



Acquisition Reform Working Group

2012 LEGISLATIVE RECOMMENDATIONS

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DETECTION AND AVOIDANCE OF COUNTERFEIT ELECTRONIC PARTS

ISSUE: Refinements to the framework established by Section 818 of the FY 2012 NDAA, Detection and Avoidance of Counterfeit Electronic Parts

ARWG believes that Section 818 includes many positive elements necessary for curbing the penetration of counterfeit electronic parts into the defense supply chain and supports the effort to address the challenge using a risk-based approach that incentivizes DoD contractors to erect counterfeit electronics parts detection and avoidance systems aimed at the root causes of counterfeit parts in the defense supply chain. However, refinements to the legislative language will help meet the goal of mitigating counterfeit parts from the supply chain, make it more practical for DoD and industry to implement, and further incentivize industry's detection and avoidance efforts. In light of budgetary constraints, it is reasonable to conclude that the effort to control the influx of counterfeit electronic parts should be designed to maximize compliance using the most cost effective means available, which currently relies on a policy of savings and efficiencies derived from combining the commercial and DOD supply chains. This is particularly important as the Department expands the anti-counterfeiting model beyond electronic parts.

DISCUSSION:

There has been much collaborative effort over the past several years by industry and professional associations and intra-governmental policy groups to understand the counterfeit parts problem and design effective solutions. Section 818 was a significant step in this process but as currently configured focuses on punitive solutions that could unintentionally undermine compliance efforts.

Section 818 instructs DoD to implement a risk-based approach to detection and avoidance of counterfeit parts, which industry has long recommended as a way to be able to encourage compliance and as a predictable way to bound the cost of those efforts to our government customers. However, Section 818 also requires contractors to establish policies that go beyond the supply chain management, quality assurance, contract remedies and warranty policies and provisions in force in the commercial and federal markets today and thus represents a significant shift.

ARWG believes that Section 818 misses an opportunity to attack the cause of counterfeiting at the lowest and most effective levels by discouraging those without detection and avoidance systems from establishing these systems as part of their business processes. This is especially true for small and non-traditional federal contractors, whose ability to provide for effective

detection and avoidance systems and police their supply chains is uncertain but whose participation in the federal market is vital to maintaining a robust defense industrial base and enhancing competition and innovation.

ARWG is also concerned about the absence of perspective for commercial item manufacturers and suppliers in both the statutory provisions and the regulatory implementation of Section 818. While we realize that the policy approach identified in Section 818 will foster a climate for a more secure DoD supply chain, it must also balance those goals with a global commercial parts sourcing model and ensure that DoD supply chain practices do not shift or deviate too far away from commercial practices or prices for all DoD acquired parts, subsystems and systems will increase accordingly. The following elements depict potential industrial base problems that are likely to result from a DoD-unique commercial parts sourcing model:

- The scope of the statute covers any item with electronic components, including all commercial, commodity-type, information technology items and is far broader than the Department or industry is prepared to manage.
- Because the statute delivers potentially overwhelming compliance requirements and resultant new risks further into the supply chain than ever before, commercial companies and small businesses may choose, or be forced, to forego the DoD market, thereby creating an adverse impact on the availability of innovative products and critical devices and components at commercial item prices by driving out sources of supply.
- Commercial manufacturers may be unable to require their part suppliers to comply with DoD requirements for counterfeit avoidance or at prices reflective of the commercial item pricing model or that distribute liability risk appropriately, especially for DOD-unique alterations in capabilities added by resellers or integrators.
- The statute does not acknowledge the engineering and manufacturing cycles for commercial items and does not allow sufficient time for companies to incorporate new measures to detect and avoid counterfeits to have any measurable impact.
- DoD frequently is a very small customer in the global footprint of many commercial item manufacturers and adopting DoD-unique requirements may be counterproductive to the ability to produce cost effective commercial products that other global consumers want or would be willing to acquire.
- Because commercial item manufacturers typically do not have complete visibility into the identity or activities of the end consumer of their products, they will be challenged to comply without modifying their entire business or manufacturing model or creating separate, costly production capabilities for DoD customers.

RECOMMENDATIONS:

In order to implement a risk-based approach, ARWG makes the following recommendations:

1. Enhance Industry Engagement During the Policy and Regulation Formulation:

ARWG believes it is imperative that in order to achieve a successful, executable strategy to detect and avoid counterfeits in the DoD supply chain, there must be early, persistent and robust dialogue with industry during the legislative implementation and regulatory development stages of this effort. Unfortunately, it was recently announced that the Department had developed and finalized the implementation policy and established a definition for counterfeit parts, with little or no engagement or dialogue with industry. Because of the significant potential for mis-steps that can lead to costly or cost-prohibitive implementation challenges or even policies that cannot be executed in a reasonable fashion, we would encourage the Armed Services Committees to communicate their preference for industry and government to dialogue and cooperate to achieve a successful outcome.

2. Changes to provide exception to strict liability under certain conditions:

Existing language regarding cost allowability conflicts with statutory intent set forth in Sec. 818(b)(2) to “implement a risk-based approach to minimize the impact of counterfeit electronic parts and suspect counterfeit electronic parts.” To ensure DoD’s ability to implement existing counterfeit mitigation policies and procedures effectively and to accurately target those introducing counterfeits into the supply chain, liability should be targeted at those who: (1) fail to implement avoidance and detections systems, (2) obtain counterfeit parts from an “untrusted” source without implementing additional detection strategies, or (3) fail to notify the government of counterfeits once they have knowledge.

We believe the Department already has a precedent for this approach in the current contract clause used by the Missile Defense Agency (MDA). Using this as a model for balancing DoD and industry interests, we recommend that Congress modify subsection (c)(2)(B) as follows:

(c)REGULATIONS.—

(2) **CONTRACTOR RESPONSIBILITIES.**— The revised regulations issued pursuant to paragraph (1) shall provide that –

(B) the cost of counterfeit electronic parts and suspect counterfeit electronic parts and the cost of rework or corrective action that may be required to remedy the use or inclusion of such parts are not allowable costs under Department contracts, ***unless***

(1) the contractor has a functioning internal operational system for the detection and avoidance of counterfeit parts as required in section 818(e), and

(2) the parts were:

(a) procured from trusted suppliers per subsection (c)(3) or

(b) procured from another source approved by the Department, with additional detection strategies performed per subsection (c)(3), or

(c) provided to the contractor as government property per Federal Acquisition Regulation Part 45, and

(3) the contractor provides timely notice to the Government per Section 818 (C)(4).

While we acknowledge that there are jurisdictional concerns, as a matter of consistency, we also recommend that a contractor meeting these same conditions not be subject to the penalties described in Section 818 (h), Trafficking in counterfeit goods or services.

3. Changes to recognize the role that parts obsolescence plays in the proliferation of counterfeit parts:

As defense systems are kept in use for many more years than commercial electronic systems, the continued demand for parts known to be obsolete is one scenario where DoD and its contractors can anticipate when it will be necessary to make non-OEM purchases unless obsolete parts are eliminated from electronic equipment designs.

To reduce the likelihood of having to purchase parts through higher-risk supply chains, defense electronics producers and their DoD customers recognize the need to proactively manage the life cycle of electronic products versus the life cycles of the parts used within them. However, DoD customers are often constrained in their ability to support and fund approaches to

eliminate the use of obsolete components, such as crafting integrated design changes or parts re-engineering.

Industry has previously provided some policy recommendations to DoD to address the challenge of obsolete parts early in the product life cycle. To dovetail with those prior proposals, reduce the risk that parts obsolescence will continue to cause increasing levels of counterfeit parts, and incentivize both the Department and their suppliers to craft effective remedies for obsolete parts, we recommend that DoD be given the flexibility to consider costs to remedy a counterfeit part escape allowable under specified conditions and that Congress add subsection (c)(2)(C) as follows:

(c)REGULATIONS.—

(2) **CONTRACTOR RESPONSIBILITIES.**— The revised regulations issued pursuant to paragraph (1) shall provide that –

(C) Obsolete Parts: the cost of counterfeit electronic parts and suspect counterfeit electronic parts and the cost of rework or corrective action that may be required to remedy the use or inclusion of such parts are not allowable costs under Department contracts, unless:

(1) The contractor's proposal in response to a DOD solicitation for maintenance, refurbishment or remanufacture work identifies obsolete electronic parts and includes a plan to assure trusted sources of supply for obsolete electronic parts, or to implement design modifications to eliminate obsolete electronic parts; and

(2) DoD elects not to fund design modifications to eliminate obsolete electronic parts; and

(3) The contractor applies inspections and tests intended to detect counterfeit electronic parts when purchasing electronic parts from other than the OEM or its authorized dealer;

4. Changes to DoD internal policy guidance on supplier exclusion:

It has been represented that some government organizations believe they are constrained in their ability to 1) apply a preference for procurement from OEMs or their authorized distributors and/or 2) apply counterfeiting countermeasures when procuring from independent

distributors. We are also aware of conflicting interpretations among government contracting officials and requirements generators on whether or not FAR Part 6 permits the government to exclude any offering party from competing to provide electronic parts, even though FAR Part 6 provides authority to acquire supplies and services using “other than full and open competition.” These interpretations persist despite the introduction of Section 818 and the establishment of a preference for trusted sources, including OEMs and authorized distributors. If FAR Part 6 is interpreted such that contracting officials feel constrained from excluding specific product offerors or offerings, DoD buying organizations will be encumbered in their ability to limit procurements to those parts suppliers best situated to combat counterfeit electronic parts in the DoD supply chain. While contractors are not wholly bound by competition rules in all their sub-tier supply chain transactions, we believe further DoD guidance would encourage contracting and requirements officials to consider exclusion when it is in the best interest of the Department. This is especially important for direct procurements by DoD and to the extent that government-furnished parts are incorporated into contractor systems.

To address this, we recommend that DoD examine existing competition authorities in FAR Part 6 and DFARS Part 206 and, as needed, provide reinforcing guidance clarifying their statutory authority to limit sources.

