March 9, 1999

Mr. E.S. Lanham
Department of Health and Human Services
Office of Acquisition Management
200 Independence Avenue, S.W.
Room 517 D
Washington, D.C. 20201

Re: Comments to Proposed Rule, Republication of Department of Health and Human Services Acquisition Regulation, 64 Fed. Reg. 1344 (January 8, 1999)

Dear Mr. Lanham:

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 Board of Governors of the American Bar Association and, therefore, should not be considered as representing the policy of the American Bar Association.

I. INTRODUCTION

The Section supports the goal of the Department of Health and Human Services ("HHS") with regard to republishing its acquisition regulations, i.e., the Health and Human Services Acquisition Regulation ("HHSAR"), Title 48 of the Code of Federal Regulations, Chapter 3, for purposes of streamlining and simplifying HHS' implementation of the Federal Acquisition Regulation ("FAR").

The Section recognizes the effort that has gone into developing the republishing of the HHSAR and commends the agency for the work that it has done to streamline the HHSAR. Nevertheless, the Section believes several provisions of the proposed rule should be revised for the HHSAR to be fully consistent with applicable law and regulations and to reflect the best practices of the procurement community. The Section believes it is in the best interest of HHS and the public to clearly understand HHS's rules and regulations for its acquisition of supplies and services. This goal can be best promoted if certain HHSAR provisions are revised to take into account the recommendations described below.
II. DISCUSSION

A. Opportunity for Public Comment

The current HHSAR contains a provision providing for agency and public participation. See HHSAR Subpart 301.5. In particular, current HHSAR § 301.501-2 provides for public comment on proposed HHSAR changes when the proposed change would have an impact on the public, contractors, or both. The procedure described in the current HHSAR specifies that the Federal Register notice and comment period will apply and normally the public will be given 45 days to comment. The proposed rule eliminates the requirement for public participation. The Section urges HHS to reinstate the provision that permits the public to comment on proposed HHSAR changes of a substantive nature. HHS and its operating divisions can only benefit by public comment. Removal of this provision from the HHSAR sends the message that HHS has no interest in the public's views on HHSAR changes. The fact that HHS has chosen to republish the HHSAR as a proposed rule is evidence that HHS is interested in the public's view on HHSAR changes. To make that point abundantly clear, the Section urges reinstatement of § 301.501-2.

B. Contracts Requiring Review and Approval (§ 304.7101)

Section 304.7101 of the proposed rule requires the contracting officer to review all proposed contracts prior to award and allows the Head of the Contracting Activity ("HCA") to establish review and approval procedures beyond a contracting officer review for selected categories of contracts. This process is in contrast to the current HHSAR § 304.7101(b), which requires additional review and approval by higher acquisition authority only for those contracts exceeding a specified dollar amount and for significant sampling of contract actions below such dollar amounts. Current § 304.7101(c) also identifies the reviewing officials for the various operating divisions of HHS.

The Section believes that the requirement for review of significant acquisitions by higher authority is a desirable feature. Also, designation of the particular individual in each of the agencies, at least by title, is beneficial. Accordingly, the Section recommends that the current HHSAR practice for reviewing contract awards over $300,000 be retained and that the officials responsible for reviewing such contracts continue to be listed in the HHSAR at least by position.

C. Acquisition Planning

Similarly, the Section notes HHSAR §§ 307.105-1 and 307.105-2 currently contain a detailed procedure for the format and content of special program clearances and written acquisition plans required for various planned acquisitions. The proposed rule eliminates requirements for these written acquisition planning documents. Acquisition planning, in the Section's opinion, helps to ensure an agency carries out its acquisitions in the best possible way. Proper planning certainly inures to the agency's benefit by reducing the administrative burdens associated with challenges to solicitations and awards through the bid protest process. Therefore, the Section recommends that the provisions of the current HHSAR pertaining to the content of the written acquisition plan and the special program clearances or approvals be retained.

