Acquisition Reform Working Group

2018 LEGISLATIVE PACKET

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SMALL BUSINESS LOWER-TIER SUBCONTRACTING

Issue:

Section 1614 of the National Defense Authorization Act for Fiscal Year 2014, Public Law 113-66, requires prime contractors who have individual subcontracting plans to count work performed by lower-tier small business contractors towards the prime contractor's small business subcontracting goals. This is a significant and formidable change to small business rules. Given the shift in policy this provision requires, the Small Business Administration (SBA) must provide contractors clear guidelines, rules and implement the statute as intended.

The SBA's final rule, however, does not meet Congressional intent and fails to provide contractors necessary guidance. The rule also makes clear that not all contractors are alike. ARWG requests two changes to section 1614.

First, contrary to the underlying statutory language, the SBA final rule requires prime contractors to have two separate subcontracting goals: one for first tier subcontractors, and a second and distinct goal for lower tiers.[1] ARWG opposes this new regulatory requirement and requests Congress modify section 1614 to affirm that only one goal should be set.

Second, ARWG believes that prime contractors should have the choice whether to take credit for lower tiers. ARWG recommends that rather than mandating all tiers be counted, the statute allow prime contractors to elect whether to counter lower tiers.

Discussion:

For construction contracts valued at over $1.5 million, and for all other contracts valued at over $700,000, the prime contractor must submit a subcontracting plan to determine how much of the work from the project will go to small businesses. While there are different types of subcontracting plans that could be required, at their essence they require the prime contractor to detail the percentage, and in some cases the dollar value, of the anticipated subcontracted work that is targeted for performance by the following: 1) small businesses 2) veteran-owned small businesses; 3) service-disabled veteran-owned small businesses; 4) HUBZone small businesses; 5) small disadvantaged businesses; and 6) women-owned small businesses. Once the plan is approved, the prime contractor is required to submit periodic reports to the Electronic Subcontracting Reporting System (ESRS) during contract performance, so that the contracting officer can determine whether the contractor is acting in compliance with its subcontracting plan and meeting these goals.

However, many contracts necessitate numerous layers of subcontractors as there is work involved in each project that prime contractors will not always have the skill-set to perform or,

[1] U.S. Small Business Administration, "*Credit for Lower Tier Small Business Subcontracting*," Final Rule (81 Fed. Reg. 94246).

due to subcontracting requirements, must be performed by small businesses. Currently, prime contractors receive credit towards their subcontracting goals if their first-tier subcontractors fall within a given small business category.

To capture total small business participation within the federal market and to provide prime contractors with credit for incorporating small businesses into their entire supply chains, Section 1614 amended subcontracting plan requirements in the Small Business Act. This Section mandated prime contractors "receive credit for small business concerns performing as first tier subcontractors or subcontractors at any tier pursuant to the subcontracting plans required under paragraph (6)(D) in an amount equal to the dollar value of work awarded to such small business concerns."

In SBA's 2017 final rule, however, it imposed an additional requirement that prime contractors establish two subcontracting goals, one for the first tier and one for the lower tier subcontracts.[2] Such a requirement was not envisioned by Congress when it passed the statute. While changes were made to what was required of those who filed subcontracting reports, the Congress did not dictate what goals would be required in those reports. Additionally, the reporting system in which subcontracting data is reported is not built to take in a lower tier subcontracting goal.

Next, SBA's final rule does not explain how contractors are to avoid double counting. This has always been the long pole in the tent. The final rule also requires prime contractors to be responsible for the subcontractors at all tiers to meet small business goals. There are associated cost and challenges of collecting this data as well as impact to performance ratings if goals are not met at lower levels. Large businesses will incur more than minimal new costs and new responsibility and burden. As published, the multi-tier reporting requirement creates significant new performance, oversight and compliance risks; and is not scalable under the current federal subcontracts compliance and reporting frameworks. The solution is to allow prime contractors the choice whether to participate in this new regime and to elect whether to take credit for lower tiers. While SBA contends that this new requirement will ensure that agencies are not receiving double credit for lower-tier subcontracting, ARWG contends that the statutory change was intended to provide agencies with accurate data on total small business participation in the federal market, not to aid them in achieving the subcontracting goals they negotiate with SBA. There are other instances in which agencies receive augmented credit for contracting with small businesses, but SBA has not similarly altered reporting for businesses.

Recommendation:

ARWG recommends that the statute be amended to prohibit SBA or any federal agency from requiring additional goals for lower-tier subcontracting. Additionally, ARWG recommends clarifying that credit for subcontract contracting at any tier is not available to contractors who

[2] *Id.*

report subcontracts using either a Commercial Plan or Department of Defense Comprehensive Subcontracting Plan.

Proposed Legislative Language:

Section 8(d) of the Small Business Act (15 U.S.C. 637(d)) is amended to read:

(16) Credit for Certain Subcontractors.—
(A) For purposes of determining whether or not a prime contractor has attained the percentage goals specified in paragraph (6)—
(i)
if the subcontracting goals pertain only to a single contract with the executive agency, the prime contractor may elect to receive credit for small business concerns performing as first tier subcontractors or subcontractors at any tier pursuant to the subcontracting plans required under paragraph (6)(D) in an amount equal to the dollar value of work awarded to such small business concerns; ~~and~~
(ii)
if the subcontracting goals pertain to more than one contract with one or more executive agencies, or to one contract with more than one executive agency, the prime contractor may only count first tier subcontractors that are small business concerns~~.~~; and

(iii)
credit is not permitted for subcontracts at any tier that are to be reported under a Commercial Plan or Department of Defense Comprehensive Subcontracting Plan.

(B)
Nothing in this paragraph shall abrogate the responsibility of a prime contractor to make a good-faith effort to achieve the first-tier small business subcontracting goals negotiated under paragraph (6)(A), or the requirement for subcontractors with further opportunities for subcontracting to make a good-faith effort to achieve the goals established under paragraph (6)(D) and

(C) Nothing in this paragraph shall permit lower-tier subcontracting goaling requirements to prime contractors that are eligible to receive lower-tier subcontracting credit under this paragraph.

ACCELERATED PAYMENT TO SMALL BUSINESSES AND SMALL BUSINESS SUBCONTRACTORS

Issue:

Since the inception of the OMB program to accelerated payments to small business prime contractors and small business subcontractors in 2011, payment times for many small business subcontractors have been cut from 30 to under 15 days. Paying small business suppliers faster facilitates access to working capital at lower costs and helps facilitate growth opportunities. The economic benefits of accelerated payments for small businesses are substantial. In 2014, the federal government purchased $83 billion in goods and services from small businesses through prime contracting procurements. Across the entire U.S. economy, nearly half of all private sector employees in the U.S. work for a small business. Moreover, small businesses accounted for over 60 percent of net new jobs created over the past two decades.

