November 13, 2015

Defense Acquisition Regulations System
Attn: Mr. Mark Gomersall
OUSD (AT&L) DPAP/DARS, Room 3B855
3060 Defense Pentagon
Washington, DC 20301-3060

Subject: DFARS Case 2013-D034 Evaluating Fair and Reasonableness for Commercial Items

Dear Mr. Gomersall:

Thank you for the opportunity to provide comments on the proposed rule amending the Defense Federal Acquisition Regulation Supplement ("DFARS") to implement Section 831 of the National Defense Authorization Act ("NDAA") for FY2013, specifically, the requirement to issue guidance on use of the authority to require the submission of other than cost or pricing data.

The Coalition for Government Procurement ("the Coalition") is a non-profit association of firms selling commercial services and products to the Federal Government. Our members collectively account for a significant percentage of the sales generated through General Services Administration ("GSA") contracts including the Multiple Award Schedules program. Coalition members are also responsible for many of the commercial item solutions purchased annually by the Federal Government. Coalition members include small, medium, and large business concerns. The Coalition is proud to have worked with Government officials for more than 35 years towards the mutual goal of common sense acquisition.

Considering the inconsistencies of the proposed rule with the Federal Acquisition Streamlining Act ("FASA") and provisions in S. 1356, the National Defense Authorization Act for FY2016 (the amended version of H.R. 1735 in response to the President's veto of the latter, and which passed the House and Senate and is anticipated to be signed into law shortly), the Coalition recommends that the Defense Acquisition Regulations (DAR) Council withdraw the current proposal in order to ensure that any modifications to commercial item acquisition policies proffered by the Department of Defense (DoD) align with the law and are consistent with Congress' intent. We are very concerned that as proposed, the rule would have far reaching negative implications for the Defense procurement system.

I. Proposed rule is Inconsistent with the Federal Acquisition Streamlining Act

The proposed rule should be withdrawn because it is inconsistent with existing law governing the acquisition of commercial items, the Federal Acquisition Streamlining Act of 1994 (FASA). Specifically, the proposed rule includes a new term, "Market-based pricing," to be used as the standard for determining whether additional price or cost data may be requested for commercial items. Under the proposed rule, Market-based pricing:

> *…means pricing that results when nongovernmental buyers drive the price in a commercial marketplace. When nongovernmental buyers in a commercial marketplace account for a preponderance (50 percent or more) of sales volume of a particular item, there is a strong likelihood the pricing is market-based pricing.*

This definition, as well as other language in the rule, effectively amends the underlying statutory definition of "commercial item" by eliminating language relating to "offered for sale" and "of a type." It should be recalled that Congress rejected these changes in 2012 because they were inconsistent with FASA and Congress' overall intent for the Government to have access to, and benefit from, commercially available products and services. The proposed *market-based pricing* definition also appears to use as an analog for price analysis the government-nongovernment distinction used in defining a commercial item. This government-nongovernment distinction addresses the features, use, and ubiquity that may distinguish an item's commercial character. Pricing in the commercial market, however, is driven by the forces of supply and demand, and, all things being equal, those forces operate in a manner that is customer agnostic.

Further, by directly contradicting the explicit intent of Congress, the proposed *market-based pricing* definition calling for the implementation of a "percentage of sales" test strikes at the foundational purpose for modern acquisition reform. In enacting FASA, Congress clearly asserted that the application of a "percentage of sales test," which utilized a comparison of a company's public and government sales for a particular item, invariably leads to unequal treatment of companies. For this reason, the conferees stated their intent that, "the 'percentage of sales' test no longer be used."[1] More to the point, however, the legislative history to FASA is replete with references to Congress' intent to "facilitate the acquisition of commercial products."[2] For instance, the Senate, referencing the report of the Section 800 Advisory Panel, recognized that the "report called for a comprehensive overhaul of the federal procurement laws that would improve government access to commercial technologies."[3] It noted that the provisions of FASA would encourage the use of commercial items by making their purchase easier than under the process that existed previously. Congress' rationale was rooted in the benefits associated with purchasing such items, specifically that they "can eliminate the need for research and development, minimize acquisition lead

[1] H.R. Conf. Rpt. 103-712, at http://federalconstruction.wp.lexblogs.com/wp-content/uploads/sites/344/2006/12/1994_USCCAN_2607.pdf
[2] S. REP. 103-258, 1994 U.S.C.C.A.N. 2561 at 2562.
[3] *Id.*

time, and reduce the need for detailed design specifications or expensive product testing."[4] The proposed definition, then, is a retrograde step because it imposes of an artificial market impediment to the very items commercial items Congress sought to make available to the Government.