For that purpose, we recommend that Congress add conditional language to subsection (a) as follows:

(a) ASSESSMENT OF DEPARTMENT OF DEFENSE POLICIES AND SYSTEMS —

The Secretary of Defense shall conduct an assessment of Department of Defense acquisition policies and systems for the detection and avoidance of counterfeit electronic parts,

including examining procurement authorities to expressly permit the Department to:

- (1) limit competition for procurements of electronic components to original equipment manufacturers (OEMs) and their authorized dealers, notwithstanding the prospect of lower prices for those same purported components from other sources; and***
- (2) allow competition to include other suppliers only when electronic components are not available from OEMs, their authorized dealers or trusted suppliers;***
- (3) If the existing regulatory authority is deemed insufficient for the purposes above, Congress should propose clarifying technical amendments to the Competition in Contracting Act (CICA) at 10 USC 2304 to provide such authority.***

GOVERNMENT COMPETITION

As the federal government faces austere budgets for the foreseeable future it becomes increasingly important that Congress provide a framework that allows agencies to make sound decisions about how to manage a multi-sector workforce, i.e. a workforce comprised of both federal employees and contractors. In order to make strategic decisions, agencies must be provided with the flexibility and tools that facilitate sound sourcing decisions.

DISCUSSION:

In 2011, the Office of Management and Budget undertook an initiative to provide agencies with guidance on how it should manage a blended workforce. The initiative resulted in a September 12, 2011 final OMB policy memo titled “Performance of Inherently Governmental and Critical Functions.”¹ The policy memo lays the foundation for what work should be performed by government employees and what factors should be taken into consideration when contemplating the use of contractors. The policy memo states that cost is one such factor, and that contractor costs should be compared with the cost of performing functions in-house. However, the federal agencies currently lack a sufficient methodology or tools for making accurate comparisons between the public and private sectors. Additionally, the civilian agencies are governed by different standards from those governing Defense Department agencies with regard to how they should treat certain work when making sourcing decisions.

Specifically, separate DoD and civilian agency standards exist for how each sector is to handle “closely associated with inherently governmental functions.” Currently, both the civilian agencies and DoD are required to publish inventories of services contracts. Section 743(e) of the Fiscal Year 2010 Consolidated Appropriations Act (P.L. 111-117) requires civilian agencies to review the inventories and ensure that they are giving special management attention to functions that are closely associated with inherently governmental functions. However, Title 10 USC 2330a (e) (2) (C) requires military departments or defense agencies to review their inventories to ensure that “to the maximum extent practicable,” the activities on the list do not include any functions closely associated with inherently governmental functions.

Appropriately, both the civilian agency requirements and the 2011 OMB policy letter recognize the distinction between “inherently governmental” and “closely associated with inherently

¹ See “Performance of Inherently Governmental and Critical Functions,” September 12, 2011, <http://www.gpo.gov/fdsys/pkg/FR-2011-09-12/pdf/2011-23165.pdf>

governmental” functions and explicitly state that it is suitable for contractors to be performing functions that fall into the “closely associated” category as long as the agencies can effectively manage contractor performance of such functions. ARWG supports a universal, balanced approach to how federal departments and agencies address “closely associated with inherently governmental” functions and believes that the current civilian agency standard is a more appropriate standard than the current DoD approach.

ARWG also recognizes that, beyond insourcing decisions for inherently governmental functions, the cost of public versus private sector performance should be a factor in the sourcing decision. While the OMB policy memo adopts this approach, civilian agencies lack a cost comparison model to make these assessments. Historically, federal agencies had been able to rely on OMB Circular A-76 to conduct public-private competitions but Section 325 of the Fiscal Year 2010 National Defense Authorization Act (NDAA) placed a moratorium on A-76 competitions until DoD took a number of actions regarding the services contract inventories. To date, most of those requirements have been met. While the A-76 process is not perfect, it is a viable tool for agencies and has proven to result in government savings. Hence, ARWG recommends lifting the moratorium.

To conduct its cost comparisons, DoD relies on a framework contained in DoD Directive-Type Memorandum 09-007 (DTM). ARWG has serious concerns with the DTM based on its numerous shortcomings, which were highlighted in a Center for Strategic International Studies (CSIS) 2011 “DoD Workforce Cost Realism Assessment” report.² Although the DTM contains a number of elements that should be appropriately incorporated into any cost comparison, without addressing the shortcomings CSIS identified, the DTM would result in inaccurate results and therefore lead DoD to make sourcing decisions that may lead to long-term cost growth in lieu of desired savings. ARWG believes that incorporating the recommendations of the CSIS Cost Estimation Methodology, as outlined in its 2011 report, would result in more accurate cost comparisons, and therefore recommends that the DTM be amended to more closely resemble CSIS’ methodology.

RECOMMENDATIONS:

1. Amend Title 10 USC 2330a (e) (2) (C) to mirror the civilian agency standard—and the OMB policy letter on inherently government functions—so that DoD is required to ensure special management attention is being given to contractor performance of

² See “DoD Workforce Cost Realism Assessment,” May 17, 2011, <http://csis.org/publication/dod-workforce-cost-realism-assessment>

closely associated with inherently governmental functions. This change would provide DoD with greater flexibility in making its sourcing decisions with regard to such functions.

2. Amend Section 938 of the fiscal year 2012 NDAA to require DoD to fix the problems in Directive-Type Memorandum 09-007 as identified by CSIS.
3. Strike, or amend, Section 325 of the fiscal year 2010 NDAA so that DoD is permitted to use the OMB Circular A-76 public-private competition process.

ACCESS TO COMMERCIAL TECHNOLOGIES, PROCESSES AND PRODUCTS

Commercial item acquisition has been the preferred method of acquisition since 1994. Congress has for at least two decades recognized that government acquisition of commercial items helps to increase competition, reduce costs and provide the most effective approaches to supporting agency missions by increasing access to commercial products, technologies and processes. This enables the government to leverage the latest advances in technology at lower costs, particularly in markets in which the government is not a dominant market force. The proliferation of government-unique requirements imposed on companies interested in selling commercial products or services to the government undermines the public policy to maximize government commercial item acquisition.

DISCUSSION:

The importance of the government's ability to access the commercial marketplace for items and services is clear. The enactment of the Federal Acquisition Streamlining Act of 1994 (FASA), Federal Acquisition Reform Act of 1996 (FARA), and Services Acquisition Reform Act (SARA) of 2004 all underscore the importance of commercial item acquisition. This legislation helped transform the federal acquisition system from one based on acquiring government-unique products under detailed design or performance specifications and processes to one embodying a preference for the acquisition of existing, market proven commercial items, including services and technologies.

The Government Accountability Office (GAO) and other government and academic sources have issued several reports documenting the benefits of commercial item acquisitions. Those benefits include:

- Access to and more rapid deployment of state-of-the art technologies.
- Increased integration of the defense and commercial industrial bases to benefit the nation's security and economy.
- Lowering government research and development costs; leveraging state of the art technologies developed in the commercial marketplace; reducing economic risk associated with developing new government unique items.
- Increased competition.
- Availability of market prices for price analysis.
- Utilization of open industry standards.

Over the last decade, there has been an erosion of the government's ability to access the commercial marketplace because of the proliferation of government-unique requirements imposed by various legislative and regulatory changes that are often unrelated to the government's acquisition process. Government-unique requirements add administrative burden, costs and risks to the products and services offered to the government by commercial companies because commercial business models and supply chains are structured for standardized processes to achieve economic efficiency and rapid adaptation to market conditions.

The number of government-unique clauses that are required in a FAR Part 12 commercial item prime contract has grown from the original dozen to about 50 provisions (FAR 52.212-5) and another 40 or so clauses under DFARS, 252.212-7001. Similarly, the clauses required to be flowed down to commercial item subcontractors was very limited in 1995 but has continued to grow in the years since. ARWG has written about this several times in the past and Section 821 of the FY 2008 NDAA reflected this concern by tasking the Department of Defense (DoD) to develop an ongoing plan to minimize such unique provisions. However, despite this legislative mandate, the DFARS continues to add additional government-unique clauses at both the prime and the subcontract level, making it more difficult for commercial companies to do business with the Department of Defense, whether as a prime or subcontractor.

The government must align its policies with its clear preference for the acquisition of commercial items. Unfortunately, the message from the last several years is that the government is moving incrementally backward toward more burdensome acquisition policies that only serve to discourage commercial companies from doing business with the U.S. government, unnecessarily limit competition at the prime contract level and discourage small and innovative businesses from being prime and, in many cases, subcontractors. The flow-down of government-unique requirements to commercial item suppliers thus discourages those companies from participating in these contracts at any tier because the cost of meeting the cumulative set of government-unique requirements regularly exceeds the benefit of any single or class of government transactions and increases company operating costs so that products or services developed and sold by those suppliers become less competitive in the commercial marketplace.

Furthermore, commercial item suppliers are being challenged as never before to compete internationally as industry supply chains become global. Separate supply chains, separate

business segments, and separate manufacturing facilities just for performing U.S. government work are increasingly expensive to maintain, driving up prices to the U.S. government and discouraging new market entrants. If achieving competitiveness at the global level becomes threatened, some contractors will follow those who have already chosen to leave the government marketplace, rather than lose out to competitors who do not incur such costs in the global commercial market. In fact, the Washington Post reported in March of 2012 that the number of new suppliers to the federal government dropped 14% in the last year³. In addition to existing government suppliers exiting the marketplace, there is also no clear way to assess how many businesses choose to never enter the government market in the first place though recent indicators point to this being an increasing problem.

Those companies that choose to remain are increasingly being forced to segregate the operations supporting their commercial customers from their federal government customers, for reasons such as preserving the confidentiality of proprietary commercial business information and technical data and to avoid the compliance, data collection and reporting costs singularly associated with federal acquisition. Under current budgetary constraints, the increased costs of managing two completely different enterprises for different markets are prohibitive and could result in significant delivery delays and increased levels of overhead cost for both the government customers and commercial item suppliers. It is reasonable to conclude that another unforeseen consequence would be commercial item suppliers deciding to halt direct sales to the federal government and instead market their products through distributors or integrators whose markets are limited to government customers. With higher costs and increasing risks, direct access to the commercial markets will often not be available to government customers.