D. Incorporation by Reference Of the General Administration Manual (§ 307.302)

Proposed § 307.302 retains the references to the General Administration Manual ("GAM") that are currently described in HHSAR Subpart 307.3. The GAM is not a publicly available document and is extremely difficult for any member of the public to locate. The Section recommends that the HHSAR incorporate the substance of the GAM provision that is referenced in this Section.

E. Assistance Instruments (Subpart 307.70)

Various provisions of proposed Subpart 307.70 encourage HHS agencies to utilize grants or assistance instruments, rather than contracts, when such instruments are appropriate. Guidance on whether a grant or contract should be used, according to the current HHSAR as well as the proposed republication, refers to the Federal Grant and Cooperative Agreement Act of 1977, with a citation to 41 U.S.C. § 501. The Federal Grant and Cooperative Agreement Act of 1977 was revised by Public Law 97-258, Section 5(b), on September 13, 1982. The guidance that was provided by that Act is now recodified in Chapter 63 of 31 U.S.C. at §§ 6301-6308. Therefore, the republished HHSAR should reference the appropriate U.S.C. citation. Also, there is a citation to guidance in the Grants Administration Manual. Because this manual is not a publicly available document, HHS should provide the substance of this general instruction in this provision of the HHSAR.

F. Review of Request for Contract (§ 307.7101)
There appears to be a typographical error for the reference to § 307.7101 that appears in the middle column of page 1355 of the proposed rule. The section entitled "Review" follows § 307.7106, "Statement of Work," and should therefore be renumbered, most likely as § 307.7107. (There is already a § 307.7101 in the third column on page 1352 of the proposed rule.)

G. Debarment Procedures (§ 309.406-3(b))

There is a typographical error near the bottom of proposed § 309.406-3(b). The reference to FAR 406-3(b)(2) should be to FAR 9.406-3(b)(2).

H. Disclosure of Evaluation Criteria (§ 315.204-5(c)(2)(ii)(D))

The Section is concerned with the proposed language in § 315.204-5(c)(2)(ii)(D) stating that HHS agencies should avoid disclosing too many evaluation factors in an RFP and that "[u]sg too many criteria will prove as detrimental as using too few." The Section disagrees with this statement. Certainly, if several evaluation criteria are disclosed in an RFP, with no meaningful ability of a prospective offeror to discern which criteria are more or less important than others, the HHSAR statement might have some validity. Nevertheless, with a proper disclosure of relative weights regarding the various evaluation criteria, offerors will not find the disclosure of more criteria to be detrimental.

The Section considers full disclosure of evaluation criteria to be very helpful to the acquisition process. Full disclosure permits offerors to place greater emphasis in their proposals on areas that the Government states are more important than others. Disclosure eliminates guesswork. The Section believes the HHSAR statement, though presumably well intended, could have a chilling effect on the extent to which contracting officers will disclose evaluation criteria. The Section urges HHS to delete the statement that a disclosure of too many evaluation factors would be detrimental. The Section believes the provision should be rewritten to encourage the disclosure of as many evaluation criteria as is consistent with applicable law and regulation.

I. Types of Evaluation Criteria (§ 315.204-5(c)(3))

Proposed § 315.204-5(c)(3) lists various optional evaluation criteria that could be included in a solicitation. The Section fears that the HHS discussion of these optional criteria could be construed to conflict with the requirement in FAR 15.304(c)(2) that certain criteria are mandatory, such as price or cost being a necessary ingredient in every solicitation, as well as a requirement for quality of a product or a service to be addressed in every source selection through consideration of one or more non-cost evaluation factors. Accordingly, the Section recommends that HHS revise this provision of the republished HHSAR to clarify that there are certain evaluation criteria that are required in every solicitation.

J. Requirement for Cost or Price Evaluation (§ 315.204-5(c)(4)(ii))

Proposed § 315.204-5(c)(4)(ii) states that cost or price is generally not included as one of the evaluation criteria and therefore not assigned an indication of relative importance or weight. This statement appears to conflict with FAR § 315.304(c)(1) which requires price or cost to be evaluated "in every source selection." While HHS may intend this distinction between source selection criteria and evaluation criteria that are published in an RFP, some could misconstrue HHS’s intent. Therefore, the Section encourages this provision of the republished rule to be fully consistent with the FAR provision cited above.


