November 10, 2016

Defense Acquisition Regulations System
Attn: Mr. Mark Gomersall
OUSD (AT&L) DPAP/DARS
3060 Defense Pentagon Room 3B941
Washington, DC 20301-3060

Subject: DFARS Case 2016-D006

Dear Mr. Gomersall,

Thank you for the opportunity to provide comments in response to the Department of Defense's ("DoD") proposed rule *Defense Federal Acquisition Regulation Supplement: Procurement of Commercial Items*.

The Coalition for Government Procurement (the "Coalition") is a non-profit association of firms selling commercial services and products to the Federal Government, and is proud to have worked with Government officials for more than 35 years towards the mutual goal of common sense acquisition. Our members, which include small, medium, and large business concerns, 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 that the Federal Government purchases annually.

The Coalition supports DoD's commitment to removing barriers for nontraditional defense suppliers and to promoting uniformity in the acquisition process, and believes that the proposed rule reflects significant progress over its predecessor in connection with achieving common sense procurement policy for commercial items. Accordingly, the Coalition's recommendations (outlined below) focus on modifying the proposed rule to ensure that it accords with existing statutes and regulations.

For the final rule, the Coalition recommends that DoD:

1. *Separately determine commerciality from the evaluation of price reasonableness.*
2. *Emphasize Contracting Officers' ("CO") obligation to conduct market research prior to soliciting information from offerors for purposes of determining the price reasonableness of commercial items.*

3. *Expand Contracting Officers' discretion under the proposed rule to allow for the consideration of non-DoD component determinations related to commerciality.*
4. *Recognize Federal Supply Schedule items as "commercial" for purposes of a commercial item determination.*
5. *Remove the catalog pricing provision at 252.215-70XX(b)(ii)(B)(2).*
6. *Amend the Pre-Award Audit Provision to Ensure Consistency with the Federal Acquisition Regulation (FAR).*

The Coalition believes that the adoption of these recommendations, each of which is discussed in more detail below, would streamline commercial item procurements and ensure consistency with existing law and regulation.

DETAILED COMMENTS

Proposed 252.215-70XX Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data

1. Separately Determine Commerciality and Price Reasonableness

Throughout the proposed rule, the commercial item exception is linked to providing information that is adequate for evaluating the price reasonableness of that item. *See e.g.*, DFARS 252.215-70xx(b)(1)(ii) (referring to "information that is adequate for evaluating the reasonableness of the price for this acquisition…"). Whether an item is commercial and whether its price is reasonable, however, are two separate inquiries, which should be determined independently. *See* 10 U.S.C. § 2376(1) (referencing the definition of commercial item, which, in turn, cross-references Title 41, section 103 of which defines commercial item without linking it to price reasonableness). For this reason, and despite the fact that FAR 52.215-20 combines these two determinations, the Coalition recommends that the DAR Council differentiate between such determinations so that, for example, the commercial item exception to submitting certified cost and pricing data is solely based on whether a product or service falls within the definition of commercial item. Factors that the DAR Council may consider in determining commerciality include sales volumes, customers, and the markets in which items are sold.

2. Emphasize that Contracting Officers Must Conduct Market Research Prior to Soliciting Information from Offerors for Purposes of Price Reasonableness Determinations of Commercial Items

One of the purposes of the rule is to improve the process of determining price reasonableness in commercial item acquisitions. The Coalition strongly advocates the use of commercial item contracts as a way of providing high quality, innovative products and services to the federal government, using streamlined processes. We believe that the government shares industry's desires to leverage the benefits of commercial contracting. In this regard, we applaud the addition of proposed DFARS section 239.101 stating a preference for commercial products and services when acquiring information technology. The Coalition, however, is concerned that this proposed rule potentially increases the

burden to industry partners by permitting contracting officers to request volumes of transactional data to support determinations of price reasonableness, and, thus may miss a significant opportunity to streamline the process for acquiring commercial items. Specifically, proposed section 215.404-1 details three levels of increasingly expansive data that contracting officers can request from offerors to support determinations of price reasonableness, which, in turn, imposes a potentially significant burden on industry to collect, maintain, and report data, an issue on which the Coalition frequently has commented.

At the same time, the proposed rule only briefly mentions a contracting officer's responsibility to obtain price reasonableness information using market research. Specifically, the rule contains only two references alluding to the fact that, prior to seeking information from an offeror, the contracting officer will conduct market research:

> If the contracting officer determines that the information obtained through market research is insufficient to determine the reasonableness of price, the contracting officer shall consider information submitted by the offeror….

DFARS 215.404-1(b)(ii); *see also* DFARS 212.209.

This statement reflects the policy of the current FAR 15.402 that contracting officers rely "first on data available within the Government; second, on data obtained from sources other than the offeror; and, if necessary, on data obtained from the offeror." 48 C.F.R. § 15.402. The prior version of this provision, FAR 15.802, was issued pursuant to the Federal Acquisition Streamlining Act ("FASA"). *See* 60 Fed. Reg. 2282, 2283 (Jan. 6, 1995) and 60 Fed. Reg. 48,208, 48,209 (Sept. 18, 1995) (explaining that "[a] hierarchical policy preference for the types of information to be used in assessing reasonableness of price is established[,]" "no additional information should be obtained from the contractor if there is adequate price competition[,]" and "[t]his is followed by progressively more intrusive types of data requirements.").