DFARS changes published on March 12, 2012 require that Contracting Officers (COs) obtain higher level approval to use FAR Part 12 for commercial item procurements over \$1 million when the determination is based on “of a type” or “offered for sale” language of the commercial item definition. This change reduces decisional flexibility, constrains the CO, and increases the probability that COs will not utilize FAR Part 12 procedures for anything other than Commercial Off-the-Shelf Items (COTS). COs are already presumptively resisting making commercial item procurements for hardware or services that are either “of a type” or “offered for sale in the commercial marketplace” out of concern that an auditor or other oversight entity will criticize their judgment. It would be an unfortunate reversal of the reforms enacted in the

³ http://www.washingtonpost.com/business/economy/new-suppliers-to-us-government-fall-14-percent/2012/03/08/gIQApu5R_story.htm

mid-1990s if our warfighters were to be denied timely access to state-of-the-art commercial technology due to unnecessary constraints resulting from a CO's decision to avoid commercial item contracting out of a fear of criticism. This situation is all the more unnecessary given that the concerns about price reasonableness of commercial items and services have been effectively addressed by Congress in Sections 805 and 815 of the FY 2008 NDAA (P.L. 110-181), which added limitations on the designation of weapons systems programs and components as commercial items and new requirements on provision of price or cost data for pricing of commercial items.

Another example is the inappropriate application to commercial items of the Federal Funding Accountability and Transparency Act (FFATA), as originally enacted and as amended by the FY 2008 Supplemental Appropriations Act. FFATA requires prime contractors to report to the government certain data about itself and its first-tier subcontractors for inclusion in the publicly available FFATA database. 41 U.S.C. 1906 and 1907 state that a provision of law shall be inapplicable to contracts for the procurement of commercial items and COTS items unless: (1) the law provides for criminal or civil penalty; (2) the law specifically refers to 41 U.S.C. 1906 or 1907 and provides that, notwithstanding those sections, it shall be applicable to contracts for commercial or COTS items; or (3) the FAR Council or OFPP, respectively, make a written determination that it would not be in the best interests of the United States to exempt such contracts from the provisions of the law. 41 U.S.C. 1906 and 1907 were intended to put the federal government in the position of procuring commercial items or COTS items from commercial companies in a manner that most closely represents the standard commercial practices in the marketplace for those items or services.

Notwithstanding the inapplicability, the Federal Register publication of the FFATA interim rule states that the FAR Council has made the determination required by 41 U.S.C. 1906 and 1907 to apply FFATA to commercial items and COTS items to "...reduce wasteful and unnecessary spending" by disclosing detailed information on a public web site regarding the first tier subcontracts of commercial item and COTS contractors. It is unclear on how this rationale applies to commercial items and COTS items. How will publication of first tier subcontractor information for commercial items "reduce wasteful and unnecessary spending" when the items the government is procuring are primarily sold in the commercial market? We are not convinced that such a determination is in the best interest of the United States.

This month DoD also submitted a legislative proposal that would further limit DoD access to the commercial market. DoD's proposal, Section 806, *Revision to Definition of Term "Commercial*

Items” For Purposes of Federal Procurement Statutes Providing Procedures for Procurement of Commercial Items, if adopted would eliminate the phrase “of a type” from the definition of commercial items in 41 U.S.C. 103. For the reasons above, ARWG strongly opposes this DoD recommendation and any such amendment offered to the defense authorization bills. ARWG would support additional workforce training to ensure that DoD has the resources needed to obtain the maximum intended benefits from this longstanding legislative authority.

Given the impacts of the various legislative and regulatory changes that have occurred since FASA and FARA, ARWG believes additional changes are warranted to restore and enhance the government’s ability to access the commercial marketplace for its needs and to insure that the preference for commercial items retains its importance to the acquisition community of buyers and sellers and not become a historical artifact. These benefits include greater access to emerging commercial technologies and products, a larger and more energized contractor base, and more and better competition with resultant cost savings.

RECOMMENDATIONS:

ARWG recommends that Congress reiterate its statutory preference for acquiring commercial items to meet its requirements, and direct all agencies to improve and expand acquisition training to reinforce their functional capabilities in market research, requirements definition and price analysis.

Congress and the Executive branch should:

- Refrain from imposing new government-unique clauses in the FAR ,DFARS and other agency supplements that are not implementing a statute that specifically states that it is applicable as required by 41 U.S.C. 1906 and 1907;
- Require that all procurement related statutes that would be applicable to commercial items be subject to review and scoring by the Congressional Budget Office to determine their implementation cost on businesses that do not otherwise have a government-unique business infrastructure;
- Mandate a study by the Congressional Research Service on the extent and cost of existing government-unique clauses using the goals expressed in Executive Orders 13563 as a yardstick;

- Amend the Federal Funding Accountability and Transparency Act (Public Law 109–282, 31 U.S.C. 6101 note) to specifically exempt contractors and subcontractors supplying commercial items from reporting requirements on executive compensation.
- Oppose any further efforts to narrow the definition of commercial item or service in recognition of the new authorities granted to contracting officers to address price reasonableness concerns.
- Extend the Clinger Cohen Act Sec. 4202 authority, Test Program for Certain Commercial Items, that expired on January 1, 2012.
- Oppose DoD legislative recommendation section 806, “Revision of term “Commercial items” for purposes of federal procurement statutes providing procedures for procurement of commercial items.”
- Require that at least ten percent of the funds available under the DoD Acquisition Workforce Development Fund be made available for training in commercial item acquisition, market research and other tools to enable appropriate use of commercial item acquisition to achieve the intended efficiencies and affordability.

CONTRACTOR COMPENSATION

DISCUSSION:

Since 1994, the law requires that the Office of Federal Procurement Policy annually establish a limit on the allowability of contractors' executive compensation. The current cap had, until recently, applied only to the five highest paid management employees of the contractor. However, with the passage of the FY 2012 National Defense Authorization Act (NDAA), Congress broadened the coverage of the cap to include all employees of federal contractors, with limited exception. During the FY 2012 NDAA conference negotiations, two divergent provisions were considered:

- Section 803 of the House-passed FY 2012 NDAA would have expanded the executive compensation cap to cover ALL employees of federal contractors.
- Section 842 of the Senate-passed FY 2012 NDAA would have extended the cap in a fashion similar to the House bill, but also would have arbitrarily set the cap equal to the President's salary (\$400,000).

Congress rejected the arbitrary setting of the cap and adopted the House provision. In February 2012, the Obama administration announced its support for the implementation of another arbitrary cap for the allowability of contractors' compensation at Executive Schedule Level I (\$200,000). In addition, in March 2012, Senators Boxer, D-Calif., and Grassley, R-Iowa, introduced legislation (S. 2198) that seeks to broaden the cap on executive compensation to cover all contractor employees working on civilian agency contracts. The legislation would also repeal the use of the current formula and would set a maximum allowable cap for DoD and civilian agency contractor employees at a level no higher than the President's salary. Congressman Paul Tonko, D-NY, introduced similar legislation (H.R. 2980) that would implement a cap at no higher than Executive Schedule Level I (\$200,000). ARWG is strongly opposed to these proposals for the following reasons:

- They will result in a loss of access to specific expertise and innovation that the private sector delivers for the federal government. Imposing a fixed cap would sever the compensation practices of the private sector-supported federal agencies' missions from the dynamics of those of the rest of the private sector. Because of the arbitrary compensation cap, companies will be reluctant to assign top management or highly-skilled employees to federal contracts and such employees may be more eager to work on commercial rather than government contracts. Hence, the government may lose

access to key skill-sets that it would not be able to afford under the current federal employee compensation model. Furthermore, employees may decide to work for companies providing professional services solely to the commercial market, thus exacerbating the government's loss of access to talent.

- The formula was established to ensure that federal contractors could continue to compete for high-level management and other technical talent, while also protecting the government from paying excessive costs for the compensation of such employees. The original intent of the cap is to be a commercial-to-contractor sector comparison. The White House and legislative proposals that seek to tie the cap to current federal employee compensation levels ignore the intended purpose by making the comparison a government-to-contractor comparison.
- The proposals will put many small and mid-sized firms at a significant disadvantage when competing for talent with companies that operate in both the government and commercial market. Companies that operate in the federal and commercial space are better able to support higher levels of compensation for employees through revenue received from commercial business, even though salaries paid to those supporting government clients may not be as competitive as those paid to employees supporting commercial clients. Contractors that only support federal agency clients have limited financial flexibility. If the cap were significantly lowered, these companies would be extremely hard pressed to offer competitive salaries to its government contract staff. For companies operating only in the federal market, the reimbursement cap would act as a salary cap severely impacting their ability to recruit and retain essential and highly capable talent for critical government contracts.

RECOMMENDATIONS:

ARWG recommends that Congress consider non-arbitrary alternatives to the administration's proposal and S.2198 and H.R. 2980. First, Congress could freeze the cap at its current level and require the Office of Federal Procurement Policy to work with industry on assessing and revising the formula to capture real cost savings for the government while maintaining a level playing field for all contractors to compete for top talent when staffing government projects. In addition, any proposal regarding contractor compensation should include broad exemption authority to ensure that DoD and civilian agencies are able to access critical skills needed to carry out their missions.

Congress should also refrain from adopting any new statutory limitations on contractor compensation until the provisions from the FY 2012 NDAA have been fully implemented and their impacts adequately assessed.

RIGHTS IN TECHNICAL DATA

Section 815 of the National Defense Authorization Act for Fiscal Year 2012 makes a number of significant changes to technical data delivery procedures and technical data rights in 10 USC 2320 and 10 USC 2321 by introducing new concepts that have arisen over the last year.