II. Negative Impacts on DoD Efforts to Attract Commercial Innovation

Over the past year, DoD emphasized the importance of gaining access to innovative commercial technologies as a strategic imperative. Reflecting this priority, *Better Buying Power 3.0 – Achieving Dominant Capabilities through Technical Excellence and Innovation (BBP 3.0)*, identified "removing barriers to commercial technology utilization" as key to accessing electronics, information technology, and related technologies available in the commercial market at much shorter development cycles than what is typically available for Defense military products. Further, Secretary of Defense Ashton Carter highlighted DoD's desire and need to gain access to the latest innovative technology. In a recent speech in California, Secretary Carter highlighted plans to partner with businesses to leverage commercially driven technology in areas critical to national defense like cybersecurity. BBP 3.0 creates a path for increasing access to these commercial technologies by emphasizing the need to eliminate barriers to the Defense market and outlining specific steps to make that happen.

The Coalition agrees that streamlining processes and reducing risks for commercial firms are fundamental to the Department's efforts to gain access to innovative, cutting edge technologies. Streamlining and risk reduction are achieved by eliminating, to the maximum extent practicable, government unique requirements that are inconsistent with the commercial practices that those firms encounter in the normal course of business. Unfortunately, rather than incentivizing innovative commercial companies to pursue the Defense market, the proposed rule increases barriers and risks for these firms.

The narrow definition of commercial item in the proposed rule would have negative implications for the procurement system, especially in connection with the acquisition of services, because of the complications associated with demonstrating that 50 percent or more of contractor sales for a particular service went to nongovernmental purchasers. Firms unable to meet this requirement will have the additional compliance burden of submitting certified (or uncertified) cost or pricing data inconsistent with standard commercial practices. For the Department, this additional burden risks reduced competition and access to innovative products, services, and solutions readily available in the commercial market.

In addition to its substantive narrowing of the commercial item definition, the proposed rule would further burden the relationship between prime and subcontractors, and, thus, limit access to innovation in the Federal market. Under the proposed rule, prime contractors would be required to:

[4] *Id.* at 2565-66.

> …obtain from subcontractors whatever information is necessary to support a determination of price reasonableness as described in FAR part 15 and DFARS part 215. It may include cost data to support a commerciality determination, cost realism analysis, should-cost review, or any other type of analysis addressed by FAR part 15 and DFARS art 215.

Because DoD's view that cost data down the supply chain is somehow relevant to whether a commercial market exists for a particular item, the proposed rule risks destabilizing established prime contractor-subcontractor relationships and disputes in an effort to support a subcontractor's commercial item assertion. Absent from the analysis here is the impact on subcontractors, especially small business subcontractors, and whether they have the processes and resources to meet this new burden. Noteworthy is the fact that these requirements would affect subcontractors at all tiers.

At a time when DoD has expressed a strong need to access technologies to achieve dominant capabilities through technical excellence and innovation, it is critical that acquisition policies support increased access to the commercial market.

III. In light of the pending NDAA's provisions addressing commercial item, the DoD should withdraw the rule.

The Coalition strongly recommends that, in light of its many inconsistencies with the pending FY2016 NDAA, DoD withdraw DFARS Case 2013-D034. Within the pending NDAA, at Subtitle E, there are a number of provisions pertaining to commercial items acquisitions. With significant reform imminent, the proposed rule appears to be administratively wasteful. Upon enactment, the new law itself will require implementation through regulations for commercial items.

Considering the inconsistencies of the proposed rule with FASA, the provisions drafted of the FY2016 NDAA, and in light of DoD's current efforts to improve access to innovation, the Coalition recommends that the DAR Council withdraw the current proposal. Further, the Coalition recommends that any possible modifications to commercial item acquisition policies by DoD are suspended until the DAR Council can be sure that they are in line with Congress' intent. We are very concerned that as proposed, the rule would have far reaching negative implications for the Defense procurement system, and thus, we stand ready to assist the Department in this matter.

Thank you for the opportunity to provide public comments in response to the proposed rule. If there are any questions, please contact me at (202) 331-0975 or rwaldron@thecgp.org.

Sincerely,

Roger Waldron
President