



November 2, 2016

The Honorable Orrin Hatch
Chairman
Committee on Finance
United States Senate
Washington, DC 20510

Dear Chairman Hatch,

The Coalition for Government Procurement (“the Coalition”) sincerely appreciates the opportunity to provide industry feedback concerning Federal agency use of commercial information technology (“IT”) solutions.

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 (“MAS”) 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.

The Coalition respectfully submits the following responses to the October 5, 2016 request to the IT community regarding the procurement of commercial products to modernize Federal IT systems. At the outset, before addressing the questions you have provided, you may wish to consider the body of work created by GAO and the then-Senate Governmental Affairs Committee in the early 1990s on the subject of Tax Systems Modernization. This material spans the years preceding and following major acquisition reform initiatives, like the Federal Acquisition Streamlining Act (FASA) and the Clinger-Cohen Act, which promoted reliance on commercial

items and practices, and flexibility and discretion for the agencies to manage their programs. This material may help guide oversight by identifying distinctions between systemic problems and management problems.

Along these lines, from the Coalition's perspective, many of the questions you have identified could be addressed with an oversight review by Government Accountability Office (GAO), as vendors may not have complete visibility into the totality of agency actions, and thus, may be able to provide, at best, an incomplete picture of what is taking place. Thus, what appears below should be read from the standpoint of issues that should be considered in connection with subjects being raised in your questions.

Question 1: Federal Market Research and the Identification of Commercial Items

To improve the procurement of IT to modernize legacy systems, the Federal government should research how IT procurements are conducted in the commercial market and mirror these practices as much as practicable. The issue may not be that Federal agencies fail to conduct market research in accordance with FAR Part 10, or that they may not be identifying commercial items properly. Rather, the challenge, generally, is that the Federal government does not follow commercial best practices that can reduce costs for taxpayers and increase efficiency. Federal agencies regularly add unnecessary government-unique requirements when purchasing commercial IT, requirements that add costs or present barriers to market participation which, in turn, has the effect of limiting competition and access to innovation. This practice is counter to the intent of FASA. FASA requires that, to the maximum extent practicable, the agency head ensure that commercial items are procured to fulfill agency requirements, that requirements be modified so that they can be met by commercial items, that specifications be stated to enable offerors to supply commercial items, and that policies be revised to reduce the impediments to acquiring commercial items. See 41 U.S.C. 3077.

To realign current IT procurement practices with the clear language of existing statute, Federal agencies need to understand commercial best practices and adopt these practices as much as possible. The Coalition recommends that GAO assist agencies in this endeavor by conducting a study of current commercial best practices for the procurement of IT.

Question 2: Acquisitions that Exclude Proposals from Companies that offer Commercial IT

GSA's IT Schedule 70 is the largest Indefinite Delivery Indefinite Quantity (IDIQ) Multiple Award Schedule (MAS) contract in the Federal government, generating \$14.7 billion in sales in FY2015. Despite the success of IT Schedule 70, however, it has become less attractive to commercial IT companies over the past year due to the addition of terms and conditions that are inconsistent with standard commercial practice. Two recent changes to the IT Schedule 70 program that are especially problematic are the Commercial Supplier Agreement (CSA) deviation and transactional data reporting. (See the attached August 1, 2016 Coalition Comments on the proposed CSA deviation.)

The CSA deviation was designed to address commercial terms that are inconsistent with Federal law. Unfortunately, this deviation went far beyond this original intent by lowering commercial terms in the "Order of Precedence" clause for interpretation purposes. Now, notwithstanding the requirements of FASA, in the case of a conflict between any commercial term and a government-unique term, the government unique term controls. For IT companies, the rule applies to commercial software licenses, sale agreements, service level agreements, and any other commercial terms included as addenda to a commercial item contract. Although perhaps unintended, the unfortunate consequence of the CSA deviation is that it marks a fundamental shift away from commercial item contracting, creating significant risk for commercial firms that currently participate in the program and a barrier to entry for those seeking to enter the Federal market through IT Schedule 70.

The Coalition is also concerned about IT Schedule 70's adoption of Transactional Data Reporting (TDR), which would require contractors to report certain data elements, including prices paid, associated with every transaction, on a monthly basis. In a 2015 TDR survey, our members reported significant reporting burdens associated with TDR in terms of time and cost, with the total cost of TDR implementation estimated at nearly \$815 million (which, incidentally, was nearly 30 times GSA's estimate when it proposed TDR). Again, the TDR requirement is inconsistent with customary commercial practice, as required by FASA and the implementing rules applicable to commercial item procurements in Federal Acquisition Regulation (FAR) Part 12. For example, FAR 12.301(a)(2) requires that contracts for the acquisition of commercial items

“shall, to the maximum extent practicable, include those clauses...[d]etermined to be consistent with commercial practice.”

Question 3: FAR Clauses that if Utilized, could Increase Competition

Agencies appear not to be capitalizing on the authorities they have under FAR Part 12, which “implements the Federal Government’s preference for the acquisition of commercial items...by establishing acquisition policies more closely resembling those of the commercial marketplace and encouraging the acquisition of commercial items and components.”¹

Coalition members overwhelmingly report that in recent years, the proverbial pendulum has continued to swing away from commercial item contracting through increased government unique policies, procedures, requirements, and non-commercial terms. The inevitable effect, if not specific intent, has been to shift increased risk to the vendor, undermining a central premise of FAR Part 12, namely, allocating risk between the Government and the vendor consistent with commercial practice to promote “best value” competition. The above-referenced CSA class deviation and TDR are just two examples of this problem. There are countless others that, and their cumulative impact has been significantly increased risks and barriers for commercial companies in the Federal market, at a time when, ironically, the government is seeking to increase access to commercial innovation. Frequent and appropriate use of FAR Part 12 by agencies is essential to putting “commercial” back in commercial item contracting and increasing competition for Federal IT requirements.

Question 4: Barriers to Commercial Products in the Federal Market

See responses to Questions 1-3.

Question 5: Reform to Increase Access to Federal IT Contracts

In order to increase efficiency and reduce costs in Federal IT Modernization projects, the Coalition recommends the following:

1. Increased training for the acquisition workforce in commercial item contracting and application of FAR Part 12 procedures.

¹ See FAR 12.000

2. A GAO study of current best practices used in the commercial market for the procurement of IT that could be utilized by Federal agencies.
3. An extensive review of current acquisition regulations to identify and eliminate, to the degree practicable, those that create barriers to the Federal market for commercial IT companies.

The Coalition sincerely appreciates the opportunity to submit feedback in response to the questions concerning the Federal IT marketplace. If there is interest in additional details regarding the forgoing or any other matter, we would be happy to meet with and/or survey our members to provide more information. I may be reached at (202) 331-0975 or rwaldron@thecgp.org if there are any questions.

Sincerely

A handwritten signature in black ink, appearing to read 'Roger Waldron', with a long horizontal flourish extending to the right.

Roger Waldron
President