Among the most significant changes to the statutes are:

- A new authority for the government to release a new and as yet undefined class of contractor limited rights or commercial data that is necessary for the segregation and/or reintegration of an item or process (or its equivalent) with other items or processes (referred to below as “interface data”).
- A statement granting the U.S. government purpose rights in technical data pertaining to items or processes developed in part with federal funds and in part at private expense unless the parties otherwise negotiate (consistent with the pre-existing regulatory scheme).
- Restoration of the historical treatment of IR&D/B&P as private expense funding in all cases in the determination of rights in technical data.
- Extending the allowable period for the government to challenge contractor assertions of restrictions on data release or use in 10 USC 2321 from three years to six years.
- Insertion of new authority allowing the U.S. government, notwithstanding any other contract delivery requirement, to **require** the delivery **at any time** of technical data generated **or utilized** in the performance of a contract and to compensate the contractor only for the reasonable costs of converting and delivering it upon a determination that the technical data is needed for reprocurement, sustainment, modification or upgrade (including through competitive means) of a major system, weapon systems, subsystem thereof, or a non-commercial item or process; and
 - Pertain to an item or process that was developed in whole or in part with federal funds, or
 - Is necessary for the segregation and/or reintegration of the item or process (or its equivalent) with other items or processes.

DISCUSSION:

Section 815 is an improvement over the statutory changes enacted in the 2011 NDAA to the extent it reestablishes the long-standing status of IR&D/B&P funding as non-federal funding

and clarifies the issue of government purpose rights in statute. However, the new legislation introduces a concept of “interface data” which could place valuable contractor technical data rights at risk, and introduces long term uncertainty into the procurement process as applied to contractors’ and subcontractors’ intellectual property.

ARWG remains concerned about the scope of the new concepts introduced by Section 815. A major concern is that the central terms of the Section 815 statutory changes, specifically “segregation” and “reintegration,” neither have a clear definition in the section or in government usage nor have any meaningful common or well understood usage, meaning or context within the defense or commercial industrial base. Nevertheless, Section 815, in a sweeping change, permits DoD to release outside the government limited rights and commercial contractor proprietary data that is deemed necessary for the segregation and/or reintegration of an item or process (or its equivalent) with other items or processes. The problems with this change include:

1. The term “segregation,” as noted above, is not a defined term and has no commonly accepted meaning in the procurement and reprourement sense used in Section 815. Without a clear definition or functional description of the term, any regulation that might be drafted would likely be open to interpretation, revision or challenge based on the ambiguity in the underlying statutory language.
2. The term “reintegration” has not only the challenges and deficiencies noted in bullet 1, but also includes the terms “with another item or process, or its equivalent, with other items or processes.” The statute here does not limit the other items or components to those provided by the owner of the technical data (or their equivalent) and the use of such data by the government or third party contractors is not expressly limited to the purpose of reintegration.
3. Finally, depending on the definition of the terms “segregation” and “reintegration,” either initially or at some future time, the technical data encompassed may include contractor or subcontractor commercial data which would otherwise be protected from such disclosure and use by third parties under the existing DFARS regulations.

The issues with the ambiguity surrounding these terms is compounded by the new technical data delivery requirements in new Subparagraph (b)(9) in 10 USC 2320.

First, the delivery requirement applies not only to technical data that has been generated in the performance of contract, but also to technical data that is **utilized** in the performance of a

contract. This latter category of data is very broad and could include technical data pertaining to items or processes developed exclusively at a contractor's private expense and to which the government has no pre-existing rights, inchoate or otherwise. The scope of this category of data includes detailed process data, manufacturing data and software that is used to produce a deliverable but is neither a deliverable itself nor actually incorporated therein. This raises a number of issues:

1. How will limited rights and commercial technical data pertaining to items or processes embedded in a system, weapon system or a subsystem be protected if a government official deems acquiring such data necessary for the segregation/reintegration of an item or process?
2. How will limited rights and commercial technical data utilized in the performance of a contract and pertaining to items or processes developed in whole with federal funds be protected in the face of persistent and wide spread demands by contracting officers that ***all*** technical data be delivered with unlimited or government purpose rights?
3. How will existing systems and items and processes be treated to ensure adequate protection of preexisting limited rights and commercial technical data?
4. How will appropriate and fair licensing of limited rights and commercial technical data utilized, but not generated, in the performance of a contract be assured?
5. Who has the authority to determine and what are the criteria for determining what level of technical data utilized in the performance of a contract is needed for segregation/reintegration?

Second, the subparagraph authorizes DoD to require "delivery at any time" of certain types of data. This unqualified requirement could make a contractor liable for retaining technical data in deliverable form for years beyond any point where such data would serve a practical purpose. This requirement is in contrast with the current deferred ordering contract clause in DFARS 252.227.7027 that provides for a delivery requirement that ends three years after the acceptance of the items to be delivered under the contract or after contract termination. A similar limit needs to be spelled out in the statute so that industry is able to establish reasonable and affordable internal data retention policies.

Third, paragraph (b)(9) requires that the government compensate a contractor "only for reasonable costs incurred for having converted and delivered that data in the required form." As noted above, neither the issue of licensing fees nor the right of use of the data required to be delivered under this paragraph is clearly addressed as it is in the DFARS delivery clause. In

addition, the government should be required to reimburse the contractor for the costs incurred to locate the data (if it can be found) or to create or recreate the data (if it never existed or was lost or destroyed, was transitory in nature or otherwise wasn't retained) provided such creation or recreation is practicable. In no event should there be any obligation to deliver nonexistent data that reasonably cannot be created or recreated. Finally, a contractor should not be required to deliver data belonging to a third party (e.g., a software licensor), or permit the use thereof by the government that is contemplated by Section 815, if the contractor does not both possess the data and have the legal right to do so. As written, Section 815 has the potential to cause the contractor to either default under the new delivery requirements (as applicable to third party data) or default under the contractor's contracts with the third party.

ARWG recognizes that the regulatory process for implementing Section 815 will likely attempt to address and clarify how many of the new terms, such as "segregation" and "reintegration" should be defined and applied to data rights issues as well limitations on what may be requested for delivery. If the regulatory process does not adequately define the use of the terms and establish limitations on the scope of the new requirements in accordance with current industry practice, the statute may have to be clarified further. Even if the outcome of the regulatory process in this area adequately addresses all concerns, ARWG believes that Section 815 should be amended to incorporate the definitions and limitations that may arise from that process.

RECOMMENDATIONS:

ARWG urges Congress to consider amending 10 USC 2320(b)(9)(B) as follows:

- Amend 10 USC 2320(b)(9) to establish a reasonable time period during which DoD must exercise its compulsory delivery rights using the three-year standard in the DFARS 252.227.7027 clause as a model. A statutory solution is preferred, to ensure that contractors can establish singular data retention policies, instead of contract-specific data retention policies that result from specially negotiated contract provisions that may define different time periods. Contract-specific data retention policies would be much less efficient and would drive up administrative costs.
- To encourage contractors and commercial vendors to offer or use commercial products to satisfy military requirements, limit applicability of (b)(9) to commercial items and processes as follows:

- Exempt technical data associated with commercially available off-the-shelf (COTS) items (as defined in 41 USC 431) or processes, which are offered to the government, without modification, in the same form in which such items are sold in substantial quantities in the commercial marketplace, and
 - For all other commercial items or processes, limit applicability only to the technical data customarily provided to the public with the commercial item or process (except technical data that are: (1) form, fit, or function data, or (2) required for repair or maintenance of commercial items or processes, or for the proper installation, operating, or handling of the commercial item, either as a standalone unit or as a part of a military system, when such data are not customarily provided to commercial users or the data provided to commercial users is not sufficient for military purposes).
- Make more explicit the relationship between the requirement to deliver item or process data and the need to obtain the appropriate licenses for the right to use the item or process data pertaining to commercial or proprietary technologies utilized in the performance of a contract.
 - Add a clarification that that right to use any of the data delivered pursuant to 10 USC 2320(b)(9)(B) is subject to the requirements, restrictions and procedures in 10 USC 2320 (a)(2).
 - Limit the application of the delivery requirement for technical data in 10 USC 2320 (b)(9)(i) to data that is itself developed in whole or part with federal funds.

LIMITATION ON USE OF COST-TYPE CONTRACTS FOR PRODUCTION

DISCUSSION:

ARWG is opposed to S. 1694, the “Defense Cost-Type Contracting Reform Act of 2011,”. ARWG has serious concerns with this legislation and its underlying premise that DoD should be prohibited from using cost-type contracts for any stage of production under a major defense acquisition program (MDAP). This prohibition would also establish a preference – as yet unjustified – for the use of fixed-price development contracts in MDAP programs, even during low-rate initial production (LRIP).

ARWG is not opposed to the appropriate use of fixed price contracts in production. In cases where designs, technologies, manufacturing processes, production numbers and funding streams are stable this is the most appropriate type of contract. ARWG is opposed to an arbitrary, mandatory “one-size fits all” requirement to use fixed price contracts. The government should have the discretion and the authority to manage its acquisition process in a way that best meets the needs of the taxpayer.

Currently the FAR allows for this type of discretion and decision-making. However, S. 1694 runs counter to the existing regulatory guidance provided at FAR Part 16.1 “Selecting Contract Types” which provides contracting officers sufficient information on which to determine the proper contract type for the requirement.

- FAR 16.104 addresses the factors to use in determining the contract type. It is unclear how the proposed legislation would fit with the existing direction for contracting officers to consider the 11 factors in 16.104. The bill would reject this informed decision making process by directing that contracting officers need no longer consider those factors but rather should adopt a preference for the use of fixed price contracts.

Section 818 of the John Warner National Defense Authorization Act for FY 2007 (P.L. 109-364), already contained additional restrictions on the use of cost-type contracts and required written justifications for the use of cost-type contracts. No further guidance is needed. S. 1694 would add to the Section 818 restrictions by prohibiting the use of cost-type contracts for any production of MDAPs, even during early low-rate initial production, and require additional steps and congressional reporting before entering into cost-type contracts for MDAP development.

