March 11, 2004

Via Hand Delivery and Electronic Mail

General Services Administration
Attn: Ms. Laurie Duarte
FAR Secretariat (MVA)
Room 4035
1800 F Street, N.W.
Washington, DC 20405

Re: FAR Case 2000-305
Proposed Rule
Commercially Available Off-the-Shelf (COTS) Items

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 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 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 Proposed Rule, published in the Federal Register on January 15, 2004, is a follow-on to two Advanced Notices of Proposed Rulemaking ("ANPRs") published in response to passage of the Federal Acquisition Reform Act of 1996 ("FARA"), Pub. L. No. 104-106. See 61 Fed. Reg. 22010, May 13, 1996; 68 Fed. Reg. 4874, January 30, 2003. Section 4203 of FARA amended the Office of Federal Procurement Policy Act (codified at 41 U.S.C. § 431) to require the Administrator of OFPP ("Administrator") to establish a list of provisions of law that would not be applicable to federal government procurement of commercially available off-the-shelf ("COTS") items. The purpose of this provision was to expand – beyond the exemptions already applicable to the broader category of "commercial items" - the list of exemptions applicable to procurement of COTS items. Any law that meets the criteria in 41 U.S.C. § 431(b) shall be included on the list unless the Administrator "makes a written determination that it would not be in the best interests of the United States" to exempt COTS procurements from application of that specific law. 41 U.S.C. § 431(a)(1)(3).

As we did in our comments on the 1996 and 2003 ANPRs, the Section generally commends the FAR Council's recommendation concerning the laws that should not be applicable to purchases of COTS items. We have comments, however, in a number of areas, each of which is addressed below.

1. **Buy American Act/Trade Agreement Act**

   The proposed rule would exempt COTS procurements from both the Buy American Act, 41 U.S.C. §§ 10a-10d and the Trade Agreements Act, 19 U.S.C. §§ 2501-2518. The Section strongly endorses this proposal, which is consistent with previous comments of the section in connection with the two earlier ANPRs. See Section's July 12, 1996 Comments to Advance Notice of Proposed Rulemaking (FAR Case 96-308); Section's March 31, 2003 Comments to Advance Notice of Proposed Rulemaking (FAR Case 2000-305). This comment addresses why the Section believes exemption from these statutes is mandated by FAR, and offers suggested improvements in the language seeking to implement this exemption.

   As indicated above, FAR mandates that COTS procurements be exempt from statutes that impose government unique and burdensome requirements, unless the Administrator makes a written determination that the public interest nonetheless requires application of the statute to COTS procurements. The Buy American Act and the Trade Agreements Act unquestionably meet the threshold standard and there is no significant countervailing public interest that mandates continuing to apply these statutory restrictions to procurement of COTS products.
First, both statutes impose significant, and importantly, different obligations on manufacturers and suppliers of COTS products. Under the Buy American Act and its implementing regulations, a supplier must track the place of "manufacture" – an undefined term – of each "component" and then make the complex calculation of whether the value of those components manufactured in the United States exceeds 50% of the total value of all components. It is not enough to know the country in which the component was purchased, but the end product manufacturer must determine the "manufacturing" location which may or may not be the same as the country of origin for purposes of labeling (governed by Federal Trade Commission rules) or customs (governed by U.S. Customs and Border Protection rules). Tracking the place of "manufacture" and component value is not necessary for compliance with the general origin labeling requirements applicable generally in the U.S. commercial market place.

The Trade Agreements Act and its implementing regulations employ a different test, focusing instead on the country in which the components were "substantially transformed" into a new product distinct from its component parts. It is difficult enough for Original Equipment Manufacturers ("OEMs") to evaluate their manufacturing to ensure that the definitive "substantial transformation" occurred in a "designated country." For downstream suppliers, proper identification is even more problematic as the OEM's origin labeling may not be sufficient to determine the location of "substantial transformation" for Trade Agreements Act purposes.

Compounding the compliance burden for both contractors and government contracting officials is the complexity of determining which rules apply. For example, in many complex procurements it can be difficult to ascertain the "end product" for purposes of the Buy American Act because the definition does not make it synonymous with "end item." There is often ambiguity – particularly in Federal Supply Schedule contracts for which no Buy American Act or Trade Agreements Act compliance guidance has been published – whether the threshold for application of the Trade Agreements Act applies to each individual offered product or to the FSS contract as a whole. Indeed, one need only parse through the examples in FAR Subpart 25.5 Evaluating Foreign Offers – Supply Contracts to appreciate the complexity and government-unique burden imposed by these statutes.

