By email to osd.dfars@mail.mil

Ms. Heather Kitchens
Senior Policy Analyst
Office of the Secretary of Defense
Department of Defense
Washington, DC 20301

Subject: Defense Federal Acquisition Regulation Supplement (DFARS): Disclosure of Information Regarding Foreign Obligations (DFARS Case 2018-D064)

Ms. Kitchens,

The Coalition for Government Procurement (Coalition) appreciates the opportunity to comment on the Department of Defense (DoD) proposed rule concerning the disclosure of information regarding foreign obligations.

By way of background, the Coalition is a non-profit association of firms selling commercial services and products to the Federal Government. Its members collectively account for a significant percentage of the sales generated through General Services Administration (GSA) contracts, including the Multiple Award Schedule (MAS) program. Coalition members also are responsible for many of the commercial item solutions purchased annually by the Federal Government. These members include small, medium, and large business concerns. The Coalition is proud to have collaborated with Government officials for 45 years in promoting the mutual goal of common-sense acquisition.

Coalition members have expressed feedback on the following areas:

Exclusion of Commercial Products

In its rulemaking, DoD has determined that the proposed clause should apply to commercial products, including Commercially Available Off-the-Shelf (COTS) products. This determination is contrary to congressional intent and the statutory language, which limits the scope to "non-commercial products." DoD's determination will impose a significant burden on commercial contractors and will disincentivize contractors to provide COTS products within the scope of the proposed rule (i.e., products and services that relate to information or operational technology, cybersecurity, industrial control systems, and weapons systems), limiting the products and services available to the DoD and decreasing competition. The Coalition recommends that DoD limit the rule to non-commercial products to ensure continued access to COTS products at a best value when available, consistent with clear congressional intent.

Disclosure Requirements

The proposed clause requires disclosure (1) if any foreign person or foreign government has reviewed the source code of any DoD implemented product or system, and (2) if DOD vendors are under any obligation to allow a foreign person or foreign government to review source code as a condition for entering a contract. Section 1655 of the National Defense Authorization Act (NDAA) of Fiscal Year 2019 references a foreign person only in the second clause covering an obligation to allow a foreign person or government to review code as a condition of entering into a contract. By adding the foreign person requirement to the first clause, DoD expands the rule beyond the statutory language. Additionally, "foreign person" is undefined by the DFARs clause or statute which means that any non-US person

including a firm's employee could be covered by the rule. The Coalition recommends that the DoD remove foreign person from the first clause and provide a definition of a "foreign person." Additionally, members have requested clarification on how firms should comply when these disclosures conflict with international privacy laws.

Clarification on Scope

Members have requested clarification on the definition for the phrase "information and operational technology." If the intent is to adopt the definition of information technology in Federal Acquisition Regulation (FAR) 2.101, the clause should do so explicitly. Additionally, as the term "operational technology" is unclear the Coalition requests that DoD provide a definition for the term. Members request clarification regarding the applicability of the clause to medical equipment, in part due to concerns that global health authority reviews could trigger the disclosure requirement. If that is the intent, this will create a significant burden for medical device companies to verify the entities that have reviewed their products. In addition, members have noted that the Defense Health Agency already requires a rigorous cybersecurity review to obtain an Authority to Operate for any medical equipment within DoD medical facilities. If applicable, these proposed requirements would require global medical companies to create processes to monitor the extent to which any foreign government or foreign person has reviewed the source code, creating a significant financial impact on these companies which would be passed on to the Federal government through higher prices.

Time Period for Disclosures

Members have expressed concern about the timeline of the rule. The rule requires disclosure dating to August 12, 2013. This date reflects the Section 1655 requirement for contractors to review and disclose beginning five years prior to enactment of the statute in 2019. Given the timeline of the implementation of the rule, the rule will require a review that extends back more than 10 years. To reflect the realities of the delayed promulgation of the rule, the Coalition recommends a disclosure date five years prior to the rule's effective date.

In addition, the Coalition recommends the clause make an allowance for best efforts regarding retrospective efforts following finalization of the rule. Firms that act in good faith should be shielded from potential liability under the False Claims Act.

The Coalition hopes you find these comments useful and thanks you for your time and consideration. Should you have any questions or concerns, I may be contacted at rwaldron@thecgp.org or 202-331-0975.

Sincerely,

Roger Waldron
President