On September 30, 1996, the Section submitted comments to the General Services Administration ("GSA") regarding its revised interim rule amending the acquisition regulations for commercial items. The Section noted that these comments supplemented its comments of June 3, 1996, on the original interim rule, published at 61 Fed. Reg. 6164 (Feb. 16, 1996).

In addition to several general comments challenging GSA's authority to implement this interim rule rather than as a proposed rule and other matters, the Section submitted extensive specific comments. These comments addressed a wide range of issues, including GSA's sources for its research on commercial buying practices; access to records and post award audit rights; lack of justification for most favored customer pricing; burdensome commercial sales practices data request; retention of de facto certification requirement; and GSA's assertion that the proposed rules are necessary and in the best interest of the government.

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September 30, 1996

General Services Administration
Office of Acquisition Policy (MV)
18th & F Streets, N.W.
Room 4010
Washington, D.C. 20405

Re: Revised Interim Rule Amending the General Services Administration Acquisition Regulation for the Acquisition of Commercial Items, 61 Fed. Reg. 46607 (Sept. 4, 1996)

Dear Sir or Madam:

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 Public Contract Law Section consists of attorneys and associated professionals in private practice, industry and Government service. The Section's governing Council and substantive committees contain a balance of 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.

On June 3, 1996, the Section submitted comments on the original interim rule, published at 61 Fed. Reg. 6164 (Feb. 16, 1996). The Section does not repeat the text of its earlier comments here. To the extent that the revised interim rule failed to address concerns raised in the original comments, however, the Section incorporates its earlier comments by reference.

The Section's comments are divided into two substantive sections. The first section consists of general comments regarding the implementation of the revised interim rule. The second section consists of comments regarding specific aspects of the revised interim rule.

**General Comments**

As described more fully in its earlier comments, the Section continues to object to the manner in which the General Services Administration ("GSA") published these regulations. Rather than repeat its earlier comments, the Section provides the following summary of its comments.

First, the Section believes that GSA's attempt to implement these regulations as interim rules rather than proposed rules violates the Federal Acquisition Streamlining Act of 1994, Pub. L. 103-355 ("FASA"). Second, contrary to GSA's assertion, the Section takes the position that GSA's interim rule is a "significant regulatory action" under Executive Order 12866 and, as such, requires submission to the Office of Management and Budget for review in accordance with the Executive Order. Third, the Section disagrees with GSA's assertions about the Regulatory Flexibility Act. Fourth, as described further below, the Section calls upon GSA to support its assertion that its interim regulations are consistent with standard commercial practice as required by FASA and the FAR.

**Specific Comments**

**GSA Still Has Not Supported Its Assertion that Its Rules Are Consistent with Standard Commercial Practices**

The statutory phrase "standard commercial practice" means a practice that is typically and ordinarily used in the commercial marketplace. Adequate substantiation that a practice is standard requires an identification and examination of the extent and manner of usage of the practice. Although GSA has identified its sources for its research of commercial buying practices, nothing indicates that this research has examined the manner and usage of such practices.

In its earlier comments, the Section considered and declined to rely upon two of the studies that GSA relies upon as evidence that the interim rule is consistent with "standard commercial practices" -- the July 1995 GSA/VA report discussed above and an August 1993 report by the General Accounting Office titled "Multiple Award Schedule Contracting: Changes Needed in Negotiation Objectives and Data Requirements." As the Section noted previously, these reports were not prepared for the purpose of analyzing standard commercial practices. Nothing in these two reports provides any identification or examination of the extent and manner of usage of commercial practices.

In materials accompanying the revised interim rule, GSA also identifies "publications of the National Association of Purchasing Management" and "the results of a survey of approximately 150 of the Fortune 500 companies commercial buying practices," as other sources for GSA's research of commercial practices. Unfortunately, GSA fails to explain the results of its research in terms of the manner of or extent of usage of commercial practices. Therefore, these sources also may represent isolated instances of similar provisions from which GSA has extrapolated support for its "commercial" practices.

Any support offered by GSA must contain more than a simple collection of similar provisions that may exist within certain industries. To the extent that GSA's other sources are patterned after the approach taken in
the July 1995 GSA/VA IG Report, these sources do not represent adequate support. As the Section noted in its previous comments, no reasonable conclusions about "standard commercial practices" can be drawn from such an approach.