And to what end? Addressing the need to balance cost and efficiency, Acting Undersecretary for AT&L Frank Kendall stated:

“Fixed price low-rate production – does it matter whether you do fixed price or cost plus low-rate production? The data says it doesn’t make much difference. Well, if that’s the case, we’ve got to look carefully at what the consequences are and why. Maybe that’s not where we should be trying to put our effort . . . But until we start examining carefully the impacts of our policies we’re not going to learn enough from our experience to be able to make good decisions and put good things in place.”⁴

This legislation would likely have a negative impact on the industrial base. S. 1694 could ultimately result in increased costs as contractor risk is priced into contracts, or qualified contractors with decades of expertise and experience will simply not be able to undertake these programs in the first place. It would most certainly serve to stifle innovation, dampen competition, and have unforeseen impacts on small and medium sized businesses in our industry.

A contracting officer’s decision to choose fixed price contract types for late development or early production contracts could have a significant adverse impact on a company’s working capital. Increases to working capital balances will have a detrimental effect for both industry and the government with the impacts becoming visible in reduced capital dollars being available for capital improvements, reduced dollars being available for application to IR&D initiatives, and higher costs associated with reduced working capital to sustain on-going operations. Each of these impacts are envisioned to have long term implications to the industrial base which in turn will impede industry’s ability to support the government in a manner that is currently expected.

RECOMMENDATION:

ARWG recommends the Senate not adopt S. 1694.

⁴ Acting Undersecretary of Defense (AT&L) Frank Kendall speech at CSIS, “The Acquisition Implications of the DoD Strategic Guidance and the FY 2013 Budget,” February 2012.

POLITICAL CAMPAIGN DISCLOSURES

DISCUSSION:

In 2011, the Administration considered issuing an Executive Order (EO) titled, “Disclosure of Political Spending by Government Contractors” that would levy a requirement upon those bidding for government work that they disclose contributions and expenditures that they, their directors, officers, affiliates, subsidiaries—and presumably the directors and officers of those affiliates and subsidiaries—have made within the two years prior to submission of their offer to any federal candidate, party, or party committee and any third party entity that would use those contributions for communications during an election.

Although the draft Executive Order has not been issued to date, Congress acted appropriately by including provisions in the FY 2012 omnibus appropriations and National Defense Authorization (NDAA) acts that would place restrictions on the collection and disclosure of this information from contractors as part of the acquisition process. However, the President requested, in his FY 2013 budget proposal, that the language in the appropriations act not be included in any FY 2013 appropriations bills, which would effectively repeal it after FY 2012. Furthermore, the language included in the FY 2012 omnibus appropriations act prohibited all agencies from asking for the political contribution language as a condition of submitting a proposal for contract award. Yet, as written, the language would only apply to FY 2012 funds.

The NDAA provision implemented a permanent prohibition on requiring the submission of the information in conjunction with the submission of a proposal for contract award, or at any time during the performance of a contract as part of the process associated with modifying a contract or exercising a contract option. ARWG applauds the passage of these two provisions. However, both statutes retain loopholes that would allow the administration to require contractors to provide information after a contract has been awarded. ARWG firmly believes that Congress should take additional action to eliminate the loopholes and prevent the administration from requiring political contribution information at any time during or following the acquisition process or contract performance.

As written, the draft EO would introduce political contributions into the government contracting process. It is unclear how the information would be used by a contracting officer in the source selection process. This creates the possibility that donations to a particular party or candidate will be a consideration when evaluating contract proposals whether intended or not.

This might also create the unfortunate belief among some that political contributions are a requirement for winning contracts.

The draft EO appears to ignore current law barring government contractors from making “any contribution of money or other things of value, or to promise expressly or implicitly to make any such contribution to any political party, committee or candidate for public office” from corporate funds. In fact, it goes well beyond established law requiring companies to report political contributions their officers and directors have legally made with their own personal funds, thus infringing on contractor employees’ First Amendment rights.

In order to comply with the requirements of the draft executive order, each federal contractor will have to develop and implement a system to track and record all personal political contributions, to include retroactive contributions upon implementation. This is an additional cost burden that will be reflected in overhead rates. This is particularly challenging for small companies who do not have a large corporate organization to meet this new federal mandate.

RECOMMENDATIONS:

ARWG recommends that Congress enact additional government-wide legislation that prohibits agencies from requesting political contribution information from contractors at any time during the acquisition process or during the performance of a federal contract. Such legislation should be uniformly applied to all federal departments and agencies and should be permanent.

SUSPENSION AND DEBARMENT

ISSUE:

Suspension and debarment seems to be misunderstood in terms of the purpose of the process and the ability of some companies to respond to allegations of a lack of responsibility before they are placed on the Excluded Parties List System (EPLS).

DISCUSSION:

Given the current environment both on Capitol Hill and in the Executive branch we anticipate agencies may be more aggressive in the utilization of their authority to suspend and debar non-responsible contractors⁵ and some in Congress seem to be urging the same course.⁶ It is important for policy makers to understand that debarment or suspension is not intended to be punishment; rather it is a prophylactic measure to protect the government from doing business with a person or business that is not presently responsible. They should also contemplate with care “listing” businesses on EPLS because that will materially adversely impact employees and investors who may be victims of the willful or even negligent bad acts of an employee(s) just as the contracting agency is. The person or business may be unaware of these bad acts or these acts may be beyond the control of the business or person.

Suspension and debarment are not punishments for businesses that defraud the government or commit other crimes. The Federal Acquisition Regulation states this explicitly in subsections (a) and (b) of 9.402:

a) Agencies shall solicit offers from, award contracts to, and consent to subcontracts with responsible contractors only. Debarment and suspension are discretionary actions that, taken in accordance with this subpart, are appropriate means to effectuate this policy.

(b) The serious nature of debarment and suspension requires that these sanctions be imposed only in the public interest for the Government’s protection and not for purposes of punishment. Agencies shall impose debarment or suspension to protect the

⁵ Office of Inspector General, Department of Homeland Security, *DHS’s Use of Suspension and Debarment Action for Poorly Performing Contractors*. OIG-10-50. February 2010.

⁶ Senator Bernie Sanders, Release: Pentagon Spent Billions on Contractors that Committed Fraud, February 2, 2011, <http://sanders.senate.gov/newsroom/news/?id=2b80052e-9401-4b96-989c-84d506b76deb>

Government's interest and only for the causes and in accordance with the procedures set forth in this subpart.

Those who criticize the practice of awarding new contracts to companies that may have transgressed in the past often fail to take into account the purpose of suspension and debarment. The actions required by suspension and debarment officials (SDOs) are intended to lead to corrections that make a company "responsible" thus protecting the government from dealing with persons or businesses who are not responsible and ensuring potential competitors are not needlessly excluded. Once a SDO assesses corrective actions as adequate, there is no reason to withhold the award of new contracts and task orders except to punish the organization. When properly administered the suspension and debarment process should not damage organizations (who most often have been victims of rogue employees themselves) out of all proportion to the injury the employee caused to the government.

It is critical that Congress keep this firmly in mind when evaluating new proposals to "reform" or improve the suspension and debarment process. Too often critics seek to punish companies that have had employees transgress in the past. In these critics' minds the company is the criminal and should not continue receiving contract awards. At times this appears based on a conspiracy theory that each contractor is out to bilk the government when in fact the interests of the contractor are to perform each contract well to help assure it is paid for that work and gets more work in the future.

Thus when a SDO determines that the company's corrective actions have been adequate to make doing business with that company reasonable, these critics are not satisfied because the company still receives government funds. While there is no guarantee that no one employed by the company will violate the rules ever again, the company has reasonable processes and policies in place to mitigate this risk to keep the company as a supplier.

Companies fire employees who commit serious offenses for betraying the trust of their employers. SDOs debar such individuals from obtaining government contracts for betraying the government's trust. These deviant employees victimize the employer organization by violating corporate policies and the employees' duties to the organization. Nonetheless, their employers often not only pay for damages done but also for the costs of government investigations. When properly administered, the suspension and debarment process does not injure organizational victims out of all proportion to the injury an employee causes.

One should also remember that if an organization is debarred, every employee will suffer. When the government is a business's main customer, much of the business's innocent workforce will become unemployed if the company is debarred and thus driven out of business. Even when the government is not the main customer, a government suspension, and even more so, a debarment will materially damage a business and its employees. Congress should reject calls to ignore the distinction between persons who commit wrongs and the businesses that employ them.

Because of the potentially devastating government-wide impact on the mission of agencies and businesses, ARWG believes that suspension notifications should include an opportunity to respond to the merits of any such action and to provide a mitigation plan before the person or business is listed in EPLS in almost every case.⁷ The discussion in advance may eliminate the need for listing the organization at all. Such notice may well allow corrections that avoid the collateral damage listing will cause to the government or business. Nonetheless there may be occasions when the public interest dictates the business must be listed without prior notice. ARWG proposes that if public health or safety would be endangered if the person or business continued to do government business, then a suspension could take effect upon issuance.

ARWG would also support making the suspension and debarment process more transparent and ensuring debarment offices are properly resourced but would be concerned if a SDO's job performance would be determined by simply noting how many debarment actions had been taken.

⁷ This is consistent with the long standing recommendation of the Administrative Conference of the United States.

Recommendation 95-2, Debarment and Suspension from Federal Programs, 1 C.F.R. 305.95-2 (1995) <<http://www.law.fsu.edu/library/admin/acus/305952.html>> last accessed 02/16/2011. The recommendation states in pertinent part:

As also noted, suspensions become effective immediately. The suspended respondent may, after the fact, submit written comment and information to the debarring official opposing the continuation of the suspension. In some cases, the lack of advance notice is necessary to allow an agency to protect the integrity of its contracting or nonprocurement program. In other cases, however, it may be appropriate to provide advance notice to the potential respondent that a suspension or proposed debarment may be forthcoming. In fact, some agencies do send what are in essence "show cause" letters in certain situations. In cases where the interests of the government would not be substantially adversely affected by providing advance notice of a suspension of proposed debarment, the Conference encourages agencies to provide such notice.

Furthermore, Congress must refrain from passing laws that require the automatic suspension or debarment of contractors. In cases where Congress believes contractor, or contractor employee, behavior may warrant suspension or debarment, Congress should reiterate the need to refer those cases to agency suspension and debarment officials, and allow them to exercise their professional judgment to make a final decision whether to suspend or debar based on the relevant facts.