Proposed § 315.305(a)(3)(ii)(E) provides several instances in which technical evaluators would not need to be reconvened to review revisions to an offeror’s technical proposal submitted during the course of the acquisition. Examples of when it would not be necessary for the technical panel to reconvene are listed, e.g., when answers to a question would not have a "substantial impact" on the proposal or the revised proposal would not be "materially different" from the original proposal.

The Section believes the message in the republished HHSAR that reconvening the technical panel is not necessary in such instances is not in the best interest of the Federal acquisition process. With the FAR Part 15 rewrite liberalizing the opportunity for the Government to engage in "clarifications" and "exchanges" with offerors during the course of the procurement without triggering the need for a revised proposal, the general rule should be that the technical evaluators should generally be required to review actual revisions to a technical proposal. Decisions as to whether revisions to a technical proposal would have a "substantial impact" or a revised technical proposal would be "materially different" can be best made by the technical evaluators who initially reviewed the technical proposal in
question. Those are the individuals who are most familiar with the details of the technical proposal in question. Accordingly, the Section recommends that this Section of the proposed rule be revised to encourage technical review panels to generally review all technical proposal revisions. The only exception should be where the technical chairperson, with the concurrence of the contracting officer, is absolutely convinced that the revision would not have any material impact because it is obviously relatively minor from the face of the revision.

L. Outside Evaluators (§ 315.305(a)(3)(ii)(F)(1))

Proposed § 315.305(a)(3)(ii)(F)(1) provides examples as to when outside evaluators are required to be used. The current HHSAR provision relating to outside evaluators, § 315.608-71(f), prohibits outside evaluators unless there is an expertise that is not generally available to the Government or is otherwise required by law. The proposed HHSAR provision does not contain a statement that outside evaluators are generally prohibited. The Section recommends that the statement generally prohibiting outside evaluators is salutary and should be retained.

Alternatively, the practice of using outside evaluators could be subject to protections of the type contained in the standard protective order that applies in bid protests when company representatives seek access to confidential material of other vendors, i.e., whether the individual in question is or is not engaged in "competitive decisionmaking" as that term is defined in the applicable caselaw. This alternative is not the preferred solution because there is little ability of the agency to monitor misuse. Accordingly, the Section believes that the general policy prohibiting outside evaluators should be retained in the republished HHSAR.

M. Profit for Non-Profit Organizations (§ 315.404-4(d)(1)(iv))

Proposed § 315.404-4(d)(1)(iv) provides that a reduction in the amount of profit that an HHS agency can award to a non-profit organization will be up to three percent less than the amount a for-profit organization could otherwise earn. Presuming that such a reduction is appropriate for a non-profit entity, the provisions should be rewritten to permit full profit for those non-profits that are otherwise treated as commercial organizations by virtue of being listed in Attachment C of OMB Circular A-122. Such a change would be consistent with the requirements in the OMB Circular to treat certain non-profits for cost reimbursement purposes as being tantamount to a commercial organization. Treating such an organization the same as a commercial organization for purposes of allowable profit is a logical extension of that requirement.

N. Independent Research and Development Costs (§ 316.307)

Proposed § 316.307 of the republished HHSAR requires the "Additional Cost Principles" clause to be inserted in all solicitations and resulting cost-reimbursement contracts. The current HHSAR requires this contract clause to be included only in contracts with non-profit organizations that are identified in OMB Circular A-122. There is no compelling rationale advanced in either the current HHSAR or the proposed republished HHSAR explaining why HHS believes it necessary to insert the Additional Cost Principles clause in any cost contract. The effect of the clause is to bar a contractor from seeking reimbursement for independent research and development ("IR&D") costs.

To the best of the Section's knowledge, no other federal agency has a blanket policy prohibiting a contractor from recovering IR&D costs. Although it is true that FAR § 31.205-18(c) seems to permit an agency to adopt its own rules pertaining to the allowability of IR&D costs, the examples given in the FAR do not suggest that the FAR cost principles contemplate that an agency would totally eliminate a contractor's ability to recover any such costs. To the extent that HHS believes that IR&D costs should not be allowable and can advance a compelling reason for departing from the general procedure contained in the FAR, the preamble of the proposed rule should articulate that rationale. By doing so, the public would have the opportunity to offer HHS meaningful comments relating to HHS's departure from the FAR's IR&D cost principle.

