April 23, 2014

Mr. Michael Canales
Room 5E621
3060 Defense Pentagon
Washington, DC 20301–3060

Subject: [Docket No. DARS–2014–0012] Review of Statutory and Regulatory Requirements

Dear Mr. Canales:

The Coalition for Government Procurement (The Coalition) appreciates the opportunity to respond to the above referenced request for public comment regarding a review of statutes and regulations applicable to the Department of Defense (DOD) acquisitions.

The Coalition is a non-profit association of firms selling commercial services and products to the Federal Government. Our members collectively account for approximately 70% of the sales generated through the GSA Multiple Award Schedules (MAS) program and about half 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 over the past 30 years towards the mutual goal of common sense acquisition.

A review of the entire body of regulations applicable to DOD acquisitions is a daunting task in that it involves approximately 400 DFAR sections required by numerous statutory provisions. The Coalition believes, however, that such a review is important as clarifying and reducing the complexity of the regulatory system offers the possibility of improving outcomes and reducing costs for both government and industry. In order for the review to be successful we suggest that DOD use the initial public comments to identify sections of the DFAR that have the best opportunities for streamlining. DOD should then use a modular approach to generating proposals for change. The total project, as currently rolled out, is so large that it is difficult for even large organizations to process.

There are several areas of the DFAR which Coalition members believe offer opportunities for improvement. Specifically, we believe that complex and overly burdensome requirements prevent DOD from realizing the maximum benefits of commercial item contracting, use of multiple agency contracts, and use of the GSA Schedule. Consequently, we suggest revisions to DFAR parts 212, 217 and 208.

I. DFAR 212 Acquisition of Commercial Items

A. Overview

Effective commercial item contracting will foster savings, efficiency, competition, and innovation for Federal agencies and the American taxpayer.

B. Current State

Over the last decade, the proverbial pendulum has swung regarding policy, procedures and requirements imposed on commercial item contracting in Federal procurement. Specifically, in 1996 there were 17 provisions of law or executive order applicable or potentially applicable to commercial item contracts. By 2012, the number had grown to 51 provisions. In addition, the level of oversight and data reporting associated with commercial item contracting programs program have increased significantly.

Identifying and eliminating policies, procedures and requirements that are inconsistent with commercial practice is consistent with President Obama's Executive Order 13563—Improving Regulation and Regulatory Review and Executive Order 13610—Identifying and Reducing Regulatory Burdens. In sum, these executive orders provide direction to agencies to review and eliminate regulations where the costs outweigh the benefits.

The growing complexity of federal procurement has led to commercial firms managing risk by creating separate entities to deal with the federal government. This is inefficient and counter to the government's efforts to reduce transactional costs across the procurement system. Putting "commercial" back in commercial item contracting will reduce risks and increase efficiency for all.

C. Recommendations

DOD should examine the DFAR and implementing policy guideline to eliminate approval, reporting and documentation requirements that are not critical to effective operations. For example, DOD has a policy of requiring labor hour reporting for all service contracts. However, this fails to recognize the distinction between service contracts for repair and maintenance of

commercial items (i.e. services not subject to the Service Contract Act and treated, for all other purposes under the FAR, as Costs of Goods Sold (COGS)) and those that are traditional services. This lack of distinction causes COGs manufacturers of capital equipment to unduly develop new systems to track this information exclusively for DOD purchasers or consider no longer servicing the DOD purchaser.

II. Interagency contracting – FAR Part 17 and DFAR 217.5

A. Overview

Simplifying the guidance and procedures required to conduct interagency acquisitions has the potential to deliver the dual benefits of achieving costs savings for the Department *and* reducing contract duplication.

B. Current State

Today, the path for DOD contracting officials to conduct an interagency acquisition is an arduous one. Regulations in the FAR and DFARS require contracting officers to comply with a myriad of complex documentation and approval processes before they can achieve the efficiencies and cost savings that the Federal Supply Schedules, GWACs and MACs were put in place to deliver. The need for the acquisition workforce to conduct best procurement approach determinations, determination and findings reports for Economy Act purchases, and evaluations proving that non-DOD contracts are "in the best interest of DOD" all serve as disincentives to pursuing interagency acquisition within the Department and achieving the associated cost savings.