RECOMMENDATIONS:

- ARWG recommends that Congress direct that the FAR be revised to prohibit agencies from listing persons or businesses without prior notification and an opportunity to be heard unless the SDO determines that allowing the person or business to be awarded new contracts would present an unacceptable risk to the safety of persons or property. Agencies could continue to use a notice of proposed debarment and suspension notices, but a person or business could not be listed until the SDO reviewed any timely response from the person or business unless the SDO made a written determination that persons or property would be threatened without immediately listing the person or business.
- Congress should also require the agency SDO initiating a suspension or proposed debarment to notify all other SDOs of the proposed action. Recipient SDOs shall notify contracting offices within their agency of the proposed action. The notice should request that any interested agencies contact the issuing SDO within the same 30 days provided the person or business. The SDOs shall determine which agency SDO should take the lead. After the person or business responds to the notification of suspension or proposed debarment, the lead agency shall promptly determine whether listing is necessary to protect the government's interest while the debarment or suspension action continues.
- The lead agency SDO should be required to consider, based upon discussions with other interested agencies, whether any agency is likely to waive the suspension or debarment if imposed. Where the lead agency determines that suspension or debarment is necessary but learns that waiver by other agencies would occur, the lead agency should not immediately exclude the person or business. Rather, the lead agency should offer the person or business the opportunity to enter into an administrative agreement, whereby the person or business agrees to implement relevant compliance measures to prevent reoccurrence of the cause for suspension or debarment and refrain from

competing for new awards with the exception of agencies that have demonstrated compelling reasons to continue their business relationship.

- All SDOs should be required to prepare a periodic report of companies that they considered for debarment or suspension and determined that debarment or suspension under the circumstances was not appropriate either because the SDO found the company/individual to be presently responsible or because the SDO entered into an administrative agreement with the company/individual. Such reports shall be published as part of the EPLS.

These recommendations are consistent with a discussion of suspension and debarment considerations by Professor Ralph Nash in the July 2009 Nash and Cibinic Report, ¶ 26, *SUSPENSION AND DEBARMENT: Protecting The Government By Denying Due Process To Contractors*, and by Todd J. Canni, *Shoot First, Ask Questions Later: An Examination and Critique of Suspension and Debarment Practice Under the FAR, Including a Discussion of the Mandatory Disclosure Rule, IBM Suspension, and Other Noteworthy Developments*, Vol. 38 No.3 Public Contract Law Journal Pg 547-609 (Spring 2009)

TRANSPARENCY IN CONTRACTING

Many call for increased transparency of the government procurement function. Depending on where one stands in the acquisition system/process, transparency may mean different things. Those different meanings include, but are not limited to:

- The process by which regulations governing the acquisition process are made;
- Market research into the availability of industrial base solutions that either satisfy or could be modified to satisfy, government requirements;
- Market research into industry practices for buying, selling and pricing solutions;
- The development by the government of its requirements;
- The reuse by the government of solutions it already owns either in current form or with modification;
- The development of solicitations by the government to obtain through contract, or by other acquisition methods, solutions that satisfy the government's requirements;
- The responsibility determination process by which the government determines whether a company is presently responsible and therefore eligible for award of a contract or other acquisition instrument;
- The award of government contracts, or other acquisition instruments, that allow the government, and the public, to see what the government bought, from whom and how much the government paid;
- Contract administration, which will allow the government, industry and the public to monitor performance under existing contracts or other acquisition instruments and inform the government when performing market research and determining present responsibility in other acquisitions;
- Past performance, which will allow the government to evaluate performance by a contractor, sharing it first with the contractor and then with the public as appropriate; and,
- Disposal, which will allow the government to maximize reuse of solutions it has purchased and to ensure the proper disposal of solutions when they no longer serve a government requirement.

BACKGROUND:

Greater transparency of the government's acquisition system/processes is one of the President's goals.⁸ Congress has also sought greater transparency. In March 2010, 18 members of Congress formed the Transparency Caucus, whose goals, among others, are to provide the public the ability to analyze government information and to have inter-active access to federal laws, regulations, and rules.⁹ We support reasonable transparency—a cost effective means of providing the public with accurate information needed to analyze how funds are spent without releasing company proprietary data or other confidences. This background is necessary to understand how the procurement process came to its current state and to set the stage for where we should be going in the future.

Today's efforts at providing transparency are focused on sharing after-the-fact data, which in many cases is entered more than once in multiple systems, and in most cases lacks the discreet data that would allow the government, the oversight community and the public know what the government actually bought and what the taxpayer paid for it.

In the late 1980s and early 1990s, the government's acquisition system frustrated federal agencies because administrative delays and costs undermined agencies' ability to acquire state-of-the-art commercial technology in sufficient time so that it was not obsolete at the time it was delivered to the government customer. To address these and other issues, Congress directed the DoD to form what is commonly referred to as the Section 800 Panel (Acquisition Law Advisory Panel).¹⁰ The Panel completed its study and submitted its recommendations in January 1993. Among other things, the Panel urged new simplified rules for the purchasing of commercial items. The Panel did not specifically address the issue of transparency.

President Clinton tasked Vice President Gore with conducting the National Performance Review ("NPR"). The outcome of that effort was the report titled "Creating a Government that Works Better and Costs Less".¹¹ This report addressed changes necessary to improve the access to the commercial marketplace through the adoption of commercial practices wherever practicable.

⁸ Memorandum of January 21, 2009, "Transparency and Open Government," Federal Register, Vol. 74, No. 15 Monday, January 26, 2009

⁹ Quigley, Issa head of new Transparency Caucus in Congress, [Mark Tapscott](http://washingtonexaminer.com/blogs/beltway-confidential/quigley-issa-head-new-transparency-caucus-congress#ixzz1C9aaWI55), 04/22/10, <http://washingtonexaminer.com/blogs/beltway-confidential/quigley-issa-head-new-transparency-caucus-congress#ixzz1C9aaWI55>

¹⁰ Section 800, National Defense Authorization Act for Fiscal Year 1991, Pub.L. 101-510 (Jul 1990)

¹¹ The National Performance Review, Creating a Government that Works Better and Costs Less, (Sep 1995)

The NPR found that these commercial practices did not include the record keeping requirements and other government unique terms and conditions doing business with the government included. For most commercial firms, the cost benefit analysis could not justify undertaking the risks and costs the government imposed on its contractors. Moreover, these firms feared the exposure of their commercial proprietary data by participating in the government contracting and audit processes. The NPR concluded that DoD, and the government as a whole, could not maintain the technological superiority necessary to address new challenges without rapid, unimpeded access to commercial technologies. Additional recommendations included the need for the government to focus on buying “Best Value” as opposed to “Low Price.”¹²

Congress, based on the Section 800 Panel Report and the National Performance Review, enacted a series of reforms designed to move government acquisition toward commercial practices: the Federal Acquisition Streamlining Act (FASA) (Pub. L. No. 355, 103d Cong., 2d Sess. (1994)); the Clinger-Cohen Act of 1996, Division E, National Defense Authorization Act for FY 1996 (Pub.L. No. 106 (1996)); and the Service Acquisition Reform Act of 2003 (Pub. L. No. 136 (2004)), among other statutes are among the reforms that in varying degrees sought to address the need for providing greater government access to the commercial marketplace through the use of appropriate commercial practices and streamlining processes to purchase goods and services. Also driving the passage of FASA and Clinger-Cohen on the Executive Branch side was a desire to realize a “peace dividend” resulting from the end of the “Cold War” by reducing DoD spending.

At that time, it was believed that by relying on commercial products and services rather than government-unique products and services, the government could leverage the research and innovation expenditures as well as the investment in production lines by commercial producers, thereby freeing-up funds for those needs that were particularly governmental in nature. Since that time, however, trade and supply chains in the commercial and government markets have extended globally, with innovation and production coming from sources outside the U.S.¹³ Moreover, the government procurement infrastructure has changed. The acquisition workforce has declined in number and skill levels,¹⁴ while the number of government contract

¹² *Acquisition Reform: A Mandate for Change*, Hon. William J. Perry (Feb. 9, 1994) at 1-3.

¹³ *National Defense Industrial Association System Assurance Guidebook Version .89*, National Defense Industrial Association - System Assurance Committee, Draft (Feb. 12, 2008) at 14.

¹⁴ In 1991 there were over 33,000 contract specialists (1102s) acquiring approximately \$150B worth of primarily goods and today the contract specialists number approximately 28,800 and acquire over \$550B worth of goods and services, now primarily services.

dollars spent has tripled since 1991 (doubled since 2000), the level of difficulty of government procurement has increased and the use of multiple award contracts and Indefinite Delivery Indefinite Quantity contracts has increased exponentially.¹⁵ The remaining acquisition employees are overburdened with administrative and transactional demands that were both caused by and exacerbated by these trends and were, until approximately 2008, subject to actual and threatened personnel and budget cuts.

The government has made the acquisition system more transparent. In fact, the U.S. Federal Acquisition System is more transparent than any other in the world. Before 2000, the federal government created the:

- Federal Procurement Data System (FPDS) - In its early stages FPDS provided data on disk to the public upon request;
- Federal Acquisition Computer Network (FACNET) - an effort to automate both solicitations and the receipt of offers;
- Excluded Parties List System (EPLS) - a list of suspended and debarred contractors – publicly available;
- Federal Business Opportunities (FBO) - automating and replacing the Commerce Business Daily publicizing opportunities to sell to the federal government and some international organizations.

Subsequently the federal government added the:

- Centralized Contractor Registration (CCR) – where companies can register to do business with the Federal government;
- Online Representation and Certifications Application (ORCA) – where companies can make and update required representations and certifications for doing business with the federal government;
- Electronic Subcontracting Reporting System (ESRS) – where companies can report their small business subcontracting accomplishments;

The Federal government is now reworking these databases into a single database called the System for Award Administration (SAM).

¹⁵ In the early 1990's the Department of Defense took the position that IDIQ contracts could not be used because they violated the Competition in Contracting Act (CICA).

In addition to the automated solutions available above, the public has long been able to receive contract-related documents through the Freedom of Information Act from individual federal agencies and Federal Contracting Offices.

