with applicable competition requirements or what the authority is to exempt the SmartBUY procurements from those requirements. The proposed rule mandates that when a SmartBUY agreement exists, the contracting officer *shall* place an order for the item or services under that agreement. The contracting officer may consider other contractors only if the SmartBUY contractor does not provide the best value (after being given an opportunity to revise its offer) *and* the contracting officer obtains approval from the Senior Procurement Executive and Chief Information Officer (or as otherwise provided by agency procedures). Thus, the proposed rule would effectively establish sole source agreements with particular commercial software providers, or their resellers, to the exclusion of all other similarly situated software providers and service contractors. The proposed rule does not identify what legal authority exempts the SmartBUY program from the usual competition and source selection processes. For example, if these SmartBUY agreements are supposed to be BPAs, FAR Subpart 8.4 requires, among other things, that the contracting officer “survey” at least three schedule contractors before awarding a BPA or placing an order. FAR 8.405-1(c)(1). In addition, with regard to Department of Defense procurements under the GSA Schedules, Section 803 of the National Defense Authorization Act for Fiscal Year 2002 (Pub. L. 107-107) requires that each order above \$100,000 must be placed using competitive procedures. *See* DFARS 208.405-70. Although the proposed rule does not state that these procedures do not apply, the award process established in the proposed rule clearly does not comport with any of these usual competition requirements. Accordingly, the Section recommends that the FAR final rule delineate the basis for this apparently new exemption from the above competition requirements and make the rule explicit that they do not apply so as to avoid any uncertainty or confusion.

3. The Section Recommends that the Rule Be Clarified To Include Only Maintenance Services so as to Avoid Adversely Impacting Small Businesses.

Finally, the proposed rule may significantly impact small businesses. References throughout the proposed rule to “related services” may be based on the presumption that only the software provider can provide software maintenance related to its software. In many cases, this presumption may be accurate.

However, by also making the SmartBUY contractor a sole source of *all* "related services," -- not just maintenance and technical support -- the rule may be misinterpreted in a way that adversely affects small businesses. For example, many small businesses are qualified to provide, and currently do provide, services related to software, such as software installation and integration, and these small businesses might not be afforded the opportunity to compete for services related to the software reflected on a SmartBUY agreement. There is a robust marketplace for services related to commercial software, and many of those service providers are small businesses. The Section is concerned that the proposed rule might inadvertently disadvantage those small businesses. Accordingly, the Section recommends that the final rule be revised to make clear that the services provided under the SmartBUY agreement should be limited to maintenance and technical support. Thus, for example, under GSA Schedule 70 for Information Technology, only services under Special Item Number ("SIN") 132-34, Software Maintenance, and not services under SIN 132-51, Information Technology Services, would be required sources of supply under the SmartBUY program.

### **Conclusion**

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

Sincerely,



Patricia A. Meagher  
Chair, Section of Public Contract Law

cc: Michael W. Mutek  
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