These hurdles create the unintended consequence of encouraging contracting officers to pursue open market procurements. The result is the proliferation of duplicative contracts across DOD that offer the same or similar services and products. These duplicative contracts increase government and contractor administrative, bid and proposal costs without added value for the American taxpayer. Overlapping, redundant contracts also have to be managed by both government and industry in the long term causing inefficiencies in the Department and in companies for the life of these contracts. Current examples are the SPAWAR Pillars portfolio, NOAA Pro-Tech IT SBSA, and the Pax River PASS contracts. While the specific costs involved in developing and managing these contracts are not easily tracked, the costs are known to be real.

C. Recommendations

This issue is best addressed by changes to the FAR, DFAR and implementing guidelines.

1. FAR

a. FAR 17.502-1— Best Procurement Approach

i. The requirements in FAR 17.502 should be balanced so that the need to conduct a best procurement approach determination does not serve as a disincentive to using existing contracts.

ii. The FAR should be revised to also require best procurement approach determinations for open market procurements to ensure that it is a suitable method of conducting the acquisition and that it is cost effective for the taxpayer.

iii. The FAR language should encourage interagency acquisitions for efficiency purposes and to generate lower administrative costs. It should also include a preference for GSA Schedules, GWACs or MACs with broad competitive bases because of the ability to achieve low pricing and innovation through competition under these contracts.

iv. Executive agency designations and OFPP business case approvals should serve as the best procurement approach determination for orders under GWACs and MACs and require no further action by a contracting officer.

b. FAR 17.502-2— Economy Act

i. The government should maintain the distinction between the Economy Act authority, the authority of the Federal Property and Administrative Services Act and the Clinger-Cohen Act; and focus on improving the underlying procedures.

ii. FAR 17.502-2 should be revised to acknowledge that interagency contract vehicles that have been established and approved by OFPP provide administrative efficiencies and cost savings. Rather than requiring each interagency acquisition under the Economy Act to conduct a determination and findings (D&F), contracting officials should conduct a D&F when existing contracts are not being used.

C. FAR 17.7— Interagency Acquisitions: Acquisitions by Nondefense Agencies on Behalf of the Department of Defense

i. A more accessible and transparent list of agencies who have certified that they will comply with all applicable DOD procurement requirements should be maintained DOD contracting officials should be required to justify when they choose not to utilize existing interagency contracts within these agencies.

2. DFARS

A. DFARS 217.5—Interagency Acquisitions

i. See previous comments regarding best procurement approach.

B. DFARS 217.78—Contracts or Delivery Orders Issued by a Non-DOD Agency

i. Harmonize the requirements that DOD contracting officers have to follow to determine whether a non-DOD contract is "in the best interest of DOD" with the FAR's best procurement approach requirements to the greatest extent feasible. Contracting officials should not be required to conduct a best procurement approach or "in the best interest of DOD" evaluation for interagency contracts that have Executive agency designation and business case approval.

3. DPAP Acquisition Policy

A. Simplify the guidance on interagency contracting by updating, clarifying and reducing the number of memos posted on the DPAP website—the volume of policy guidance is overwhelming.

B. Issue guidance and provide templates to the acquisition workforce explaining how to conduct interagency contracting in accordance with the FAR and DFARS in plain language.

C. Make it clear that an Executive agency designation and OFPP business case approval meet the "best procurement approach" and "in the best interest of DOD" determinations for the Department.

D. Elevate use of the MAS program in the FAR Part 8.002 list of priorities

E. Eliminate any competing procedural or documentation requirements across the military departments—DPAP should establish sole guidance.

F. Commit to simplifying all interagency acquisition guidance and requirements.

G. There is power (and cost savings) in making interagency contracting easier for the acquisition workforce.

III. DFAR 208.4 Ordering from Federal Supply Schedules

A. Overview

This section should be modified to strengthen pricing procedures and streamline processes to assure DOD gets the intended benefits of the GSA Schedules program.