OMB Memo M-12-16 – allowing accelerated payments to large primes with small business subcontractors – expired at the end of December 2017 while accelerated payments for small business primes remains in effect through OMB Memo M-11-32. According to the White House, M-12-16 was always intended to be a temporary policy, although it was extended four times. M-11-32 does not have an expiration date and the assumption is that it will remain in effect indefinitely. The failure to renew M-12-16 is having an immediate negative economic impact on small businesses supporting government contracts across all agencies. Most immediately, reduced cash flow stemming from the termination would result in increased debt for many small businesses. While profit margins do not generally draw companies into the federal marketplace, prompt cash flow does. Ending this accelerated payment policy could discourage many commercial companies from choosing to do business with the government.

Discussion:

On 6 December 2017, the U.S. Chamber of Commerce sent a multi-association letter to the Director, Office of Management and Budget (OMB), Mick Mulvaney requesting the extension of the accelerated payments rules to both small business prime contractors and to large prime contractors with small business sub-contractors. While OMB has made no public pronouncements, representatives from the Pentagon (USD ATL/MIBP) and the White House National Economic Council confirmed that OMB decided to allow M-12-16 to lapse as of 1 January 2018.

Recommendations:

ARWG recommends that Congress codify the policy in OMB Memo M-12-16 in statute and the Administration should extend the practices under the memo until a permanent legislative solution is enacted.

EXPAND DOD REQUIREMENTS FOR COMPREHENSIVE DEBRIEFINGS AND APPLY GOVERNMENT-WIDE

Issue:

The fiscal year 2018 National Defense Authorization Act included a provision (Sec. 818) requiring the Secretary of Defense to revise the Department of Defense Supplement to the Federal Acquisition Regulation to provide that all required post-award debriefings provide detailed and comprehensive statements of the agency's rating for each evaluation criteria and the agency's overall award decision, with protections for proprietary information. The provision also requires DOD to respond in writing to additional, follow-up questions within 5 days and the debrief would not be concluded until the answers are provided.

Background:

ARWG believes that enhanced debriefings will provide contractors with additional information after a source selection and create a more meaningful dialogue between the government and offerors. ARWG believes that the fundamental purpose of the bid protest process is to hold agencies accountable for following the law and their procurement procedures in a transparent manner. Additional transparency during debriefings will reduce the instances where a protest is filed for the purpose of forcing disclosure of the Department's award rationale and analysis.

ARWG commends Congress for recognizing and addressing the value that comprehensive debriefings can have on the acquisition and bid protest processes. We urge Congress to address a number of gaps and inconsistencies in Sec. 818 while expanding this provision government-wide.

Recommendation:

ARWG urges the Congress to revisit and amend Sec 818 by reducing the award threshold for comprehensive debriefings and eliminating the distinction between traditional and non-traditional contractors.

ARWG further believes that all agencies should be required to conduct similar comprehensive debriefings. In the proposed legislative language below, subsections (a), (b), and (c) are identical to Section 818 except for the thresholds for application – which are lower for the civilian agencies – and the elimination of the traditional and nontraditional contractor distinction. Subsection (d) in the proposed legislative language below conforms the GAO statutory timeliness provision to cover both Defense (as in Section 818) and the civilian agencies.

While the threshold for a debriefing for task orders for civilian agencies is set at $3 million (see subsection (a)(2)), nothing in this provision changes the $10 million threshold for filing a protest at GAO of a task order issued by a civilian agency.

Proposed Legislative Language One:

Section 818 of the National Defense Authorization Act for Fiscal Year 2018 (Public Law 115-91) is amended:

(1) In the case of a contract award in excess of $50,000,000 ~~100,000,000~~, a requirement for disclosure of the agency's written source selection award determination, redacted to protect the confidential and proprietary information of other offerors for the contract award, and, in the case of a contract award in excess of $10,000,000 and not in excess of $50,000,000 ~~100,000,000~~ with a small business ~~or nontraditional~~ contractor, an option for the small business ~~or nontraditional~~ contractor to request such disclosure.

Proposed Legislative Language Two:

SEC___ ENHANCED POST-AWARD DEBRIEFING RIGHTS.

(a) RELEASE OF CONTRACT AWARD INFORMATION.—Not later than 180 days after the date of the enactment of this Act, the Federal Acquisition Regulatory Council shall revise the Federal Acquisition Regulation to require that all required post award debriefings, while protecting the confidential and proprietary information of other offerors, include, at a minimum, the following:

(1) In the case of a contract award in excess of $20,000,000, a requirement for disclosure of the agency's written source selection award determination, redacted to protect the confidential and proprietary information of other offerors for the contract award, and, in the case of a contract award in excess of $3,000,000 and not in excess of $20,000,000 with a small business contractor, an option for the small business contractor to request such disclosure.

(2) A requirement for a written or oral debriefing for all contract awards and task or delivery orders valued at $3,000,000 or higher.

(3) Provisions ensuring that both unsuccessful and winning offerors are entitled to the disclosure described in paragraph (1) and the debriefing described in paragraph (2).

(4) Robust procedures, consistent with section 552(b) of title 5, United States Code, and provisions implementing that section in the Federal Acquisition Regulation, to protect the confidential and proprietary information of other offerors.

(b) The debriefings described in (a)(2) shall include, at a minimum-

(1) the agency's evaluation of the significant weak or deficient factors in the offeror's offer;

(2) the overall evaluated cost and technical rating of the offer of the contractor awarded the contract and the overall evaluated cost and technical rating of the offer of the debriefed offeror;

(3) the overall ranking of all offers;

(4) a summary of the rationale for the award;

(5) in the case of a proposal that includes a commercial item that is an end item under the contract, the make and model of the item being provided in accordance with the offer of the contractor awarded the contract;

(6) reasonable responses to relevant questions posed by the debriefed offeror as to whether source selection procedures set forth in the solicitation, applicable regulations, and other applicable authorities were followed by the agency; and

(7) an opportunity for a disappointed offeror to submit, within two business days after receiving a post-award debriefing, additional questions related to the debriefing.

(c) The agency shall respond in writing to any additional question submitted under subparagraph (b)(7) within five business days after receipt of the question. The agency shall not consider the debriefing to be concluded until the agency delivers its written responses to the disappointed offeror.

(d) COMMENCEMENT OF POST-BRIEFING PERIOD.— Section 3553(d)(4)(B) of title 31, United States Code, is amended—

(1) by striking “any component of the Department of Defense” and inserting “any federal agency.”

RESTRICTIONS ON THE MISUSE OF LOWEST PRICE, TECHNICALLY ACCEPTABLE SOURCE SELECTION CRITERIA

Issue:

The fiscal year 2017 National Defense Authorization Act included a provision (Sec. 813) to limit DOD's use of Lowest Price, Technically Acceptable (LPTA) source selection criteria for technical and knowledge-based services contracts. ARWG applauds Congress for working to ensure that LPTA is applied only for DOD procurements with well-defined requirements and objectives; and that LPTA is avoided to the maximum extent practicable for IT services, cybersecurity services or other knowledge-based professional services contracts. There are two outstanding LPTA-related issues we urge Congress to address this year: (a) Sec. 813's implementation regulations; and (b) LPTA's misuse in the civilian agencies.

