March 24, 2015

Denise Turner Roth
Administrator, General Services
1800 F Street, N.W.
Washington, D.C. 20004

Anne Rung
Administrator
Office of Federal Procurement Policy
Office of Management and Budget Tom Sharpe
Washington, DC 20006

Subject: FAR Part 12 and the Recent Court of Appeals for the Federal Circuit Decision, *CGI Federal Inc. v. US (March 10 2015)*

Dear Administrator Roth and Administrator Rung:

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 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 35 years towards the mutual goal of common sense acquisition.

Given the recent decision of the Court of Appeals for the Federal Circuit in the case, *CGI Federal Inc. v. US (March 10 2015)* ("the Court of Appeals decision" or "the decision"), the Coalition is interested in how your organization will address/implement the decision across the Federal enterprise. The Coalition believes the decision provides the government a significant opportunity to increase the efficiency and effectiveness of commercial item acquisition programs, particularly the GSA's Multiple Award Schedules (MAS) Program.

As you know, the Court of Appeals concluded that the FAR Part 12 prohibition against the use of terms that are inconsistent with customary commercial practice applies to orders placed against a GSA Schedule contract. As a result, the court found that noncommercial payment terms included in a MAS task order violated the FAR, and they were invalidated. In addition, the court held that "FAR Part 12's proscription against terms inconsistent with customary commercial practice applies to [solicitations issued pursuant to the Financial and Business Solutions Schedule] and therefore that the [solicitations] violate that proscription." Further, the court noted that FAR § 12.302(c)'s proscription against any "solicitations or contracts" including terms "inconsistent with customary commercial practice" applies to [RFQs issued pursuant to the

Financial and Business Solutions Schedule] because the RFQs are a "solicitation," and the resulting order is a "contract" as those terms are defined by FAR.

The case reaffirmed that FAR Part 12 was created to implement the Federal Acquisition Streamlining Act of 1994 (FASA), which requires that the Federal Acquisition Regulations ("FAR") include "a list of contract clauses to be included in contracts for the acquisition of commercial end items," and that the list, to "the maximum extent practicable . . . shall include only those contract clauses that are . . . determined to be consistent with standard commercial practice." Moreover, as noted by the Court of Appeals, the regulation precludes the inclusion of "any additional terms or conditions in a solicitation or contract for commercial items in a manner that is inconsistent with customary commercial practice for the item being acquired unless a waiver is approved in accordance with agency procedures." See FAR 12.12.302(c).

This decision is a powerful statement of support for returning the notion of "commercial" to "commercial item" contracting across the Federal enterprise. Focusing on commercial practices, terms, and conditions will increase government access to best value products, services, and solutions from the commercial market place. In particular, a reinvigorated commercial item contracting paradigm will increase competition and enhance access to innovative, cutting edge commercial technologies and solutions, both key Administration procurement goals.

GSA's MAS program is the largest commercial item contracting program in government. It accounts for over $35 billion in purchases annually, and it provides thousands of commercial firms, including thousands of small businesses, access to the federal market. The Court of Appeals decision should provide the Administration the impetus for a top-down review of MAS contracts to eliminate terms and conditions that are inconsistent with standard commercial practice. Such a review is consistent with the vision established in OFPP's December 4, 2014 memorandum to Chief Acquisition Officers and Senior Procurement Executives. The letter points to the need for agencies to continually review regulations, to ensure they remain relevant to today's buying environment. The memo stated … "[i]n particular, greater attention must be paid to regulations related to procurements of commercial products and services, as the Government is typically not a market driver in these cases and the burden of Government-unique practices and reporting requirements can be particularly problematic, especially for small businesses.

In closing, the Coalition is very interested in hearing GSA's and OFPP's plans for addressing the court's decision across government and within the MAS program. We stand ready to engage in a robust "Myth-Busters" dialogue to put the "commercial" back in "commercial item" contracting. In this regard, we look forward to inviting you to speak to our members about this important issue.

Sincerely,

Roger Waldron
President