B. Current State

On March 13, 2014, Defense Procurement and Acquisition Policy (DPAP) issued a class deviation "clarifying" (i.e. establishing) that DOD ordering activities are responsible for determining prices fair and reasonable for Blanket Purchase Agreements (BPAs), task orders and delivery orders issued under GSA's Multiple Award Schedule program. This deviation has generated significant discussion, analysis and debate in the procurement community regarding the balance between procedures and outcomes when using the GSA's Schedules streamlined ordering processes. The language of the deviation is as follows:

> *Supplies offered on the schedule are listed at fixed prices. Services offered on the schedule are priced either at hourly rates, or at a fixed price for the performance of a specific task (e.g. installation, maintenance, and repair). GSA has determined the prices of supplies and fixed-price services, and rates for services offered at hourly rates, to be fair and reasonable for the purpose of establishing the schedule contract. GSA's determination does not relieve the ordering activity contracting officer from the responsibility of making a determination of fair and reasonable pricing for individual orders, BPAs, and orders under BPAs, using the proposal analysis techniques at 15.404-1. The complexity and circumstances of each acquisition should determine the level of detail of the analysis required.*

The impetus behind the DPAP deviation is a growing concern that when using the GSA Schedules program, DOD contracting officers are not doing any analysis of proposed prices at the BPA and task order level. Specifically, DPAP is concerned that rather than doing any analysis DOD contracting officers are merely relying on the language in FAR 8.4 (the regulations governing the GSA Schedules program) that states GSA has already determined Schedule prices fair and reasonable and, therefore, ordering activities are not required to make a separate determination of fair and reasonable pricing. See FAR 8.404(d). In essence, the concern is that the FAR 8.4 language promotes a lack of due diligence on the part of DOD contacting officers in evaluating task order and BPA pricing under the GSA schedules program. It should be noted that FAR 8.4 actually includes additional price analysis requirements for orders and BPAs requiring a statement of work.

DPAP's concern is understandable. Some due diligence by the contracting officer is appropriate to ensure that the government is getting a fair deal at the task order level under multiple award contracts, including the GSA Schedules. At the same time, a balance should be struck recognizing that one of the important benefits of multiple award contracts is the streamlined task order competition process—a process mandated by statute and regulation. Currently that balance has not been struck. Our members report that some DOD Contracting Officers are asking for cost data (and in some cases Cost and Pricing Data Certifications as well) on schedule orders. Such requests are not appropriate or helpful for commercial items and add significant cost to contractors which will ultimately be passed on to the government.

Importantly, the deviation establishes an approach that is inconsistent with the treatment of orders under multiple award contracts. A review and comparison of FAR 16.505(b) (3) and FAR 8.404(d) reveals guidance that is essentially the same regarding the determination of fair and reasonable pricing at the order level. In both cases, the regulatory guidance informs contracting officers that if the prices are established at the contract level, the pricing policies and procedures of FAR 15.4 do not apply. FAR 8.404(d) states that since GSA has determined contract prices for supplies and service fair and reasonable; the ordering activity does not have to do a separate determination of fair and reasonable pricing at the order level. FAR 16.505(b)(3) states that "[i]f the contract

> ***did not***
> establish the price for the supply or service, the contracting officer
> ***must***
> establish prices for each order using the policies and methods in subpart 15.4."
> [Emphasis added.]

As such, FAR 16.505(b)(3) also makes clear that if the prices **have been** established at the contract level under a multiple award contract, then the contracting officer **does not** have to make a fair and reasonable price determination pursuant to FAR 15.4.

C. Recommendations

1. Add language to clarify that prior to the award of task and delivery orders place under all IDIQ contracts (including those placed against the GSA Multiple Award schedule) contracting officials must exercise due diligence to ensure that the government is getting a fair deal given the particular circumstances of the order.

2. Add language to clarify that the formal price negotiation methods of FAR 15.4 are not required or encouraged. Requests for certified cost and pricing data are not authorized.

Conclusion

Addressing the recommendations in Sections I, II and III above would improve the efficiency of the acquisition process and reduce costs for the Department of Defense and the American taxpayer. Thank you for the opportunity to provide comments.

Sincerely,

Roger Waldron, President