Background:

Section 813 of the FY17 NDAA establishes the policy of the Department of Defense to avoid using lowest price technically acceptable (LPTA) source selection criteria in circumstances that would deny the Department the benefit of cost/technical tradeoffs in the source selection process. The provision also directs that, within 120 days after enactment (i.e., by April 2017), the Defense Federal Acquisition Regulation Supplement (DFARS) be revised to limit the use of LPTA to specifically identified situations, to the maximum extent possible. Unfortunately, the regulations to implement Section 813—which were due in April, 2017—have not been issued, and instances of the inappropriate use of LPTA continue to be widely reported by members of the ARWG associations. Of greater concern, we are learning of instances where the reliance on LPTA is leading to staffing shortfalls and failure to meet contractual requirements.

Section 813 of the FY17 NDAA codified a 2015 memo from then-Under Secretary of Defense for Acquisition, Technology and Logistics (AT&L) Frank Kendall, designed to limit the use of LPTA as a source-selection method for DOD contracts. At the time, the Department of Defense represented the majority of LPTA-related procurements discovered. Since then, growth of LPTA use has been faster within civilian agencies (24% and 55% respectively). Particularly concerning, for IT—a category of services where requirements are harder to define and innovation is sought—the number of LPTA procurements grew only 19% for DOD and 222% for civilian agencies.

Recommendation:

ARWG recommends that Congress modify Section 813 to require DOD to report on the status of the long-overdue revision of the DFARS regulation and the implementation of such regulation by its buying activities. Further, ARWG recommends that Congress modify Section 813 to prohibit DOD from using LPTA evaluation criteria for covered services, i.e. IT services, cybersecurity services systems engineering and technical assistance services, advanced electronic testing, audit

or audit readiness services, or other knowledge-based services, until the required regulation is published as a final rule or the relevant Services Acquisition Executive provides a written justification for why it is in the best interest of the Service to use LPTA for a specific acquisition.

Additionally, ARWG recommends that Congress expand these common-sense provisions government-wide by passing the Promoting Value Based Procurement Act of 2017 (H.R. 3019), bipartisan legislation that passed the House Committee on Oversight and Government Reform unanimously on September 13, 2017, or including it in the FY19 NDAA. The legislation restricts the use of LPTA at the civilian agencies to acquisitions that meet the same six criteria established for DOD by the FY17 NDAA. It also requires federal agencies, to the maximum extent practicable, to avoid LPTA for contracts in which a focus on price over value is particularly problematic, including information technology and cybersecurity services, engineering and technical services, and other knowledge-based services or solutions. ARWG also recommends that any legislation include the additional criteria for the use of LPTA made in the FY18 NDAA as well as a prohibition on the use of LPTA for higher valued information technology equipment and software. Enactment will ensure that all federal agencies have the flexibility necessary to seek and obtain innovative solutions, better outcomes and ultimately the best value on behalf of taxpayers.

Proposed Legislative Language 1:

Sec. __ Section 813 of the National Defense Authorization Act for Fiscal Year 2017 is amended by adding at the end thereof the following:

1) In paragraph (c) by inserting "(1)" before "To the maximum extent practicable," and by adding the following new subparagraph:

"(2) The Department of Defense is prohibited from using Lowest-Price Technically Acceptable Source Selection criteria for any contract that is predominately for services or equipment covered in subparagraphs (1), (2), or (3) until such time that the regulation described in this section is published as a Final Rule or the relevant Service Acquisition Executive provides a written justification to the Armed Services Committees of the House of Representatives and Senate describing why it is in the best interest of the Service to use LPTA for the specific acquisition.".

2) By adding at the end thereof the following:

"(e) DEPARTMENT OF DEFENSE REPORT— "(1) Not later than October 1, 2018, the Secretary of Defense shall report to the congressional defense committees on (i) the status of the revision of the DFARS regulation required by subsection (b) and (ii) the implementation of such regulation by the Department's buying activities.".

Proposed Legislative Language 2:

Sec.__ USE OF LOWEST PRICE TECHNICALLY ACCEPTABLE SOURCE SELECTION PROCESS.

(a) Statement Of Policy.—It shall be the policy of the United States Government to avoid using lowest price technically acceptable source selection criteria in circumstances that would deny the Government the benefits of cost and technical tradeoffs in the source selection process.

(b) Revision Of Federal Acquisition Regulation.—Not later than 120 days after the date of the enactment of this Act, the Federal Acquisition Regulation shall be revised to require that, for solicitations issued on or after the date that is 120 days after the date of the enactment of this Act, lowest price technically acceptable source selection criteria are used only in situations in which—

(1) an executive agency is able to comprehensively and clearly describe the minimum requirements expressed in terms of performance objectives, measures, and standards that will be used to determine acceptability of offers;

(2) the executive agency would realize no, or minimal, value from a contract proposal exceeding the minimum technical or performance requirements set forth in the request for proposal;

(3) the proposed technical approaches will require no, or minimal, subjective judgment by the source selection authority as to the desirability of one offeror's proposal versus a competing proposal;

(4) the source selection authority has a high degree of confidence that a review of technical proposals of offerors other than the lowest bidder would not result in the identification of factors that could provide value or benefit to the executive agency;

(5) the contracting officer has included a justification for the use of a lowest price technically acceptable evaluation methodology in the contract file;

(6) the executive agency has determined that the lowest price reflects full life-cycle costs, including for operations and support;

(7) the agency would realize no, or minimal, additional innovation or future technological advantage by using a different methodology; and

(8) with respect to a contract for procurement of goods, the goods procured are predominantly expendable in nature, nontechnical, or have a short life expectancy or short shelf life.

(c) Avoidance Of Use Of Lowest Price Technically Acceptable Source Selection Criteria In Certain Procurements.—To the maximum extent practicable, the use of lowest price technically acceptable source selection criteria shall be avoided in the case of a procurement that is predominately for the acquisition of—

(1) information technology services, cybersecurity services, systems engineering and technical assistance services, advanced electronic testing, audit or audit readiness services, or other knowledge-based professional services;

(2) personal protective equipment;

(3) knowledge-based training or logistics services in contingency operations or other operations outside the United States, including in Afghanistan or Iraq; or

(4) information technology equipment, including electronic test and measurement equipment, and software.

(d) Reporting.—Not later than one year after the date of the enactment of this Act, and annually thereafter for three years, the Comptroller General of the United States shall submit to the appropriate congressional committees a report on the number of instances in which lowest price technically acceptable source selection criteria is used for a contract exceeding $2,000,000, including an explanation of how the situations listed in subsection (b) were considered in making a determination to use lowest price technically acceptable source selection criteria.

(e) Definitions.—In this section:

(1) EXECUTIVE AGENCY.—The term "executive agency" has the meaning given that term in section 102 of title 40, United States Code, except that the term does not include the Department of Defense.

(2) CONTINGENCY OPERATION.—The term "contingency operation" has the meaning given that term in section 101 of title 10, United States Code.