For more than ten years now, Congress has mandated the elimination, where possible, of barriers to the government's ability to procure commercial items. The Federal Acquisition Streamlining Act ("FASA"), Pub. L. No. 103-355, and this FARA provision are prime examples of that policy choice. There are also examples specifically in the Buy American context. Thus, in 1994, Congress specifically amended the list of factors included in 10 U.S.C. § 2533(a) that the
Secretary of Defense considers in granting waivers of the Buy American Act to include such factors as:

* * *

(6) A need to ensure that the Department of Defense has access to advanced, state-of-the-art commercial technology;

* * *

(9) Any need -- . . . . not to impair integration of the military and commercial industrial base.


These actions are wholly consistent with a conclusion by the Administrator to exempt COTS procurements from application of either the Buy American Act or the Trade Agreements Act. The usual justifications for these kinds of protections (the U.S. industrial base and protection of jobs) apply with significantly reduced force in the context of COTS procurements. Such items, by definition, must already survive and prosper in the commercial market place where these restrictions do not apply. Furthermore, it would make little sense to exempt COTS from Buy American but not from the Trade Agreements Act which itself is simply a waiver of Buy American restrictions. The government should be free to purchase the best available product at the lowest cost, and contractors should be free of the burden and difficulty of tracking information to ensure their COTS products qualify under these complex statutes.

The Section makes the following suggestions with respect to the language proposed to implement exemption of COTS from the Buy American Act and Trade Agreements Act.

First, we recommend two changes with respect to how the Trade Agreements Act and the Buy American Act are identified in the list of laws set forth in FAR 12.505(a). There is no apparent reason for listing the Trade Agreements Act twice as the proposed rule currently does in 12.505(a)(2) and (a)(3). It would avoid confusion by eliminating the "et seq:"
 and identify specifically the applicable sections in which the Buy American Act and Trade Agreements Act are codified. Also, the list in the proposed rule only identifies the contract clause but not the corresponding certification clause for solicitations.
Although the regulations (elsewhere in FAR 25.1101) specify that the certification clauses are only included in solicitations that included the corresponding contracts clause, the Section believes it would promote clarity to include in the list of exempted statutes references to all of the affected clauses. Accordingly, proposed FAR 12.505(a) would be changed as follows:

(2) 19 U.S.C. 2501-2518 (see 52.225-5 and 52.225-6)

(3) 
* * *

(49) (9) 41 U.S.C. 10a-10d, Buy American Act – Supplies (see 52.225-1, 52.225-2, 52.225-3 and 52.225-4).

Second, the proposed rule expressly adds “acquisitions for commercially available off-the-shelf items” to the Trade Agreements Act exceptions listed in FAR 25.401(a). The proposed rule neglects to include an equivalent exception in the list of exceptions to the Buy American Act contained in FAR 25.103. Accordingly, the Section proposes inserting a new Section 25.103(e) as follows:

(e) Commercially Available Off-the-Shelf Items.

Pursuant to the authority of 41 U.S.C. § 431, the Administrator of OFPP has determined that it is inconsistent with the public interest to apply the Buy American Act to purchases of commercially available off-the-shelf items.

2. COTS Definition in FAR 52.244-6

The proposed rule would modify FAR 52.244-6 Subcontracts for Commercial Items to specify that the definition of “commercially available off-the-shelf items” has the meaning contained in the clause at FAR 52.202-1 Definitions. That clause, however, does not currently contain a definition of “commercially available off-the-shelf items.” In fact, under FAR Case 2002-013, Federal Acquisition Regulations; Definitions Clause, 69 Fed. Reg. 2988 (Jan. 21, 2004), the Councils have proposed to modify both the Definitions clause, 52.202-1, as well as FAR 52.244-6. If that FAR case is not adopted, then this proposed rule needs to change in order to incorporate into FAR 52.201-1, a definition of commercially available off-the-shelf items. If the proposal contained in FAR Case 2002-013 is
adopted, as the Section believes it should be, then to be consistent the proposed change to FAR 52.244-6(a) should read as follows:

*Commercially Available Off-the-Shelf Item* has the meaning contained in Federal Acquisition Regulation 2.101, Definitions.

3. **Rights in Technical Data**

In the area of rights in technical data, the proposed rule cites only 41 U.S.C. § 418a (Rights in Technical Data) and 41 U.S.C. § 253d (Validation of Proprietary Data Restrictions). It has been argued that these provisions are only applicable to the civilian agencies. To avoid potential disparate treatment of software and technical data relating to commercial-off-the-shelf items sold to the Department of Defense as compared to those COTS items sold to civilian agencies, the parallel Rights in Technical Data provisions Title 10, 10 U.S.C. § 2320 (Rights in Technical Data) and 10 U.S.C. § 2321 (Validation of Proprietary Data Restrictions) should also be listed.