The federal government does not have a transactional system whereby the acquisition system/process is automated and captures all of the data and makes that data available to government managers, oversight organizations and the public.

DISCUSSION:

Congress and the Executive branch promote transparency in government operations through both oversight and insight, as well as through compliance with existing requirements for transparency, e.g., through publications and web postings.

The government is not complying with existing rulemaking requirements for promulgating policies that are fundamental to transparency.

Transparency is not limited to the transactional data pertaining to government contracts. Transparency also includes the processes by which government policies and practices are developed. Statutory and executive direction requires transparency in the development of policy when the process materially affects the public, e.g., contractors. Recently, however, DoD and other agencies have unjustifiably skirted these requirements¹⁶ reducing the transparency of the development of acquisition processes and policies. An example is the recent changes directed by the Under Secretary of Defense for Acquisition Technology and Logistics in his Directive-type Memorandum entitled "Implementation Directive for Better Buying Power – Obtaining Greater Efficiency and Productivity in Defense Spending." In the memo, there is no evidence that any waiver of existing processes and practices was made. Nonetheless, the initiative, with its far ranging impacts on how DoD's acquisition process is supposed to work, failed to follow the Congressionally required regulatory process by not publishing in the Federal Register, failing to issue a proposed rule before making the policy effective, and not soliciting public comments.¹⁷ Thus, the statute notwithstanding, DoD is making more and more

¹⁶ The government has authority to implement policy and process changes immediately when urgent and compelling circumstances make compliance with the normal publication are impracticable. 41 USC 418b(d); 10 U.S.C. x24xx.

¹⁷ DoD did have meetings with invited industry representatives before the issuance of this policy and accepted comments on a wide range of topics but these comments seemed to have no material impact on the final policy. These informal efforts do not meet the statutory requirements.

substantive changes to processes and policies that have an impact on the public without requisite transparency.¹⁸

Another example is the interpretation by OFPP that while they are required to make a determination not to exempt commercial items from new regulatory actions when the underlying statutes do not specifically reference FASA¹⁹, the determination they make does not require publication for the public's review or comment. Deviations from both the Federal Acquisition Regulations (FAR) and agency supplements are issued regularly without concomitant publication for comment, thus depriving the public the opportunity to understand that a change has been made and leaving the public ignorant of the consequences of the changes and their impact on the acquisition system.

Despite the requirements of FAR Part 10 for the government to utilize various methods to conduct market research into what industry can provide to meet government needs, government employees are being discouraged and even prohibited from talking to representatives from industry. The result is a decrease in the transparency the public has into the government's requirements and a decrease of government insight into innovative solutions which may have the ability to provide "best value" for the taxpayer dollar. This condition is precisely what FASA was designed in part to correct.²⁰

Oversight versus Insight²¹

Oversight is most often after-the-fact and is focused on ferreting out fraud, waste, and abuse and to develop lessons learned to avoid future mistakes.

Insight, on the other hand, represents the aggregation of tools and experiences available to managers at all levels of the acquisition system to administer ongoing performance of

¹⁸ The most recent example is DFARS Case 2011-D045 Performance-Based Payments, published January 2012, implementing a July 2011 Memo directing the implementation of the new policy immediately.

¹⁹ See 41 USC §430(a)(2) for the requirement that the FAR Council make a determination. Recently in the publication of the final rule on FFATA, the FAR Council did not publish, nor even the fact that it had made a written determination.

²⁰ In this regard OFPP's recent effort at "Myth Busting" should be commended for undertaking to point out that communication with industry is not only permitted by encouraged in the market research phase: See: Memorandum for Chief Acquisition Officers, Subject: Myth-Busting": Addressing Misconceptions to Improve Communication with Industry during the Acquisition Process, Feb. 2, 2011.

²¹ The Acquisition Reform Office in OSD during the 90s led an effort to increase insight versus oversight in DoD programs and procurements in order to increase the opportunity for program managers and contracting officers to manage programs and contracts better.

acquisitions by identifying problems in schedules, policies, and policy implementation, and where appropriate, suggesting solutions.

Today the focus is almost exclusively on the oversight function with very little attention being paid to the insight function. As a consequence, performance problems go unidentified for so long that the government loses the opportunity to solve them in an inexpensive way or with little impact on schedule or performance. Concurrent programs also do not benefit from lessons learned.

Transparency should allow those responsible for *oversight* of the system to have visibility into the government's operations and those responsible for managing the operations of the government to have contemporary *insight* into the performance of a particular program(s) to allow management correction when performance gets off track and well before the program(s) reach failure. Both types of transparency *inform* the taxpayers/citizens of how dollars are being spent, and although the President and Congress have provided guidance on how transparency is to be achieved.²² That guidance continues to evolve. As it does, we urge that efforts toward insight and prevention be increased.

Transparency into the Performance of Government Acquisition Programs

Decades ago the government had internal audit capacity, much like that required by the Sarbanes Oxley Act for publicly held companies. With the creation of the IG functions across agencies and the consolidation of all audit functions within an agency in the IG's office, the capability for government Program Managers and Contracting Officers, as well as other management to conduct an internal management audit for the purposes of determining whether programs or contracts are performing in accordance with policies, terms and conditions so that management can correct problems before they become major issues no longer exists. Further, the ability to obtain recommendations for improvements to the activity being audited from the internal auditors also has all but disappeared. The lack of these capabilities often results in the discovery of problems too late and the inability for managers to make course corrections, thus eliminating the opportunity for the government to save time and money.

²² See, e.g., the Federal Funding Accountability and Transparency Act (FFATA), cosponsored by the President when he served as a Senator.

Modernization Challenges

Today, unfortunately, the demands and requirements for greater transparency cannot be satisfied as transactions occur. The transaction in most cases takes place and then someone in the process must manually reenter the data related to the transaction into the appropriate databases to make the information visible for insight and oversight. In many cases, acquisition professionals working with the government's acquisition system must choose which transparency requirement they are going to comply with. Often, the publicly available information in the government's possession was not digitized as the transaction occurred and resides in a variety of formats or paper files throughout the government's 2,600 contracting offices globally. In order to achieve compliance with the electronic posting requirements of the new and various transparency initiatives by both the Congress and the President, someone must physically re-enter the data.²³ If contractors must re-enter the data the cost is ultimately paid by the taxpayer either through changes to contracts or through higher overhead costs for the contracts for the goods, services, solutions and real estate purchased by the government. If contractors do not do it, government employees must, and too often this clerical task is falling upon the already understaffed and overburdened acquisition workforce. Moreover, no matter who does the data entry, errors will likely occur, decreasing the usefulness and validity of the data. Industry would question the value of capturing in this fashion historical data for website posting. We are particularly concerned that the real costs are incurred, but unaccounted for, when acquisition workers are tasked to perform the data entry with no corresponding relief from their other responsibilities.

The current inability of the government to capture timely, accurate and complete data for public and non-public use drives the perception that the acquisition system is broken, when in fact, this is a data entry issue, not an indication of a systemic problem, although better and more current data will allow more insight and less costly oversight.

Furthermore, much of the information being sought by transparency advocates is readily at the government's finger tips, yet much of the reporting burden is being placed on contractors. The government should, to the maximum extent practicable, avoid requiring contractors to report data that is duplicative of data already in the hands of government. Such dual reporting is costly and unnecessary.

²³ Although it should be noted that transparency can be achieved through methods other than electronic posting, for example, the Freedom of Information Act (FOIA) was enacted long before electronic posting was available as a method to provide public transparency of government information.

Less Transparency in the Pre-award Process

Over the past two decades there has been a concerted effort to change the government's behavior from one of risk aversion to one of risk management. Risk aversion means the government will act to avoid risk even though accepting certain risks will improve government outcomes over the long run, e.g., more successful and less costly programs. Another important negative consequence is deferring or avoiding decision-making all together. Risk management recognizes that eliminating all risks is neither good policy nor cost effective. Scarce resources should be used to achieve the best overall results for the government, which may pursue higher risk courses if they may achieve higher rewards despite potential for negative outcomes. Recently, we believe that acquisition offices have returned to the behavior of risk aversion, in part because there is reduced communication between the government and contractors in developing contract documents. In no small part the negotiation of contracts between parties is a function of allocating risk and pricing that allocation of risk. In order to allocate risk the parties must be aware of the risk in terms of performance and alternatives to performance so that an informed decision can be made in terms of allocation. Then the buyer and seller should collaborate to determine appropriate pricing based on the risk allocation. The understanding of the existing risk and a discussion between the public and the government of the allocation of that risk is essential to achieving the outcome desired by both parties²⁴, and is a basic and fundamental best practice in contracting.

Acquisition Portal Needed

In addition to human resources needed to support both the oversight and insight functions, new tools should be acquired to allow the government to further increase the visibility into the entire Acquisition System, provide greater visibility of program performance and provide greater visibility and transparency to the taxpayer. The Procurement Executive Council (PEC), the forerunner to the Chief Acquisition Officer Council (CAOC), recommended an acquisition tool, designated as an Acquisition Portal, to be used government-wide that would provide greater insight into the acquisition process beginning with requirements development and ending with disposal. This portal would ensure compliance with many of the rules the contracting process sets forth in a manner transparent to the user and would provide a single face to industry in a single government marketplace.

²⁴ Ibid

The Acquisition Portal was to be built modularly, in accordance with the guidance in the Clinger-Cohen Act of 1996, and was eventually to allow for the conduct of all acquisition-related activities inside the portal and capturing data and information as it was entered and reusing that data for a variety of purposes, including providing transparency to managers for insight/management purposes; other functional communities (e.g. finance, property, etc.); the oversight community; and the public.