(3) APPROPRIATE CONGRESSIONAL COMMITTEES.—The term "appropriate congressional committees" means the Committee on Oversight and Government Reform of the House of Representatives and the Committee on Homeland Security and Governmental Affairs of the Senate.

REQUIRE GOVERNMENT-WIDE REPORTING ON PROCUREMENT ACQUISITION LEAD TIMES (PALT)

Issue:

The fiscal year 2018 National Defense Authorization Act included a provision (Sec. 886) to require the Secretary of Defense to develop, make available for public comment, and finalize a definition of the term "Procurement Administrative Lead Time" or "PALT," to be applied Department of Defense-wide. The definition will describe the amount of time from the date on which a solicitation is issued to the date of an initial award of a contract or task order of the Department of Defense. The Secretary must also produce a plan for measuring and publicly reporting data on PALT for Department of Defense contracts and task orders above the simplified acquisition threshold. On February 9th, DOD issued a request for comment on the definition of PALT and several members of ARWG via the Council of Defense & Space Industries Associations submitted a response.

Background:

The government has a responsibility to ensure that it solicits and acquires services and technology from contractors in the most effective and efficient manner. The acquisition process can be burdensome and cumbersome. Reducing the timeframes associated with procurement awarding process is in the best interest of the government, the contractor community and the taxpayer. When the government identifies a need, they should be able to obtain the services as soon as possible. Given the pace of technological change in the solutions contractors provide to the government, the acquisition system must be efficient. Under lengthy lead times, technology can change dramatically between the time a need was identified and the issuance of an award. Anecdotal information suggests that lead times are increasing, despite the government's expressed desire to create more efficiency within the federal acquisition system.

ARWG commends Congress for recognizing and addressing PALT's immense impact on both government efficiency and effectiveness, as well as contractor costs, and that reducing lead times will help inform ongoing process improvement and efficiencies. Congress should extend this requirement government-wide.

By standardizing the definition of PALT across all federal agencies, and collecting information based on uniform metrics, the government, contractors, and others will be able to more easily analyze this important statistic and use it as a tool to ensure needed services are obtained in a timely manner and unnecessary wait times are reduced.

Sec. 886 of the FY18 NDAA also directed the Secretary of Defense to work in coordination with the Administrator of the General Services Administration (GSA) to implement this DOD provision using existing data systems. Accordingly, the Secretary and GSA are now tasked with integrating

PALT timelines for DOD contracts into systems that track spending government-wide, which should allow for a seamless application for all federal government contracts.

Recommendation:

ARWG recommends that the Congress apply Section 886 of the FY17 NDAA to the civilian agencies, covering all federal government contracts.

Proposed Legislative Language:

SEC.___ DEVELOPMENT OF PROCUREMENT ADMINISTRATIVE LEAD TIME.

(a) IN GENERAL.—Not later than 180 days after the date of the enactment of this Act, the Administrator of the Office of Federal Procurement Policy shall develop, make available for public comment, and finalize—

(1) a definition of the term ''Procurement Administrative Lead Time'' or ''PALT'', to be applied government-wide, that describes the amount of time from the date on which a solicitation is issued to the date of an initial award of a contract or task order; and

(2) a plan for measuring and publicly reporting data on PALT for federal government contracts and task orders above the simplified acquisition threshold.

(b) REQUIREMENT FOR DEFINITION.—Unless the Administrator determines otherwise, the amount of time in the definition of PALT developed under subsection (a) shall—

(1) begin on the date on which the initial solicitation is issued for a contract or task order of the federal departments and agencies; and

(2) end on the date of the award of the contract or task order.

(c) COORDINATION.—In developing the definition of PALT, the Administrator shall coordinate with—

(1) the senior procurement executives of federal agencies;

(2) the Secretary of Defense; and

(3) the Administrator of the General Services Administration on modifying the existing data system of the Federal Government to determine the date on which the initial solicitation is issued.

(d) USE OF EXISTING PROCUREMENT DATA SYSTEMS.—In developing the plan for measuring and publicly reporting data on PALT required by subsection (a), the Administrator shall, to the maximum extent practicable, rely on the information contained in the Federal procurement data system established pursuant to section 1122(a)(4) of title 41, United States Code, including any modifications to that system.

FAR PART 16 DEBRIEFS

ISSUE:

Under FAR part 16 IDIQ task or delivery order contracts, agencies must provide debriefings to unsuccessful offerors only if the contract value exceeds $5.5 million. This administratively established floor means that unsuccessful offerors for lower value contracts are not entitled to an explanation of why their proposals were not successful, and thus they could make the same errors in subsequent proposals. The fact is that the purpose of debriefs is to educate unsuccessful offerors on why they were not selected so that they can improve future proposals, and the $5.5 million floor contradicts that goal. Debriefs, at least in written form, should be available to all FAR part 16 unsuccessful offerors regardless of contract value.

DISCUSSION:

This proposal pertains to task order and delivery order awards under FAR part 16 contracts (IDIQ's such as NASA SEWP and US Army ITES). FAR Part 16 contracts are contract vehicles, whereby an agency has a limited pool of prime contractors it considers for the acquisition of goods and services. For example, NASA counts several dozen companies as primes under its SEWP program. SEWP is available to any Federal government agency, not just NASA. If an agency needs products or services, it can turn to SEWP, and any of the prime contractors can submit a bid to meet the agency's needs. The actual purchases under SEWP or other IDIQ's are called task orders or delivery orders (TO/DO).

IDIQs account for a substantial amount of Federal contract dollars. A 2017 GAO report states that, from fiscal years 2011 through 2015, the Federal government spent $130 billion per year through IDIQ contracts. The U.S. Department of Defense (DOD) accounted for two-thirds of that amount, or approximately $90 billion per year. However, agencies must provide debriefs to unsuccessful TO/DO offerors only if the value of the TO/DO is above $5.5 million.

This floor is misguided for a variety of reasons. First, the purpose of debriefs is to let the unsuccessful bidders know what they did wrong so they can improve future proposals. Without a debrief, unsuccessful bidders will not know how they erred and thus could continue to make the same mistakes on subsequent bids, depriving agencies of innovative solutions because of errors that could have been corrected.

Second, independent reviewers have indicated that altering the debriefing process within DOD could have downstream benefits. A 2018 RAND report, Assessing Bid Protests of U.S. Department of Defense Procurements: Identifying Issues, Trends, and Drivers, recommends that DOD improve the quality of debriefings, particularly those provided to small businesses, in order to reduce the number of and improve bid protests. This is because, without useful background information from an agency debriefing, unsuccessful offerors not only could be more likely to file bid protests but also could be more likely to submit protests with incomplete or inaccurate

information. While the RAND report focused on DOD, the same logic certainly applies to civilian agency IDIQs.

Finally, the floor has a disproportionately negative impact upon small businesses and other vendors with limited resources. Relative to large government contractors, small businesses are more likely to submit proposals for TO/DOs below the $5.5 million floor. As such, they would be more likely not to be eligible for debriefs if and when they are unsuccessful. This contravenes the government's goal of empowering small businesses.