Accordingly, the Coalition urges DoD to revise proposed section 215.402 Pricing Policy to include a statement reiterating that contracting officers should conduct market research to determine price reasonableness *prior* to requesting any documentation from prospective contractors. Further, DoD should supplement proposed sections 212.209 and 215.404-1, or otherwise provide additional guidance to contracting officers, regarding information sources and strategies that they should pursue prior to requesting data from offerors.

3. Allow Contracting Officers to Consider Civilian Agencies' Commercial Item Determinations

The proposed rule provides that a "Contracting officer may presume that a prior commercial item determination made by a military department, a defense agency, or another component of DoD shall serve as a determination for subsequent procurements of such an item." DFARS 252.215-70xx(b)(1)(ii)(A). The Coalition agrees with DoD's approach toward this presumption of commerciality

based on previous determinations, but we are concerned about the rule's failure to permit a Contracting Officer to accept prior civilian agency determinations of commerciality, which is at odds with one of the rule's stated principles. Specifically, the background of the proposed rule states that the rule "provides guidance to contracting officers to promote consistency and uniformity in the acquisition process." 81 Fed. Reg. 53101. Limiting the CO's discretion to only those previous determinations made by DoD components does not further this principle and represents a missed opportunity to streamline the procurement process and further reduce burden to both the offeror and contracting officer. Moreover, there is nothing in the definition of commercial item suggesting that the definition of commerciality is contingent upon the end user. *See* 41 U.S.C. § 103. Accordingly, the Coalition recommends that DoD revise the proposed rule, broadening CO discretion to accept prior determinations made by civilian agencies.

4. Recognize Federal Supply Schedule (FSS) Items as Commercial

The proposed rule also requires that, for items included on an active Federal Supply Service (FSS) Multiple Award Schedule, offerors provide proof that a commercial item exception has been granted. *See* DFARS 252.215-70xx(b)(1)(ii)(D). Such a requirement fails to recognize the fact that GSA Contracting Officers already have determined that FSS products and services are commercial items.[1] For this reason, the Coalition recommends that the DAR Council revise paragraph (D) of proposed section 252.215-70xx to state that providing a GSA Schedule contract number shall be sufficient proof to establish that a commercial item exception has been granted.

5. Remove or Revise the Catalog Pricing Section

The proposed rule, specifically DFARS 252.215-70XX(b)(1)(ii)(B)(2), would require offerors requesting a commercial item exception for items priced via catalog to submit one of the following statements:

> (i) "The catalog pricing provided with this proposal is consistent with all relevant sales data (including any related discounts, refunds, rebates, offsets or other adjustments). Relevant sales data shall be made available upon request of the Contracting Officer."; or
>
> (ii) "The catalog pricing provided with this proposal is not consistent with all relevant sales data, due to the following: [Insert a detailed description of differences or inconsistencies between or among the relevant sales data, the proposed price, and the catalog price (including any related discounts, refunds, rebates, offsets, or other adjustments)]."

This section of the proposed rule is problematic for at least three reasons. First, the language of the proposed rule does not comport with the analogous FAR provision, which does not mandate the submission of any certain type of information or require either of the aforementioned statements. *See* 48 C.F.R. § 52.215-20(a)(1)(ii)(A). Second, the representations use terms, which raise significant questions that would need to be addressed before submitting either statement to DoD, *e.g.,* guidance as to the scope of "catalog pricing" and "all relevant sales data." Finally, neither the FY 2013 NDAA nor the

[1] *See CGI Fed Inc. v. United States*, 779 F.3d 1346, 1353 (Fed. Cir. 2015).

FY 2016 NDAA require that offerors represent whether catalog pricing is consistent with relevant sales data. Therefore, the Coalition recommends that DAR Council remove this provision in the final rule.

6. Amend the Pre-Award Audit Provision to Comport with Existing FAR Provisions

The proposed rule, like the FAR, provides a Contracting Officer the "right to examine, at any time before award, books, records, documents, or other directly pertinent records to verify any request for an exception…and to determine price reasonableness." DFARS 252.215-70xx(b)(2). Unlike the FAR, however, the proposed rule does not explicitly state that, "[f]or items priced using catalog or market prices, or law or regulation," such "access does not extend to cost or profit information or other data relevant solely to the offeror's determination of the prices to be offered in the catalog or marketplace." 48 C.F.R. § 52.215-20(a)(2). In effect, this omission, which neither the FY 2013 NDAA nor the FY 2016 NDAA requires, broadens DoD's access to cost or profit information without any explanation. As such, the Coalition recommends that DoD amend DFARS 252.215-70XX(b)(2) in the final rule to be consistent with the FAR.

In sum, the Coalition believes that the proposed rule significantly improves upon its predecessor. The Coalition, however, also believes that additional modifications are necessary to ensure that the rule is consistent with the relevant legislative history, FASA and the FAR, thereby promoting consistency and uniformity in the acquisition process.

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