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May 23, 2005

Via E-Mail and First Class Mail

Defense Acquisition Regulations Council
Attn: Ms. Robin Schulze
OUSD (AT&L) DPAP (DAR)
IMD 3C132
3062 Defense Pentagon
Washington, D.C. 20301-3062

Re: Defense Acquisition Regulation Supplement: Contractor Performance of Acquisition Functions Closely Associated With Inherently Governmental Functions, 70 Fed. Reg. 14572 (Mar. 23, 2005)

Dear Ms. Schulze:

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 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.[1]

Background

Section 804 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 ("Section 804"), places limitations on the award of contracts for the performance of acquisition functions closely associated with inherently governmental functions, as defined in subpart 7.5 of part 7 of the Federal Acquisition Regulation. Section 804 states, in part, that the head of an agency may enter into such contracts only if the contracting officer for the contract ensures that:

> appropriate military or civilian personnel of the Department of Defense
>
> (1) cannot reasonably be made available to perform the functions;
>
> (2) will supervise contractor performance; and
>
> (3) will perform all inherently governmental functions associated with the contracted functions.

To implement the statute, on March 23, 2005, the Department of Defense ("DOD") issued an interim rule at 70 Fed. Reg. 14572. The interim rule amends the Defense Federal Acquisition Regulation Supplement ("DFARS") by adding subpart 207.5 and tracks the language of the statute almost identically. The agency stated that the "objective of the rule is to ensure proper management and oversight of contracts for functions that generally are not considered to be inherently governmental, but may approach being in that category because of the nature of the function, the manner in which the contractor performs the contract, or the manner in which the Government administers contractor performance." *Id.* at 14573.

Comments

The Section submits these comments to assist DOD in the formulation of a final rule that will place limits on the award of contracts for the performance of

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[1] This letter is available in pdf format at http://www.abanet.org/contract/federal/regscomm/home.html under the topic "Privatization and Competitive Sourcing."

acquisition functions closely associated with inherently governmental functions, as required by Section 804 of the FY 2005 Authorization Act. The Section's comments suggest further guidance concerning the circumstances under which contracting officer may make a determination that appropriate DOD personnel cannot be made available. Without clarification, the point at which the DOD is authorized to contract for acquisition services remains somewhat vague.

As noted above, the interim rule states that the head of an agency may enter into these aforementioned contracts only if:

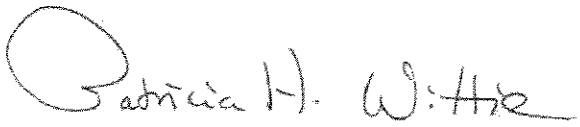
> (i) The contracting officer determines that appropriate military or civilian DoD personnel –
> (A) *Cannot reasonably be made available to perform the functions*;
> (B) Will supervise contractor performance of the contract; and
> (C) Will perform all inherently governmental functions associated with the functions to be performed under the contract . . .

70 Fed. Reg. at 14573 (emphasis added).

Neither the statute nor the interim rule defines the phrase "cannot reasonably be made available." The Section supports giving discretion to the contracting officer to make these determinations, as well as the use of a "reasonableness" standard. Nevertheless, given the importance of this issue, it would be beneficial for both the DOD contracting officer who must make these determinations, and for potential contracting parties, for DOD to provide some additional guidance in this rule as to what types of considerations should be included in any contracting officer determination that appropriate military or civilian personnel cannot reasonably be made available to perform the functions.

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

Sincerely,



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