The Acquisition Portal also would allow the government and the private sector to ensure that many of the government's acquisition requirements are addressed in a manner transparent to the acquisition professionals involved in the process, such as:

- Ensuring that excess government property is considered for use prior to purchasing new property;
- Ensuring that market research is conducted and that more complete and accurate market information is provided to the acquisition team as it formulates an acquisition plan and source selection strategy;
- Ensuring that managers have the information they need to understand where strategic sourcing is an option;
- Identifying and managing multiple award contracts across the government;
- Ensuring that the rules on competition are met in each acquisition;
- Ensuring that Contracting Officers have access to current and accurate pricing information;
- Reminding government and industry that undefinitized contract actions (UCAs) required definitization;
- Ensuring that small business goals are met;
- Ensuring that required information is entered and verified as a part of the process instead of as an extra step outside of the process requiring rework and a greater possibility for inaccuracies or mistakes; and,
- Ensuring that information concerning a contractor's present responsibility is presented to the Contracting Officer for review prior to making an award decision.

Another potential benefit of the Acquisition Portal not initially contemplated, which has become apparent as government markets have both matured and become more global, is the possibility of expanding access to the Acquisition Portal to state, local and possibly even foreign governments. This expansion would reduce the overall cost of the acquisition process to the government and industry; provide a larger government marketplace for the industrial base;

reduce supply chain risk; and, expand sources of supplies and services, thus giving America's small businesses greater access to all government marketplaces.

The costs of creating the Acquisition Portal have been estimated variably from \$50M to \$100M and it would take between one and two years to be brought on-line. It would have to be managed by a single office, most likely the Integrated Acquisition Environment (IAE) Program Office, and it would have to be fully operational and tested before it was implemented government-wide. The costs of building the system will be more than offset in its first year of operation as agencies across the government turn off and stop supporting their legacy systems that only do pieces of what the Acquisition Portal will do. The cost, as a percentage of what the government spends each year, is less than one percent. The benefit is that it will reduce waste and abuse within the system while providing greater insight into transactions.

Undefinitized Contract Actions

Undefinitized contract actions are basically letter contracts issued by the government to contractors under compelling circumstances to engage a contractor and allow performance to begin work notwithstanding the fact that there is insufficient time to complete the negotiation of all of the contract terms and conditions, including price.²⁵ It is an important tool in the contracting officer's toolbox and is very useful in responding to emergency situations, such as 9/11 or Hurricane Katrina. The parties are supposed to agree to the terms and conditions, including price, within 180 days afterward or before 40% of the anticipated work is completed.²⁶ Despite recent Congressional interest in ensuring that undefinitized contracts are definitized quickly, and guidance directing that they be definitized quickly, many undefinitized contract actions are not definitized within the specified time periods, often because the government does not have the adequate resources, like internal audit capacity mentioned above, to definitize the contracts. The result is that Congress' concern is raised over the abuse of this contract type and companies are forced to finance government actions for long periods of time, suffering a diminution in returns during the period of time that the contract remains undefinitized. Further, it is difficult to identify how many undefinitized contract actions there are and how long they remain undefinitized.

²⁵ FAR 16.603

²⁶ FAR 16.603-2(c)

RECOMMENDATIONS:

The government is not complying with existing rulemaking requirements for promulgating policies that are fundamental to transparency.

- No legislation involving acquisition may be implemented until the requirements of 41 USC 18(b) are fulfilled.
- “Compelling Circumstance” may only be used to circumvent the requirement for public notice and comment in advance of implementation when there is immediate risk of substantial loss to the government or danger to national security. Failure to comply with a legislative publication deadline is not a “compelling circumstance” in and of itself.
- No Presidential Direction involving acquisition may be implemented until the requirements of 41 USC 18(b) have been fulfilled.
- “Compelling Circumstance” may only be used to circumvent the requirement for public notice and comment in advance of implementation when there is immediate risk of substantial loss to the government or danger to National Security. Failure to comply with a Presidential publication deadline does not satisfy the requirement.
- No Agency Head may direct the implementation of any policy or process without having first fully complied with 41 USC 18(b).
- “Compelling Circumstance” may only be used to circumvent the requirement for public notice and comment in advance of implementation when there is immediate risk of substantial loss to the government or danger to National Security. Failure to comply with a legislative or executive publication deadline is not, by itself, a “Compelling Circumstance.”

Transparency into the Performance of Government Acquisition Programs

- Agency Heads shall ensure that their respective agencies have an internal audit capacity similar to that required by the Sarbanes Oxley Act of 2002 (Pub L. 107-204).
- Agency Heads may obtain internal audit services from:

- (1) their respective Inspector's General;
 - (2) other agency audit capabilities; or,
 - (2) contracts from the private sector
- Internal Audit functions within each agency shall comply with the Generally Accepted Audit Practices (GAAP) and the Government Auditing Standards (Yellow Book). Where there is a conflict between the two, the Government Auditing Standards shall control.

Acquisition Portal Needed

- The Administrator, General Services, in consultation with the Administrator, Office of Federal Procurement Policy, the Administrator, NASA and the Secretary of Defense, should be directed to establish an Acquisition Portal.
- The Acquisition Portal should be used by all agencies and agencies shall revise agency processes as necessary to facilitate its use, minimize customization, encourage government-wide uniformity and keep development and operation costs low. When complete, the Acquisition Portal will be used to:
 - (1) conduct acquisition transactions from the development of requirements to the disposal of products and solutions;
 - (2) capture material data pertinent to acquisition transactions;
 - (3) make available acquisition transaction data to appropriate government personnel in a timely manner that is updated as source data is updated
 - (4) make available for public review through the web acquisition transaction data determined to be releasable to the public and excludes any data not releasable under the Freedom of Information Act.
 - (5) provide access to the 9 databases currently part of the Integrated Acquisition Environment; and,
 - (6) provide a non-public list of all acquisition professionals, their education, training, authority, etc.
- The Acquisition Portal should operate on the principle that, at a minimum data will be entered one time and used many times. Manual re-entry of data should be minimized.
- Transactional solutions should be designed to take users through the priorities of solutions in a manner transparent to the user.

- Data in the Acquisition Portal should be defined to be consistent with existing statutory systems and be capable of being exported to be used with other functions, e.g. finance, property, security, etc.
- The Acquisition Portal should be created modularly in accordance with the Clinger Cohen Act.
- The Acquisition Portal should be tested for functionality as each module is added. Once testing is complete and the third party certifies that the module meets the government's requirements, all redundant software/systems across the government will be shutdown.
- Government requirement documents should be developed for all acquisitions without regard to dollar value. The documents necessary will be tailored to the level and complexity of the requirement.
- A library of requirements documents and public comments on the requirements documents, if any, should be maintained in the Acquisition Portal for modification and reuse by government agencies. The library should be maintained in accordance with guidance established by the Administrator for relevance and currency.
- Requirement documents for procurements exceeding \$5,000,000 should be made available for public review and comment through the Acquisition Portal before they are forwarded to the contracting office.
- Requirements may be exempted from public view where it is determined by the Head of an Agency that National Security requires such an exemption. This determination should not be delegated below one level below the Senior Procurement Executive of the Agency.
- All government solicitations (except those that are classified), invitations for bids (IFBs), Request for Proposals (RFPs), Request for Quotations (RFQs) under multiple award contracts, and similar documents that could lead to a contract award in excess of the simplified acquisition threshold should be published upon issuance in the Acquisition Portal, whether the acquisition is conducted using full and open or other procedures.

- All solicitations should be preceded by a draft solicitation published in the Acquisition Portal for comment for at least 5 business days, unless determined impracticable at one level above the contracting officer. All such determinations should be made in the Acquisition Portal and published in the Acquisition Portal promptly after signature.
- A library of solicitations shall be maintained in the Acquisition Portal in accordance with guidance established by the Administrator for relevance and currency.
- Any party may request the Competition Ombudsman for the Agency to review solicitations for irregularities such as:
 1. compliance with law and regulation;
 2. redundancy with other agency solicitations/contracts;
questions concerning the value obtained or to be obtained by the government;
and,
 3. to open the competition to solutions not contemplated by the solicitations.
- Any Party may seek review by the Agency head within five business days after receipt of the Competition Ombudsman's decision or 15 business days after submission of the request to the Ombudsman.
- The procurement may continue during any review but the Ombudsman should recommend remedial actions to the head of the agency based upon any finding of material irregularity.

Undefinitized Contract Actions

- The government should limit the use of undefinitized contract actions to those circumstances where there is an urgent and compelling requirement and time does not permit the award of a definitized contract.
- The government should post for public view through the Integrated Acquisition Environment, any successor solution and eventually the Acquisition Portal all undefinitized contract actions immediately after issuance.

- The government should not require Contractors to accept an undefinitized contract action under any set of circumstances.
- The failure of a contractor to accept an undefinitized contract action may not be used as a basis for subsequent discrimination against the contractor in any respect.
- Contractors who believe they may be suffering discrimination for failure to accept an undefinitized contracting action may file a protest with the Government Accountability Office (GAO). GAO will determine whether there has been any discrimination against the contractor, what harm, if any, the contractor has suffered as a result and recommend to the agency a remedy to make the contractor whole.
- If the government does not accept the recommendation of the GAO as to the appropriate remedy, the Agency Head shall notify both the President and respective committees of jurisdiction of the Congress of their decision not to follow the GAO recommendation and the reasons therefore.
- Where the contractor has timely submitted a request to definitize an undefinitized contract action and the government has failed to definitize the contract action within 6 months from the receipt of the contractor's proposal, the amount in issue should be subject to interest at the Treasury rate from the date of the contractor's proposal
- Where the contractor has submitted matters to the government for audit and the audit is not completed within 6 months from the date of submission, the government should pay the contractor interest at the Treasury rate from the date of the contractor's initial request. Interest is payable without a reduction in profit or any other reasonable, allocable and allowable cost.

About the Acquisition Reform Working Group

The Acquisition Reform Working Group (ARWG) is comprised of the Aerospace Industries Association, American Council of Engineering Companies, American Council of Independent Laboratories, National Defense Industrial Association, Professional Services Council, TechAmerica, The Associated General Contractors of America, The Coalition for Government Procurement and the U.S. Chamber of Commerce. We represent thousands of small, mid-sized and large companies and hundreds of thousands of employees that provide goods, services and personnel to the government.

Should you have questions about these comments, perspectives and recommendations, please contact Roger Jordan of the Professional Services Council at jordan@pscouncil.org or 703-875-8059.