RECOMMENDATION:

Congress should require all federal agencies to provide debriefings upon request, in the form of a redacted source selection memo, to all unsuccessful offerors of task orders and delivery order contracts regardless of the dollar value of the task order or delivery order.

POST-EMPLOYMENT RESTRICTIONS FOR SENIOR DEPARTMENT OF DEFENSE PERSONNEL

Issue:

The FY2018 NDAA made significant changes to the post-employment restrictions applicable to very senior Department of Defense employees departing after December 12, 1017. These changes will make it more difficult for industry to receive expert strategic and technical advice from very highly-qualified former Department of Defense officials.

Discussion:

Section 1045 of the FY18 NDAA (Public Law 115-91) made several changes to the post-employment restrictions of certain Department of Defense (DOD) employees. For the first time, the restricted post-employment activities of high-ranking DOD employees (defined as flag and general officers and their civilian equivalents) will be governed by a more expansive definition of lobbying under the Lobbying Disclosure Act of 1995, or LDA (2 U.S.C. 1602) instead of the language found in 18 U.S.C. 207. The LDA definition covers not only direct lobbying, but also "efforts in support of such activities, including preparation and planning . . . and other background work." Secondly, the LDA applies this restriction to contacts and efforts involving the entire Department of Defense, not just the agency where the former official worked in the year prior to departure. Finally, for the highest-tier employees covered by this provision (3-star and above plus civilian equivalents), the so-called "cooling off" period is extended from one to two years. These restrictions apply only to lobbying activities with covered DOD officials, or with DOD matters that involve non-DOD federal officials.

Under 18 U.S.C. 207, certain high-level officials are subject to a so-called "cooling-off" period. For a period of one year after leaving a "senior" position, a former senior employee may not represent another person or entity by making a communication to, or appearing before, the former employee's former agency to seek official action on any matter. If this long-standing and well understood rule were extended to two years for 3-Star officers and above, Government ethics officials could continue to rely upon longstanding regulatory guidance published by the Office of Government Ethics to interpret the breadth of the restriction. It would also prevent overly intrusive and expensive audits of the internal time keeping records of contractors and interviews of contractor employees in an effort to determine whether covered former general officers or their civilian equivalents have engaged in behind the scenes "lobbying activity." Instead, potentially restricted representational appearances could be quickly identified for review by agency ethics officials.

ARWG is not aware of any problem that justifies such major changes, and Congress provided no rationale for imposing the more restrictive procedures. Creating a new and more restrictive standard for a single agency – the Department of Defense – not only deprives industry of important strategic advice, it could make the department less competitive in attracting the best civilian executives across the Government. Furthermore, the more severe post-employment

restrictions for higher graded employees provides disincentives for top performers aspiring to those grades, potentially causing DOD to lose some of its best and brightest employees earlier than expected or necessary.

In addition, moving to the overly-broad and subjective LDA definition of "lobbying activity" is likely to cause inadvertent errors and enforcement headaches for an industry that works hard to maintain compliance with federal ethics laws. Determining when an email or meeting involves "preparation", "research", or "planning" for a potential lobbying effort is highly subjective, especially compared to 18 U.S.C. 207, which prohibits a "communication or appearance, with the intent to influence." In its latest annual report on lobbyist compliance with the LDA, the Government Accountability Office found that only 36% of respondents believed the LDA definition of "lobbying activity" to be very easy to understand. In the last five surveys this number has never hit 50%, and the figure is trending down.[3]

In the absence of any patterns of misconduct under the existing post-employment guidelines, ARWG believes it is a mistake to single out this group of individuals for more restrictive standards, a mistake that will make it harder to obtain the best strategic advice on critical military policies and programs.

Recommendation:

ARWG recommends a statutory change to Sec. 1045(c) to align the scope of the communications restriction with 18 U.S.C. 207(c).

[3] GAO Report 17-386, "2016 Lobbying Disclosure: Observations on Lobbyists' Compliance with Disclosure Requirements", March 2017, p. 23.

INDIRECT COST PROPOSAL DEFINITION

Issue:

On January 30, 2018, the Section 809 Panel released the Section 809 Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations. In the report, the Panel stated the following:

> "The government added new requirements of an *adequate* final indirect cost rate proposal to FAR 52.216-7(d)(2)(iii) in 2011. These newly required elements of a final indirect cost rate proposal were directly based on DCAA's incurred cost electronic model, which DCAA created many years ago to help contractors prepare their final indirect cost rate proposals in a consistent manner and provide appropriate cost detail to make DCAA's audit oversight more efficient. Many of the required elements of an adequate final indirect cost rate proposal have no bearing on calculating, understanding, auditing, and negotiating final indirect cost rates. This collection of unnecessary data has contributed to DCAA losing its focus on the purpose and scope of contractors' final indirect cost rate proposal and has created unnecessary work for contractors, DCAA, and especially contracting officers.
>
> **Findings**
> The timeliness of final rate settlements and consequent contract closeouts will substantially improve if DCAA refocuses its oversight on the purpose of the final indirect cost rate proposal to reasonably ensure the allowability of contractors' actual indirect costs, not direct costs. The term incurred cost proposal is not defined anywhere in the FAR, it must be made clear it is the same as—not different from—a final indirect cost rate proposal. This slight change will help DCAA and contracting officers refocus on the purpose of FAR 52.216-7(d) and FAR 42.705."

In their report, the Panel recommended that several of these currently required schedules be removed and made "optional information that may be required." In the Panel's opinion, they did not think a statutory change was required. Instead, they recommended that regulators update the FAR:

> "Define *incurred cost proposal* in FAR 52.216-7 as being synonymous with a final indirect cost rate proposal, and make some elements (I-M and O) of the indirect cost rate proposal in FAR 52.216-7(d)(2)(iii) optional."

Discussion:

ARWG wholeheartedly concurs with the 809 Panel's finding with respect to this issue. However, based upon our experience in dealing with regulators and the DOD acquisition workforce, we do not believe the recommendations as presented will be acted upon without the consent and direction of Congress.

On several occasions, industry has appealed DOD (e.g. the Dr. Husband Study Dated September 29, 2015 "Eliminating Requirements Imposed on Industry Where Costs Exceed Benefit") to repeal these onerous requirements that are imposed on all contractors, which were added by the FAR Council at the urging of DCAA, only to be ignored or rebuffed. Accordingly, we believe there should be legislative direction mandating the removal of these requirements.