O. Memorandums of Understanding (§ 316.770-2)

Proposed § 316.770-2 provides that a Memorandum of Understanding is an unauthorized agreement and is not permitted to be used by an HHS agency. This policy is consistent with the existing HHSAR. Nevertheless, the current HHSAR permits a "Basic Agreement" to be used in accordance with § 316.702. The republished HHSAR eliminates the use of basic agreements. The Section agrees with the concern expressed in the republished HHSAR that a memorandum of understanding should not be used to avoid the FAR deviation process. The Section's experience, however, is that Memorandums of Understanding can be useful to establish a written record of understandings that the parties have reached before a formal contract is entered into. The Section recommends, therefore, that HHS revise this Section to permit the use of a Memorandum of Understanding under appropriate circumstances.

P. Government Employees Training Act (Subpart 317.71)
Subpart 317.71 of the republished HHSAR contains a number of references to the HHS Personnel Manual and to HHS Personnel Manual Instructions. Please refer to our comments on the General Administration Manual, in Paragraph D and the Grants Administration Manual in Paragraph E above. Because these publications are not readily available to the public, HHS should include the relevant substance of these general instructions.

Q. Confidentiality of Information (§ 324.7003(b))

Proposed § 324.7003(b) of the proposed rule contains a typographical error in that it refers to FAR 324.1. The correct citation appears to be HHSAR Subpart 324.1. In addition, the reference to FAR 24.1 should be to FAR Subpart 24.1.

R. Agency Protests (§ 333.103)

Proposed § 333.103 contains the procedures for agency protests that are quite similar to the procedures that are set forth in the existing HHSAR. The Section recommends that HHS take the republication of the HHSAR as the appropriate opportunity to implement the requirement in FAR 33.103(d)(4) to establish an independent level of review above the contracting officer level for agency protests and to identify the positions in each agency that would have the responsibility to conduct such an independent review. The Department, of course, could establish such a mechanism within the Office of the Deputy Assistant Secretary for Management and Budget. Alternatively, each individual operating division could develop its own procedure. The point is that the HHSAR is the appropriate vehicle for describing the procedures and for requiring each agency to commit its resources to establishing such an independent level of review. In addition, the reference to "General Council" should be "General Counsel."

S. Withholding of Payments and Excusable Delay (§ 342.7003-1)

Proposed § 342.7003-1(a) suggests that each agency in HHS be permitted to develop its own version of a Withholding of Contract Payments clause as well as an Excusable Delay clause. The Section believes that although this may not be HHS's intent, the text of the proposed rule permits such an interpretation. This ambiguity could be clarified by referencing the Withholding of Payment clause appearing in § 352.232-9 or the Excusable Delay clause in § 352.249-14. Again, the Section assumes that this is HHS's intent, but if it is not, the Section urges HHS not to permit each contracting officer to develop the text of these important clauses on an ad hoc basis.

T. Public Health Service

The Section is unclear as to whether the current Appendix A to the HHSAR, which sets forth the Public Health Service Acquisition Regulation as a supplement to the HHSAR, will continue to be effective. If it is HHS's intent that the PHS supplement continue in effect, HHS should include a reference to Appendix A, describe why it is necessary for the Public Health Service to have its own acquisition regulation, and explain the legal effect of that regulation if it conflicts with either the FAR or the HHSAR.

III. CONCLUSION

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

Sincerely,

David A. Churchill
Chair, Section of Public Contract Law

cc: Rand L. Allen
Gregory A. Smith
Norman R. Thorpe
Patricia A. Meagher
Marshall J. Doke, Jr.
Marcia G. Madsen
John T. Kuelbs

Council Members

Agnes P. Dover

Chairs and Vice Chairs

of the Health Care Contracting Committee

Alexander J. Brittin