As in its earlier comments, the Section continues to believe that specific aspects of the revised interim rule are inconsistent with commercial practices and, in some cases, with statutory and regulatory provisions. These specific aspects include access to records and post-award audit rights, most-favored-customer ("MFC") pricing, and data disclosure requirements, and the "de facto" certification. In addition, GSA has not justified why its interim rule is necessary and in the best interests of the government.

**Access to Records and Post Award Audit Rights**

GSA's revised interim rules continue to provide for two forms of post-award audit rights: (1) rights to audit information submitted in connection with price negotiations for up to two years after award of the contract or modification at issue ("defective pricing audits"); and (2) rights to audit contract performance information relating to overbilling, billing errors, compliance with the price reduction clause and Industrial Funding Fee clause for up to three years after final payment under the basic contract period and for up to three year after final payment under each option period ("contract performance audits").

GSA's revised rules modify the provisions governing defective pricing audits to attempt to maximize pre-award audits and forgo, subject to certain exceptions, post-award audit rights when a pre-award audit is done. GSA did not materially revise the provisions governing the contract performance audits.

As the Section stated in its June 3, 1996 comments, these audit provisions, even as revised, are not consistent with applicable statute and FAR implementing regulations or with standard commercial practices. As explained in its June 3, 1996 comments, the Section disagrees with GSA's assertion that Congress did not intend to preclude GSA and other executive branch agencies from asserting post-award audit rights through implementation of agency-level regulations or otherwise.

**Most Favored Customer Pricing Still Not Justified**

The revised interim rule retains MFC pricing as a negotiation objective for contracting officers. The Section continues to object to MFC pricing as both inconsistent with commercial practices and with the FAR's requirement for "fair and reasonable" prices. Although some evidence exists that some vendors seek MFC pricing in commercial settings, this practice is not typical or ordinary.

**Commercial Sales Practices Data Request Still Too Burdensome**

The revised interim rule continues to impose burdensome data disclosure requirements on offerors of commercial items. By requiring disclosure of an offeror's best discount notwithstanding the category of customer to which it is granted, GSA imposes a burden not found in the commercial context. Although this policy may represent a reduction in disclosure requirements from prior policies, GSA has not justified why this requirement is necessary and consistent with commercial practice.

In particular, the revised definition of "ad hoc" discounts may lead to additional disclosure requirements. The revision provides that an offeror should describe the extent of ad hoc discounting in general terms to demonstrate that it is not significant. If an offeror lacks adequate pricing integrity controls, however, the revised interim rule provides that ad hoc pricing may be assumed to be significant and subject to disclosure. The concepts of "ad hoc" discounts and "adequate pricing integrity controls" contain inherent ambiguity. Therefore, a conservative offeror will be forced to disclose ad hoc discounts or face the risk that an auditor may determine that its pricing integrity controls are inadequate and insist upon a price reduction.

**"De Facto" Certification Still Present**

In its June 3, 1996 comments, the Section criticized GSA's interim rules because the rules provided that by submitting an offer, the offeror would be deemed to have warranted the information as "complete, current,
and accurate" and would be subject to a price reduction and other penalties if the information submitted was later discovered to be otherwise. The Section noted that this was a "de facto" certification and was required to have been removed from regulations by Sections 1203 and 1251 of FASA.

The revised interim rules still provide for such "de facto" certification but now state that the offeror will be subject to penalties if the information is not "accurate" or is "not provided." This is no improvement. For the reasons stated in the Section's June 3, 1996 comments, the same problems exist with these revised provisions as existed with the original interim provisions.

GSA Has Not Supported Its Assertion that Its Proposed Rules Are Necessary and in the Best Interests of the Government Even If They Are Not Consistent with Standard Commercial Practices

In responding to comments on the original interim rule, GSA asserts that to the extent that certain provisions such as MFC pricing are inconsistent with commercial practices, it has determined that these practices are necessary and in the best interests of the government. Rather than simply making that conclusory statement, GSA must provide, prior to implementing this interim rule, a rational explanation of why it has made this determination and identify what government interest is being served.

Conclusion

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

Sincerely,

John T. Kuelbs
Chair, Section of Public Contract Law

cc:  Marcia G. Madsen
     David A. Churchill
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