January 7, 2008

VIA ELECTRONIC MAIL AND FIRST CLASS MAIL

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


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.1

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

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1 Mary Ellen Coster Williams, the Section of Public Contract Law’s representative to the ABA House of Delegates, and Jeri K. Somers, a member of the Section’s Council, did not participate in the consideration of these comments and abstained from voting to approve and send this letter.
Governors of the American Bar Association and, therefore, should not be construed as representing the policy of the American Bar Association.  

Comments

On November 7, 2007, the Civilian Agency Acquisition Council and the Defense Acquisition Council (the “Councils”) published in the Federal Register an interim rule, 72 Fed. Reg. 63027, among other matters creating a new FAR Subpart 50.2, entitled “Support Anti-terrorism by Fostering Effective Technologies Act of 2002” with implementing contractual clauses at FAR 52.250-1 through -5 (referred to herein as the “Interim Rule”). The Section of Public Contract Law has reviewed this Interim Rule and offers the following four substantive comments and several suggested edits.

1. Benefit to the Procuring Agency – FAR 50.204(a)(2): The liability protections provided by the SAFETY Act to contractors also benefit Government agencies. First, the liability protections facilitate the sale of the goods and services to the Government. Second, as a purchaser of technology with SAFETY Act liability protections, the Government would be a protected party. For example, the SAFETY Act would provide the Government with a defense under the Federal Tort Claims Act (28 U.S.C. §§ 1346(b) and 2860 et seq). Accordingly, it would be in the Government’s interest not only to “encourage” contractors in FAR 50.204(a)(2) to pursue SAFETY Act coverage but also to support applicants, as appropriate, in obtaining SAFETY Act coverage. As noted in the Interim Rule, obtaining SAFETY Act coverage can be a complex endeavor for offerors and contractors. Accordingly, the Section suggests inserting the words “and support” following “Encourage.”

2. SAFETY Act Application – Post Award – FAR 50.204: Pursuant to the DHS SAFETY Act regulations, SAFETY Act coverage may be obtained for new and existing technologies. Agency support in gaining SAFETY Act coverage after award would reinforce the benefit that SAFETY Act coverage provides the Government. Therefore, the Section suggests expansion of the pre-contract time period application of the Interim Rule to encompass encouragement and support to contractors pursuing SAFETY Act coverage for technologies under contract or previously procured technologies in their sustainment phase.

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2 This letter is available in pdf format at http://www.abanet.org/contract/regscomm/home.html under the topic “Emerging Areas.”
3. **Pre-Qualification Designation Notice – FAR 50.205-2:** As noted above, the DHS regulations do not place a time limit on when procuring agencies may request a Pre-Qualification Designation Notice.

Any Federal . . . agency that engages in or is planning to engage in the procurement of a Technology that potentially qualifies as a Qualified Anti-terrorism Technology, through the use of a solicitation of proposals or otherwise, may request . . . a Pre-Qualification Designation Notice * * * * [and DHS may] issue an appropriate Pre-Qualification Designation Notice to the requesting agency so that it may be included in the government contract or in the solicitation materials, as appropriate.”

6 C.F.R. § 25.6(g)(2) & (3)

The Councils may wish to consider requests for Pre-Qualification Designation Notices without regard to the stage of the procurement. For example, a change in contract specifications after award may add an anti-terrorism application for the technology. A modification to FAR 50.205-2, addressing post-award requests for a Pre-Qualification Designation Notice, would facilitate the contractor’s SAFETY Act application and be consistent with existing DHS regulations.

4. **Pre-Award Specification Changes – FAR 50.205-2:** The Interim Rules emphasize early consideration of SAFETY Act protections. In proposed FAR 50.205-2 and the implementing clauses, procuring agencies would be responsible to seek Pre-Qualification Designation Notices in sufficient time to permit potential offerors to obtain SAFETY Act coverage before release of the formal solicitation. Early pursuit of a Pre-Qualification Designation Notice should be balanced against the likelihood of changes in solicitation specifications that the publication and release of draft solicitations are intended to produce. DHS may incorporate agency specifications in DHS’s Pre-Qualification Designation Notice. As noted in 6 C.F.R. § 25.6(g)(4):

A Pre-Qualification Designation Notice shall contain . . . a detailed description of and detailed specifications for the Technology to which the Pre-Qualification Designation Notice applies, which may incorporate by reference all or part of the
procurement solicitation document issued or to be
issued by the requesting agency . . . .