Furthermore, we would clarify the Panel's implementation language to make these items optional, with the consent of the contractor. In the report's conclusion, the panel stated:

> "Several final indirect cost rate proposal schedules that have no bearing on evaluating or settling final indirect cost rates should be removed. These schedules are currently *required*; they ***should be made optional information that may be required, if necessary, during the audit process***. This relatively minor adjustment will meaningfully reduce contractors' burden to prepare its final indirect cost rate proposal and help DCAA stay focused on the purpose of contractors' proposals and contracting officers' responsibility to settle indirect cost rates. (***Emphasis added***)"

This conclusion, from a practical standpoint, is contradictory. It is well established within the Panel's report that the intent of this activity is to review contractors' indirect rate cost proposals, and all of these additional requirements and schedules delay and inhibit the completion of this task. Prior to the 2011 change, DCAA had audited contractors' direct costs without these schedules being prepared by contractors, and there is nothing preventing those prior activities from being performed. The language in the conclusion "… may be required, if necessary, during the audit process" means they will <u>continue</u> to be required. It is just the timing of when contractors will be told by the auditors they are required. That will only move the problem into a different time frame. By requiring the "consent of the contractor" for these optional schedules in the contract clause, then contractors and the government can engage locally to determine the most efficient technique to fulfill the audit objective with the records that are available within the contractors' systems.

<u>Recommendation:</u>

Accordingly, we recommend Congress adopt the Section 809 recommendation regarding incurred cost proposal in the FY19 NDAA with the following modification:

> Define *incurred cost proposal* in FAR 52.216-7 as being synonymous with a final indirect rate proposal, and make some elements (I-M and O) of the indirect cost rate proposal in FAR 52.216-7(d)(2)(iii) optional ***with the consent of the Contractor***. (***Emphasis Added***)

DESIGN-BUILD AND THE PROHIBITION OF REVERSE AUCTIONS ON CONSTRUCTION CONTRACTS

Issue:

H.R. 679 and S. 2113 require the use of a two-phase design-build selection process for construction projects over $3 million in order to reduce burdens for small construction companies seeking government contracts. It also prohibits the use of reverse auctions for these types of construction procurements to assist small construction companies and ensure that the company with the best design wins the contract rather than the company that bids the absolute lowest prices.

Discussion:

Design-Build Section

- Construction contract proposals can be costly, especially for small contractors. This bill levels the playing field for construction contracts by instituting a two-phase design-build selection process for projects over $3 million. Initially contractors would submit a high-level proposal, with only the best proposals continuing on to the second phase which requires more granular proposals.
- The Congressional Budget Office (CBO) found that the version of this bill in the 115th Congress (H.R.679) would cost about $600,000 a year and $3 million over the 2018-2022 period. CBO also found that the bill would not affect revenues and would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2027. The current version requires only projects over $3 million to adhere to the two-phase design-build selection process. Previously, the threshold was $750,000.

Prohibition of Reverse Auctions Section:

- The bill would require the Federal Acquisition Regulation Council to issue a rule prohibiting reverse auctions as part of the two-phase design-build selection process when used for design or construction services.
- There is broad acknowledgement of the shortcomings of reverse auctions for construction procurement. The U.S. Army Corps of Engineers – the largest and most experienced federal construction agency – issued a report[4] and testified[5] that using reverse auctions to procure construction services did not ensure a fair and reasonable price and did not guarantee the selection of the most qualified contractor. Additionally,

[4] LTC A.J. Castaldo, "Final Report regarding the U.S. Army Corps of Engineers Pilot Program on Reverse Auctioning," U.S. Army Corps of Engineers (2003), *available at* http://docs.house.gov/meetings/VR/VR08/20131211/101557/HHRG-113-VR08-Wstate-CaryN-20131211.pdf.
[5] Building America: Challenges for Small Construction Contractors: Hearing before the Subcommittee on Contracting and Technology of the Committee on Small Business (Testimony of James Dalton, U.S. Army Corps of Engineers), House of Representatives, One Hundred Thirteenth Congress, First Session, *available at* http://smallbusiness.house.gov/uploadedfiles/5-23-2013_dalton_testimony.pdf.

the large reverse auction vendor stated that using reverse auctions to procure construction services did not make sense.[6]

Design-Build is a process where architects, engineers, constructors and subcontractors team together to compete for projects. Design-build is one of several delivery systems used by government agencies and can be an effective and efficient means of delivery projects to the public. The cost of competing for design-build projects can be prohibitively expensive, with a median price of $260,000 for each design firm on each competition.

Inclusion and expansion of the language from H.R. 679 and S. 2113 would encourage more efficient and competitive utilization of design-build acquisition for design and construction services by reasonably limiting use of the one-step design-build procurement process. This reform will help increase competition and opportunities for all construction industry businesses, especially small businesses, to fairly win design and construction contracts.

Recommendation:

ARWG recommends enactment of H.R. 679 and S. 2113 language covering both military and civilian construction projects.

[6] Danielle Ivory, "Reverse Auctions Draw Scrutiny," New York Times (April 6, 2014), http://www.nytimes.com/2014/04/07/business/reverse-auctions-draw-scrutiny.html?_r=1

REPEAL OF SECTION 827 OF THE FY18 NDAA (Pub. L. No. 115-91) – PILOT PROGRAM ON PAYMENT OF COSTS FOR DENIED GOVERNMENT ACCOUNTIABILITY OFFICE BID PROTESTS

Issue:

Section 827 of the FY18 NDAA requires the Department of Defense to establish a pilot program, beginning in December 2020 and ending in December 2025, to determine the effectiveness of requiring contractors to reimburse DOD for costs incurred in processing covered GAO protests. Covered protests under section 827 are those filed by a firm with annual revenues in excess of $250 million and which protests are denied in an opinion issued by the GAO.

Discussion:

After the enactment of section 827 in the FY18 National Defense Authorization Act in December 2017, the RAND National Defense Research Institute (NDRI) released its comprehensive study on the impact of bid protests on DOD acquisitions required by section 885 of the National Defense Authorization Act for Fiscal Year 2017. Although the study did not specifically address the advisability of the "loser pays" approach in section 827, the NDRI found no indications of abuse of the process by medium and large defense contractors and noted that protests by the largest firms have held steady and may be declining.[7] In fact, the study indicated that small-business protests are less likely to be effective and more likely to be dismissed for legal insufficiency.[8] Moreover, the NDRI noted that no agency or service in DOD has the means of identifying or tracking its administrative costs associated with bid protests before the GAO, which are the costs that section 827 would require losing protestors to reimburse DOD for under the pilot.[9]

In light of the analysis and findings in the NDRI report, ARWG believes that Congress should reconsider support for the pilot program in section 827. ARWG believes that there is no sound public policy basis for initiating this six-year pilot program in December 2020 in the manner structured in section 827; in fact, there are more powerful arguments against doing so.

Recommendation:

ARWG recommends that section 827 of the National Defense Authorization Act for Fiscal Year 2018 be repealed.

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[7] RAND Report, *Assessing Bid Protests of U.S. Department of Defense Procurements Identifying Issues, Trends, and Drivers*, p. 33.
[8] *Id.* at p. 45.
[9] *Id.* at p.2.

OUTCOME-BASED CONTRACTING

Issue:

The Department of Defense's acquisition workforce relies too heavily on personnel-based contracts and micromanages solutions that are often costlier and less efficient that would be achieved if they embraced more outcome-based contracting. Education and incentivization of the use of outcome-based contracts is needed to change the culture to allow for the rewards to materialize.

