



January 19, 2009

General Services Administration
Regulatory Secretariat (VPR)
ATTN: Laurieann Duarte
1800 F Street NW, Room 4041
Washington, DC 20405

**VIA FEDERAL EXPRESS,
ELECTRONIC MAIL AND
FAX**

RE: *FAR Case 2008-019
Comment on Proposed Amendments to Federal Acquisition Regulations
Our File: 1019-00*

Dear Sir or Madam:

These written comments are submitted by the Association of Service and Computer Dealers International (“ASCDI”) and the North-American Association of Telecommunication Dealers (“NATD”) in accordance with the notice of proposed rules published in the Federal Register, Vol. 73, No. 223, on November 18, 2008, by the Department of Defense (“DoD”), the General Services Administration (“GSA”), and the National Aeronautics and Space Administration (“NASA”). These comments are being provided at the request of the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the “Councils”).

Mr. Joseph Marion and Mr. Robert Boyle, Executive Director and Legal Counsel respectively, of ASCDI and NATD, appeared before the Councils and made a presentation at the public meeting held to discuss this case on December 11, 2008, at NASA headquarters in Washington, DC. ASCDI and NATD have enclosed with this letter a copy of said presentation and hereby request that the presentation be included as a part of the comments from ASCDI and NATD.

INTRODUCTORY SUMMARY:

Agencies’ Purpose in Proposing Revisions to the Federal Acquisition Regulations (“FAR”) for Information Technology (“IT”) Products

The federal government, by and through these agencies, is concerned that counterfeit IT products, parts and sub-assemblies, are infiltrating its IT systems.

Proposed Solution

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Amend existing procurement regulations to require all contractors selling IT products to the federal government:

- Be the original equipment manufacturer or original software developer (OEM), or to be an OEM-authorized distributor or reseller; and
- Represent that IT products, parts and sub-assemblies sold and to be sold to the federal government be authentic (that is, not counterfeit).

COMMENTS FROM ASCDI AND NATD:

ASCDI is a nonprofit trade association founded in 1981 in the United States; its members buy, sell, lease and maintain new and used technology business solutions to governmental subdivisions and businesses throughout the world. Members consist of OEMs, OEM-authorized and independent companies.

NATD is a nonprofit trade association founded in 1985 in the United States; its members buy, sell, lease and maintain new and used telecommunications products and solutions to governmental subdivisions and businesses throughout the world. Members consist of OEMs, OEM-authorized and independent companies.

1. ASCDI and NATD agree with the government that:
 - a. Counterfeit products, and components of products, should be eliminated from the marketplace and must be replaced with authentic products when discovered. Indeed, the membership of ASCDI and NATD includes OEMs and secondary market dealers who have joined together to create ethical rules and cooperate with law enforcement to eliminate the flow of counterfeit IT products into the supply chain.
 - b. All contractors supplying IT products to the federal government, including OEMs, OEM-authorized distributors and resellers, and secondary market dealers, should warrant that the products they sell, including all components, are authentic; and further that all contractors will immediately replace all counterfeit products, parts and sub-assemblies with authentic ones (See discussion at 2.b. below).

- c. All contractors supplying software to the federal government should be required to demonstrate that the software is licensed by the original software developer for use by the applicable federal agency.
2. ASCDI and NATD disagree with the proposed amendments as follows:
 - a. The proposed amendments require that ALL contractors for IT products must be either an OEM or an OEM-authorized distributor or reseller are too broad because:
 - i. OEM's and their authorized resellers are in business, for the most part, to sell new products, not to support legacy and discontinued products. The proposed amendments would prohibit federal government access to the secondary market which, in many cases, is the only source of products, parts, service and support for its vast installed base of legacy IT products; and
 - ii. Much of the federal government's installed base of IT products is OEM discontinued. OEM's and their authorized dealers provide limited or no service and support for OEM discontinued IT products. That portion of the federal government's installed base of IT products which consists of OEM discontinued hardware configurations and custom software will only operate with products and services available from the secondary market; and
 - iii. The secondary market sells used IT products at substantial reductions in price from new products or equivalent. The secondary market consists of an estimated 40,000 dealers who did \$187 billion worth of business in 2007; it employs more than 100,000 people; and it represents more than half of the entire market for IT products. The federal government represents approximately 15% of the total revenues of the secondary market and has been a substantial customer of the secondary market for decades. The proposed amendments would deprive the federal government of a major source of supply and of the cost savings derived from purchasing goods and services through the secondary market for IT products; and
 - iv. The proposed amendments would deprive hundreds of legitimate businesses comprising the secondary market for IT products from participating in sales to the federal government; and

- v. The impact of the proposed amendments will significantly reduce the residual value of all IT products, including those owned or leased by the federal government, by removing from the marketplace a very large buyer of these products, namely, the federal government.
- b. The requirement that all contractors must represent that their products are authentic is legally inappropriate because:
 - i. “Warranty” is the Uniform Commercial Code method for defining a sellers’ duty when a product fails to meet product specifications;
 - ii. Breach of a product warranty is not a breach of contract, rather it triggers (1) the buyer’s no-fault right to a remedy in the event of a breach of warranty; and (2) the seller’s repair/replacement obligation;
 - iii. Breach of a representation is considered a breach of contract which leads to contract termination; and
 - iv. In the event an IT product, part or sub-assembly is determined to be counterfeit, the proper remedy is replacement at no charge.

3. Recommendations by ASCDI and NATD

- a. All bids on IT products must include a provision wherein contractors provide the warranty referred to in the previous section.
- b. All contractors, including OEMs, OEM-authorized distributors and resellers, and secondary market dealers, bidding on the sale of IT products, parts and sub-assemblies to the federal government should be required to submit with each bid a description of the process used by bidder to discover and prevent the introduction of counterfeit products, parts or sub-assemblies into its inventory and bill of materials shipped or to be shipped to the federal government in fulfillment of its contractual obligation. The quality of a contractor’s process to identify counterfeit products should be one of the factors used by the federal government to evaluate bids.

[ASCDI and NATD hereby offer to assist the regulators in developing a ‘model’ process that would provide adequate assurances to the agencies that a contractor has taken all reasonable steps to reduce the likelihood of its IT products being counterfeit or including counterfeit parts.]

- c. Except as modified above, ASCDI and NATD believe the existing regulatory framework for the procurement of goods and services used by the federal government is adequate to protect against the introduction of counterfeit products, repair parts and sub-assemblies into its IT systems. Current regulations also allow sole sourcing and 'only buying new' where an agency of the federal government believes that its specific use of IT products is so critical as to justify such limitations.

REQUESTS BY ASCDI AND NATD:

1. As the process for amending the regulations goes forward, ASCDI and NATD hereby request that its representatives be kept advised of all iterations of future drafts and be given reasonable opportunity to comment on and suggest modifications to any such drafts; and
2. Representatives of the agencies responsible for finalizing these amendments should feel free to consult with and/or otherwise make use of the expertise of ASCDI and NATD acquired over the past 25 years about the secondary market and about best business practices for secondary market dealers and their customers.

Respectfully submitted,



Joseph Marion, Executive Director

Association of Service and Computer Dealers International, and
North-American Association of Telecommunications Dealers

JM/gg

Enclosure