If the solicitation specifications change during the pre-award period, the Pre-Qualification Notice will also need to be revised. Similarly, if an offeror obtains pre-solicitation SAFETY Act coverage, the DHS regulations require that the Seller provide a Modification Notice to DHS regarding any significant change to the Qualified Anti-Terrorism Technology ("QATT"). 6 C.F.R. § 25.6(l). Accordingly, it would be prudent to add cautionary language to FAR 50.205-2(a), as follows:

Such a request for a Pre-Qualification Designation Notice shall be made once the requesting agency has determined that the technology specifications are firmly established and are unlikely to undergo material modification.

The requesting agency may also notify DHS Office of SAFETY Act Implementation ("OSAI") in advance that the specifications may undergo amendment and request that the Pre-Qualification Designation Notice contain a statement to the following effect:

The referenced specifications may be modified in the course of the procurement and this Pre-Qualification Designation Notice shall apply to the final specifications in the solicitation.

In addition, the Section offers the following suggestions to clarify the final rule:

1. **FAR 50.201 – Definition – Pre-Qualification Designation Notice:** As stated above, a Pre-Qualification Designation Notice is not limited in time to the pre-award period. The Section suggests inserting "procured or" before the phrase "to be procured." Also, the definition of Pre-Qualification Designation Notice notes that a "pre-qualification designation notice authorizes successful offeror(s) to submit streamlined SAFETY Act applications . . . ." (Emphasis added). This definitional time period is consistent with the DHS anticipation of applications from "chosen" or "selected" offerors (6 C.F.R. § 25.6(g)(2)). However, the time period is inconsistent with other interim FAR guidance that focuses on pre-award SAFETY Act applications and grants before an offeror is "selected." Therefore, the Section suggests deleting "successful."

2. **FAR 50.203(a)(2):** Because SAFETY Act protections extend to purchasers and users of technologies covered by the SAFETY Act, such as procuring agencies,
the Section suggests that the phrase “and others in the supply and distribution chain” be extended by adding the words “to include purchasers and users.”

3. FAR 50.205-1(a): The term “requiring activity” is used throughout this FAR Subpart but is not defined. Nor is responsibility designated within the requiring activity. In the existing FAR, “requiring activity” is mentioned in seven locations. Because of the broad use in Subpart 50.200, it would be helpful to provide a fuller definition of “requiring activity” and clearly allocate responsibilities.

4. FAR 50.205-1(a)(1): The phrase “the requiring activity shall inform the contracting officer to notify offerors” would be improved as follows: “the requiring activity shall request that the contracting officer notify offerors.”

5. FAR 52.250-4, Pre-Qualification Designation Notice: Clause paragraph (d) states in part that:

   All determinations by DHS are based on factors set forth in the SAFETY Act, and are made independent of, and without regard to, the specific terms, conditions, specifications, statements of work, or evaluation factors set forth in the solicitation.

   This proposed language could be viewed as inconsistent with DHS regulations providing that the Pre-Qualification Designation Notice may incorporate specifications identical to those in the agency’s solicitation or contract. See 6 C.F.R. § 25.6(g)(4) (the Pre-Qualification Designation Notice “may incorporate by reference all or part of the procurement solicitation documents issued or to be issued by the requesting agency.”) The Section suggests that proposed FAR 52.250-4, Clause paragraph (d) be amended accordingly.

6. FAR 52.250-4, Pre-qualification Designation Notice: Clause paragraph (f)(1) Alt II: This paragraph addresses submission of proposals presuming SAFETY Act coverage received “before or after” award. Nevertheless, the text guidance heading at FAR 50.205-4 states “presuming SAFETY Act designation or certification after contract award.” (Emphasis added). The 50.205-4 text should be clarified to state that the SAFETY Act coverage also could be received before award.
Conclusion

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

Sincerely,

Patricia A. Meagher
Chair, Section of Public Contract Law

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