Discussion:

The Congress has long supported and encouraged the use of outcome-based contracting throughout the federal government. Multiple studies and GAO reports have stressed the success that outcome-based procurements have over procurements in which the requirements are based on inputs. The results are dollar savings, time savings, and often more innovative solutions. This is particularly the case in services contracting. The Department, in most situations, can increase the return on dollars it invests in IT and knowledge-based services contracts by requiring a measurable deliverable as the outcome that the contractor must achieve and deliver versus specifying the number and type of personnel who must perform the work.

Specifically, with innovations in automation and other technology, many of the traditional service type contracts administered by the Department should be outcome-based and not personnel-based. Personnel-based contracts often include a direction of not only the number of personnel to be contracted but the education level, experience level, work location and skill set they must possess. The Department will be able to spend less money on some contracts, have better insight and achieve better results if it instead identifies the outcome sought, and allows the contractor to manage its workforce to achieve the desired end state. Furthermore, the Department will be able to save money in part by using more fixed price contracts which set the outcomes that must be achieved in a specified time, along with associated specific milestones and standards by which success will be measured. Fixed price contracts like these allow contractors the flexibility to deliver in the most cost-effective manner while minimizing cost risk to the government.

Section 853 of the FY18 National Defense Authorization Act required the Secretary of Defense to provide a report by April 2018 with a comparison of the cost of outcome versus input-based contracts. Assuming the results of that report are consistent with previous reports showing the saving that can be realized from outcome-based contracts, action will be needed to move the Department towards utilizing this contracting tool to save money and create efficiencies.

Recommendation:

Establish a requirement similar to that in section 818 of S. 1519, the Senate-passed National Defense Authorization Act for Fiscal Year 2018, for the Secretary of Defense to prohibit a contract

for the procurement of services valued in excess of $10,000,000 based on specific descriptive personnel and labor hour requirements unless the program manager and contracting officer first submit to the Under Secretary of Defense for Acquisition and Sustainment a written justification including the reasons for basing the contract on those requirements instead of outcome- or performance-based requirements. This requirement should be initiated in FY19 and retained for five years.

The requirement should be accompanied by a requirement for a report from GAO to identify any recurring obstacles to the use of outcome- and performance-based requirements instead of specified personnel and labor hour requirements for purposes of awarding services contracts.

Proposed Statutory Language

SEC. 8__ . USE OF OUTCOME-BASED AND PERFORMANCE-BASED REQUIREMENTS FOR SERVICES CONTRACTS.

(a) JUSTIFICATION REQUIREMENT FOR USE OF PERSONNEL AND LABOR HOUR REQUIREMENTS.—The Department of Defense may not enter into a contract for the procurement of services valued in excess of $10,000,000 based on specific descriptive personnel and labor hour requirements unless the program manager and contracting officer first submit to the Under Secretary of Defense for Acquisition and Sustainment, or in case of a contract of a military service, the relevant Service Acquisition Executive, a written justification including the reasons for basing the contract on those requirements instead of outcome- or performance-based requirements.

(b) COMPTROLLER GENERAL REPORT.—Not later than two years after the date of the enactment of this Act, the Comptroller General of the United States shall submit to the congressional defense committees a report on justifications submitted pursuant to subsection (a). The report shall review the adequacy of the justifications and identify any reoccurring obstacles to the use of outcome- and performance-based requirements instead of specified personnel and labor hour requirements for purposes of awarding services contracts.

(c) SUNSET.—The requirements under this section shall terminate September 30, 2023.

NON-COMMERCIAL MODIFICATION TO COMMERICAL ITEMS

Issue:

Section 818 of the FY2005 NDAA modified 10 U.S.C. 2306a to require submission of certified cost or pricing data on "noncommercial modifications" of a commercial item that are expected to cost, in the aggregate, more than the TINA threshold, or five percent of the total contract price, whichever is greater. A "noncommercial modification" is defined as one that is not of a type customarily available in the commercial marketplace. However, this could still be a minor modification or a collection of many minor modifications. This has become a major barrier to entry for companies making minor modifications to commercial items to address federal requirements.

Discussion:

The Federal Acquisition Streamlining Act of 1994 and the Clinger Cohen Act of 1996 established the framework for commercial item procurement. These laws were designed to draw commercially-oriented companies into the defense market, as well as enable companies to integrate their commercial and military production at a time when the defense industrial base was shrinking rapidly. Since commercial companies do not have government-approved accounting systems, a key element of commercial item procurement was to waive the applicability of the Truth in Negotiations Act (10 U.S.C. 2306a), and later the Truthful Cost or Pricing Data statute (41 U.S.C. 3503), for the procurement of commercial items. Products and services that meet the definition of "commercial items" are exempt from submittal of certified cost or pricing data.

The commercial item definition is based on 41 U.S.C. 103 and includes eight subcategories that apply to products and services. The modifications subcategory is further broken down into modifications of a type customarily available in the commercial marketplace and minor modifications made to meet Federal Government requirements. The implication of section 818 is that, for DOD, if individual modifications are minor but cost more than $2 million in the aggregate (or 5% of the total price of the contract, whichever is greater), certified cost or pricing data must be submitted for such modifications.

Access to the commercial marketplace has been a continuing struggle as the DOD seeks innovative technologies to support the warfighter. This issue was highlighted in the report accompanying the Senate's version of the FY2017 NDAA:[10]

> *"The committee is concerned about the Department of Defense's (DOD) increasingly narrow interpretation of the definition of commercial items. The committee considered several outside proposals to expand the underlying statutory commercial item definition*

[10] Senate Report 114-255, "Modification of commercial items definition", accompanying the National Defense Authorization Act, FY2017.

with regards to commercial products but at this time decided that it was premature to act as the current definition is appropriately broad enough to enable commercial companies to modify commercial products to meet DOD needs. If, however, the Department continues to inappropriately limit the scope of the commercial items definition and the committee continues to hear from non-traditional contractors from Silicon Valley and other innovative regions in the United States that the application of the commercial item definition continues to serve as a barrier to their participation in the DOD market the committee will reconsider whether to expand the statutory commercial item definition as it applies to DOD contracting.

The current ''of a type'' and ''minor modifications'' language were intended by Congress to be broadly interpreted to expand access to items that were beyond commercial off-the-shelf items. If there is a problem with the definition it appears to be the Department's repeated attempts to narrow the definition to conform to an oversight strategy that will inadvertently lead to less competition, increased costs and a greater concentration of defense unique contractors."

ARWG believes there is an inherent conflict between Sec. 818 (10 USC 2306a(b)(3)) and the DOD's ability to do business with the commercial marketplace. Minor modifications over a certain price now require submission of certified cost or pricing data, which commercial companies and nontraditional contractors cannot provide. The conflict between the commercial item exception and noncommercial modifications has become a barrier that was never intended by FASA or Clinger Cohen. It should be noted that agencies other than DOD are not subject to the restrictions imposed by Sec. 818, as there is no similar restriction in 41 U.S.C. 3503.