4. **Services as COTS Items**

The proposed amendment to FAR 2.101 that would define a “Commercially available off-the-shelf item (COTS)” contains language that it is a “subset of a commercial item and means any item of supply” that meets several listed criteria. The inclusion of the words “of supply” appears to preclude a commercial item that is a service from ever being considered a COTS item, even if it meets the definition of a commercial item and meets all the other criteria to be a COTS item.

The stated purpose of the proposed rule is to implement 41 U.S.C. § 431 with respect to commercially available off-the-shelf items. 41 U.S.C. § 431(a) states that the FAR is to “include a list of provisions of law that are inapplicable to contracts for the procurement of commercially available off-the-shelf items.” 41 U.S.C. § 431(b) states that except for provisions of law that provide for criminal or civil penalties or are specifically applicable to COTS items, the list is to include all laws “for the procurement of property or services”. The statutory definition of a “commercially available off-the-shelf item” in 41 U.S.C. § 431(c) is virtually identical to the proposed FAR 2.101 definition, except the statutory definition does not contain the limitation that a COTS item be an item “of supply.”

Accordingly, we see no basis in the statute to preclude commercial items that are services and meet the statutory definition of a COTS item to be ineligible as a COTS item under the FAR. Our specific recommendation is to delete the
words “of supply” from the proposed FAR 2.101 definition of “Commercially available off-the-shelf item (COTS).”

5. **Subcontracts for COTS Items Under Commercial Item Prime Contracts**

Under subsection (c) of the proposed FAR clause 52.212-XX, Contract Terms and Conditions Required To Implement Statutes or Executive Orders – Commercially Available Off-the-Shelf (COTS) Items, Contractors are only required to flow down two (2) FAR clauses in a subcontract for COTS items. Those two clauses are the Utilization of Small Business Concerns clause, FAR 52.219-8, and the Equal Opportunity clause, FAR 52.222-26. This addresses the situation of a subcontract for a COTS item under a COTS prime contract, and we agree with the FAR Council’s approach.

Nevertheless, subcontracts for COTS items can also be encountered under prime contracts for other than commercial items and under prime contracts for commercial items that are not COTS items. To achieve uniformity, we believe the required FAR flowdown clauses for subcontracts for COTS items should be the same regardless of which type of prime contract is involved.

The proposed rule addresses this concern with respect to subcontracts for COTS items under prime contracts for other than commercial items. Under the current FAR clause 52.244-6, which is for prime contracts for other than commercial items, there are five (5) required FAR clauses that are to flowdown for subcontracts for commercial items. These include FAR 52.219-8 and FAR 52.222-26, which the FAR Council is proposing to apply to COTS subcontracts. The proposed rule would amend FAR 52.244-6 to add the following language – “(This clause does not apply to subcontracts for commercially available off-the-shelf items.)” -- after the references to each of the other three clauses in FAR 52.244-6. This leaves COTS subcontracts under prime contracts for other than commercial items with the same required FAR clauses as COTS subcontracts under COTS prime contracts, a result we commend.

The proposed rule does not, however, address the situation that could be encountered in a subcontract for COTS items under a commercial item (but non-COTS) prime contract. Under the current FAR clause 52.212-5, which is for prime

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1 Those clauses are Affirmative Action for Disabled Veterans and Veterans of the Vietnam Era, FAR 52.222-35, Affirmative Action for Workers with Disabilities, FAR 52.222-36, and Preference for Privately Owned U.S.-Flag Commercial Vessels, FAR 52.247-64.
contracts for commercial items, there are required FAR clauses that are to flowdown for subcontracts for commercial items. With respect to the references in FAR 52.212-5(c) to FAR clauses 52.222-35, 52.222-36, and 52.247-64, we recommend that the same parenthetical the FAR Council is proposing for the references to these clauses in FAR 52.244-6 be added following the references to these clauses in FAR 52.212-5(e). This would bring COTS subcontracts under prime contracts for commercial (but non-COTS) items in line with COTS subcontracts under any other prime contract.

Our specific recommendation is to add at the end of subparagraphs (iii), (iv), and (vi) of FAR 52.212-5 the following language: "(This clause does not apply to subcontracts for commercially available off-the-shelf items.)"

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

Sincerely,

[Signature]

Hubert J. Bell, Jr.
Chair, Section of Public Contract Law

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