



April 19, 2012

Honorable Howard "Buck" McKeon
Chairman

Honorable Adam Smith
Ranking Member

Committee on Armed Services
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman McKeon and Ranking Member Smith:

On behalf of the Professional Services Council (PSC), I am writing to strongly oppose a legislative provision recommended by the Department of Defense (DoD) that would revise the governmentwide definition of the term "commercial item" under the federal procurement statutes. DoD submitted this proposal to Congress on March 28, 2012 as part of its second package of legislative proposals.

Founded 40 years ago, PSC is the voice of the government professional and technical services industry. PSC's 350 member companies include small, medium, and large businesses that provide federal agencies with services of all kinds. Together, the trade association's members employ hundreds of thousands of Americans in all 50 states. Many PSC member companies provide commercial items to DoD and other federal agencies under the valuable flexibility provided in the current statutory framework for commercial items acquisitions. DoD's proposal, if adopted, would deny access to those products and services. From national and homeland security to health information technology and more, it will place at risk some of the government's most significant technology initiatives and curtail the government's access to some of the most transformative technologies in the market today, including cloud computing and tools for collecting and analyzing big data.

More than 18 years ago, through the enactment of the 1994 Federal Acquisition Streamlining Act (FASA), and reinforced by enactment of the 1996 Federal Acquisition Reform Act (FARA), Congress recognized the value of providing federal agencies with the tools to more efficiently purchase commercial items to meet their needs and, in so doing, expand the competitive marketplace serving the government. Prior to these changes, many, if not most, commercial companies refused to do business with the federal government because of its unique cost accounting and other requirements, many of which bear little similarity to the generally accepted standards under which the commercial sector operates. FARA and FASA enabled agencies to procure, and industry to provide, solutions to the government by recognizing that commercial items do not need to be defined in rigid terms, i.e. that commercial items could be considered such despite the fact that they require some modest modifications in order to meet the government's requirements and, as such, have not necessarily actually been sold in the commercial space. For example, as the government migrates to a cloud computing environment, it seeks to capitalize on world-class commercial capabilities in that arena. Yet the government also has certain unique needs, particularly in terms of security, that are not precisely

the same as those required by most consumers of cloud services. Under the current statutory construct, such services are properly considered “commercial” and the marketplace includes an array of providers. Under the proposed definitional change, such services would no longer be considered “commercial” and many providers would have little choice but to exit significant portions of the market. Thus, the definition of a commercial item is intentionally constructed to enable items to be offered that are "of a type" routinely made available in the commercial marketplace and that are "offered for sale" but not yet sold in the commercial marketplace. This regime has worked well for all federal agencies.

Despite the mythology proffered by some, the current statutory definition does not preclude DoD (or any other agency) from determining the best method for acquiring a qualified commercial item and does not preclude DoD (or any other agency) from making the appropriate determination about the "fair and reasonable pricing" of that item. In simple terms, the department is conflating two separate issues—the determination of what is a commercial item and the best means by which to procure and ensure fair pricing for those items or services. Regrettably, instead of addressing these two distinct issues directly, the department proposes to constrain the types of items or services that can be defined as being commercial. We strongly oppose such action and do not believe that a legislative change to the definition is necessary or appropriate.

In fact, on March 12, 2012, DoD published in the *Federal Register* a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to require higher level approval for commercial item determinations exceeding \$1 million when the determination is based on "of a type" or "offered for sale" language included in the definition of a "commercial item."¹ As the background information accompanying this DFARS notice highlights, this regulatory change was recommended by the DoD internal Panel on Contracting Integrity and included in its 2009 report to Congress concerning compliance with the DFARS documentation requirements for commercial item determinations. This added internal oversight has just been put into effect and we strongly recommend that the committee give this provision time to work to determine whether it addresses the department's concerns.

On April 5, 2012, DoD published another *Federal Register* notice proposing to amend the DFARS to simplify prescriptions for provisions and clauses that are applicable to the acquisition of commercial items and to specify the flow down of clauses to commercial items subcontracts. The rule identifies 58 government-unique clauses that are potentially applicable to DoD purchases of commercial items.² We are still developing our specific comments on this proposed rule although we believe in general that great care must be taken to not incrementally reinstitute the very government-unique requirements that for decades prevented the government from accessing the commercial sector. DoD's legislative proposal, in conjunction with the April 5 proposed rule, would risk proliferating the government-unique requirements that are imposed on commercial item suppliers, and thus, would be a significant barrier to expanding the opportunities for commercial item suppliers, including many small businesses.

Further, the DoD legislative proposal properly seeks to amend the governmentwide definition of a "commercial item" that is included in the codified Office of Federal Procurement Policy Act. This approach will have significant implications for all federal agencies when only DoD has raised concerns.

¹See DFARS Case 2011-D-D041 (March 12, 2012), available at <http://www.gpo.gov/fdsys/pkg/FR-2012-03-12/pdf/2012-5761.pdf>

²Available at: <http://www.gpo.gov/fdsys/pkg/FR-2012-04-05/pdf/2012-8053.pdf>

As such, in our view, the proposed amendment does not fall within the exclusive jurisdiction of the committee.

We urge the committee to exclude this provision from the fiscal year 2013 National Defense Authorization Act. If action is necessary, we recommend that the committee direct the department to address any regulatory or training gaps that may exist regarding the tools and techniques that are available to DoD contracting officers, including guidance and training on how to acquire such items and how to ensure that prices offered are "fair and reasonable." We would welcome the opportunity to work with the committee on the development of such alternatives. We have previously offered our support to the department to accomplish the same goals. We also encourage your committee to hold hearings on this radical legislative proposal and demand that DoD provide a more concrete justification, in lieu of its current, weak justification, for why this legislative change is needed.

Thank you for your attention to this important matter. If you have any questions or need any additional information, please do not hesitate to contact Alan Chvotkin, PSC's executive vice president and counsel, or me.

Sincerely,

A handwritten signature in black ink, appearing to read "Stan Soloway". The signature is stylized and cursive, with a large initial "S" and a long, sweeping underline.

Stan Soloway
President & CEO