



2003-2004

CHAIR

Hubert J. Bell, Jr.
Ste 2600 Harris Tower
233 Peachtree St, NE
Atlanta, GA 30303-1530
(404) 582-8027

CHAIR-ELECT

Patricia H. Wittle
Ste 1100 East Tower
1301 K St, NW
Washington, DC 20005-3373
(202) 414-9210

VICE-CHAIR

Robert L. Schaefer
12333 W. Olympic Blvd.
Los Angeles, CA 90064-1021
(310) 893-1609

SECRETARY

Michael A. Hordell
Hamilton Square 6th Flr
600 14th St, NW
Washington, DC 20005-2004
(202) 220-1232

BUDGET AND FINANCE OFFICER

Patricia A. Meagher
311 California St, 10th Flr
San Francisco, CA 94104-2695
(415) 956-2828

**SECTION DELEGATE AND
IMMEDIATE PAST CHAIR**

Mary Ellen Coster Williams
717 Madison Pl, NW, Ste 612
Washington, DC 20005-1086
(202) 219-9574

PREVIOUS PAST CHAIR

Norman R. Thorpe
498 Abbey Rd
Birmingham, MI 48009-5618
(248) 644-8105

COUNCIL MEMBERS

Peter D. Balch
PO Box 1027, MS 108-108
Moorestown, NJ 08057-0927

Ross W. Branstetter, III
7100 Defense Pentagon
Washington, DC 20301-7100

Alexander J. Brittin
1900 K St, NW, Ste 100
Washington, DC 20006-1108

Robert A. Burton
725 17th St, NW, Rm 9013
Washington, DC 20503

Mark D. Colley
2099 Pennsylvania Ave, NW, Ste 100
Washington, DC 20006-6800

John Alton Currier
1601 Research Blvd
Rockville, MD 20850-3173

Helaine G. Elderkin
3170 Fairview Park Dr, M/C 203A
Falls Church, VA 22042-4516

Daniel I. Gordon
1517 T St, NW
Washington, DC 20009-3909

Thomas E. Hill
3100 Bk of Amer Plz, 901 Main St
Dallas, TX 75202-3789

Karen L. Manos
1299 Pennsylvania Ave NW, 5th Flr
Washington, DC 20004-2400

John J. Pavlick, Jr.
575 7th St, NW
Washington, DC 20004

Donna Lee Yesner
1900 K St, NW, Ste 100
Washington, DC 20006-1108

**EDITOR, PUBLIC CONTRACT
LAW JOURNAL**

Carl L. Vacketta
Washington, DC

EDITOR, THE PROCUREMENT LAWYER

Mark E. Langevin
Los Angeles, CA

BOARD OF GOVERNORS LIAISON

Pamela J. Roberts
Columbia, SC

SECTION DIRECTOR

Marilyn Neforas
750 N Lake Shore Dr
Chicago, IL 60611
(312) 988-5596
Fax: (312) 988-5688

November 17, 2003

Via Hand Delivery and Electronic Mail

Defense Acquisition Regulations Council
Attn: Mr. Steven Cohen
OUSD (AT&L) DPAP(DAR), IMD 3C132
3062 Defense Pentagon
Washington, DC 20301-3062

**Re: Interim Rule: DFARS Case 2002-D024, Approval of Service
Contracts and Task Orders, 68 Fed. Reg. 56563 (Oct. 1, 2003).**

Dear Mr. Cohen:

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 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 Director of Defense Procurement has issued an interim rule with request for comments that amends provisions of the Defense Federal Acquisition Regulation Supplement ("DFARS") pertaining to the acquisition of services. The

interim rule provides, in part, that the Department of Defense ("DoD") may not acquire services through another agency's contract or task order unless approval is first obtained consistent with department or agency procedures. As discussed in detail below, the Section believes that this language may be misconstrued as restricting the DoD's use of the General Services Administration's Federal Supply Schedules ("FSS") program, as well as other multi-agency contract programs. Therefore, the Section recommends that the language be clarified as set out below.

DFARS Section 237.170-2 Should Be Revised To Clarify that the Rule Does Not Apply to FSS or Other Multi-Agency Contracts When DoD Places the Order.

As currently written, the interim rule may be read to restrict the ability of DoD agencies to acquire services through non-DoD contracts. Specifically, DFARS section 237.170-2 reads:

Unless approval is obtained in accordance with 237.170-3, do not acquire services *through use of a contract or task order* that:

- (a) Is not performance based; or
- (b) Is *awarded by an agency other than DoD*.

(emphasis added.) The referenced approval requirement (located in DFARS section 237.170-3), states that the approval must be in accordance with department or agency procedures. It is our understanding that the departments and agencies have not yet issued such procedures.

As currently worded, the provision at issue may be interpreted as applying to orders placed by DoD against contracts awarded by non-DoD agencies. For example, a technical reading of the provision may apply the restriction to DoD's use of the FSS program and other multi-agency contracts (administered by non-DoD agencies). Under this interpretation, DoD agencies essentially would be prohibited from purchasing from the FSS and other multi-agency contracts, unless an exception is first approved. At the very least, this interpretation could cause DoD purchasing agencies to be reluctant to use these contract vehicles and the approval process most likely would result in delays in the procurement process. This would adversely affect DoD's ability to benefit from the volume pricing discounts, improved access to innovative technologies, streamlined purchasing procedures, and other advantages offered by the FSS and other multi-agency contract programs.

A recent report appearing in the online version of Government Executive Magazine, however, quotes an official from the Defense Regulations Directorate as stating that DoD did not intend the interim rule be interpreted in this manner. See Amelia Gruber, *Defense Procurement Rule Confounds Contractors*, Government Executive Magazine, October 17, 2003 (available at www.govexec.com). That is, the rule is not intended to apply where *a DoD agency conducts the acquisition and places the order*, regardless of whether the order is placed against a contract awarded by a non-DoD agency. We understand that the intent of the rule is to cover only those transactions where the act of acquiring the services (e.g., placing the order) is conducted outside of DoD. The restriction should not apply, for example, to DoD purchases of services from FSS contracts or other multi-agency contracts administered by non-DoD agencies.

The Section agrees with the published report that the interim rule should not be read so narrowly as to restrict DoD purchases from the Federal Supply Schedules or other multi-agency contract programs. Under these contract vehicles, DoD retains the control to award the work to the contractor that provides the best value.

Accordingly, we recommend that the language at issue be revised to clarify that the rule is not intended to restrict DoD's use of FSS and other multi-agency contracts. We suggest that DFARS section 237.170-2 be revised to read:

Unless approval is obtained in accordance with 237.170-3, do not acquire services through use of a contract or task order that:

- (a) Is not performance-based; or
- (b) Is awarded by an agency other than DoD.

The restriction set forth in subsection (b) does not apply to orders placed by DoD agencies using the Federal Supply Schedules program or other multi-agency contracting programs.

Defense Acquisition Regulations Council
Attn: Mr. Steven Cohen
November 17, 2003
Page 4

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

Sincerely,

A handwritten signature in black ink that reads "H.J. Bell, Jr." with a stylized flourish at the end.

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

cc: Patricia H. Wittie
Robert L. Schaefer
Michael A. Hordell
Patricia A. Meagher
Mary Ellen Coster Williams
Norman R. Thorpe
Council Members
Steven P. Pitler
Michael F. Mason
David Kasanow