Recommendation:

ARWG recommends that Section 818 of the Fiscal Year 2005 NDAA be repealed, and that 10 U.S.C. 2306a be revised accordingly:

Sec. ___ Repeal of Submission of Cost or Pricing Data on Certain Modifications of Commercial Items.

(a) Applicability of Commercial Items Exception to Certain Modifications of Commercial Items. - Subsection (b) of section 2306a of title 10, United States Code, is amended by striking paragraph (3) and redesignating paragraphs (4), (5), and (6) as paragraphs (3), (4), and (5), respectively.

(b) Conforming Repeal. - Section 818 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 (Public Law 108-375) is repealed.

Suggested Report Language:

Repeal of Submission of Cost or Pricing Data on Certain Modifications of Commercial Items. (Sec. ___)

"This section would strike paragraph (b)(3) of section 2306a of title 10, United States Code, regarding noncommercial modifications of commercial items.

The committee believes that the Truth in Negotiations Act is an important safeguard to ensure that the U.S. Government purchases supplies and services from responsible sources at fair and reasonable prices. Reasonable exceptions to the requirement for certified cost or pricing data have been created to expand access to commercial markets, to promote innovation, and to remove barriers to entry to doing business with the Department of Defense. These exceptions include modifications to commercial items in cases where the modification is (a) of a type customarily available in the commercial marketplace or (b) a minor modification made to a commercial item to meet Federal Government requirements. Paragraph (b)(3) of section 2306a of title 10, United States Code, effectively puts a price cap on the total number of minor modifications to commercial items to meet Department of Defense requirements. No such cap applies to civilian agencies' procurements of modified commercial items. The committee believes the Department of Defense should make greater use of commercial acquisitions and, therefore, should a contracting officer of the Department of Defense concur that proposed modifications to a commercial item are minor, there should be no requirement for a contractor to submit certified cost or pricing data for such minor modifications, notwithstanding the aggregate price of those modifications."

USE OF EXCEPTIONAL WAIVERS OF CERTIFIED COST OR PRICING DATA

Issue:

Both the House and Senate Armed Services Committees are committed to providing affordable innovative capability to the warfighter in a volatile and rapidly evolving threat environment. The National Defense Authorization Acts of Fiscal Year 2016, 2017, and 2018 included numerous acquisition reform provisions intended to streamline and reduce bureaucracy. Section 811 of the FY18 NDAA took a major step forward by raising the thresholds contained in the Truth in Negotiations Act at 10 USC 2306a(b)(1)(C) and the Truthful Cost or Pricing Data statute at 41 U.S.C. 3503(a)(3). These statutes are essentially the same. However, there is a discrepancy that exists in the waiver authority, providing less latitude for the Secretary of Defense to use waivers than that enjoyed by civilian agencies. Additional, stand-alone criteria regarding the Secretary of Defense's use of waiver authority was included in Section 817 of the FY03 NDAA (P.L. 107-314)[11]. These additional criteria are not reflected in the U.S. Code, but they are reflected in the DFARS (section 215.403-1). ARWG recommends a repeal of section 817 of the FY03 NDAA to ensure consistency in the use of waivers. At a minimum, ARWG believes subsection 817(b)(1) should be repealed. Repeal of this requirement would be especially helpful at streamlining the award of follow-on production contracts, where there is a long history of cost and pricing data and learning curves.

Discussion:

The Truth in Negotiations Act (TINA) was enacted to ensure that the Government purchases supplies and services from responsible sources at fair and reasonable prices. In establishing the reasonableness of offered prices, the contracting officer may require contractors to submit certified cost and pricing data for covered contracts. Certified cost or pricing data is not required if: (1) there is adequate price competition; (2) prices are set by law or regulation; (3) the item is a commercial item; or (4) in exceptional cases where the head of a procuring activity, without delegation, justifies a waiver in writing. These exceptions provide flexibility both to encourage commercial contractors and subcontractors to do business with the Government, and to provide more efficiency by enabling contracting officers to use market research and historical data to determine price reasonableness.

The exceptional circumstances waiver authority is essentially the same in both Title 10 and Title 41. 41 U.S.C. 3503(a)(3) provides for waivers "in an exceptional case when the head of the procuring activity, without delegation, determines that the requirements of this chapter may be waived and justifies in writing the reasons for the determination." The counterpart in 10 USC 2306a(b)(1)(C) provides for a waiver "in an exceptional case when the head of the procuring activity, without delegation, determines that the requirements of this section may be waived and justifies in writing the reasons for such determination."

[11] As further amended by Section 809 of the FY12 NDAA (P.L. 112–81) and Section 1071 of the FY15 NDAA (P.L. 113–291).

Section 817 of the FY03 National Defense Authorization Act (P. L. 107-314) added three new criteria for the Secretary of Defense to justify "exceptional case" determinations: (1) the property or services cannot reasonably be obtained under the contract, subcontract, or modification, as the case may be, without the grant of the exception or waiver; (2) the price can be determined to be fair and reasonable without the submission of certified cost and pricing data or the application of cost accounting standards, as the case may be; and (3) there are demonstrated benefits to granting the exception or waiver.

The Director of Defense Procurement published detailed guidance on granting waivers of certified cost and pricing data on March 23, 2007, which included the requirements of Section 817, as promulgated at DFARS 215-403-1. Contracting officers have since been reluctant to make "exceptional case" determinations because of the difficulties in meeting the first criteria – determining that the property or services "*cannot reasonably be obtained*" without the exception or waiver. As a result, few waivers are granted. This is especially the case for long running production programs where it is unlikely that the contractor would refuse to provide cost and pricing data, even if there is little value in providing such data. In those cases, the price can be determined as fair and reasonable based on the program's long history, and common sense would justify a waiver to accelerate contract negotiations.

Prior to this guidance, the DOD and industry had been making progress in the prudent use of exceptional waivers of certified cost and pricing data. Starting with the FAR implementation in 1995, there were numerous reported successes in using TINA waivers to reduce procurement administrative lead time (PALT) by 20-40%. The record of past waivers – including multiyear procurements for ACAT 1 weapon systems -- demonstrate that they facilitate DOD's ability to conduct efficient acquisitions while also protecting the taxpayer. This is particularly true in follow-on production lots for major weapons systems procurements, by limiting the demands for cost and pricing data from small company suppliers supporting those systems, where reasonable alternatives exist to demonstrate price reasonableness. We believe DOD should use the waiver process to enable contracting officers to streamline the acquisition process where there is a sufficiency of historical, market or other than cost or pricing data to determine a fair and reasonable price.

Recommendation:

ARWG recommends that Sec. 817 of the Fiscal Year 2003 NDAA be repealed, as shown below, with explanatory report language.

Sec. ___ Repeal of Certain Determinations Required for Grants of Exceptions to Cost or Pricing Data Certification Requirements

Section 817 of the Bob Stump National Defense Authorization Act for Fiscal Year 2003 (Public Law 107-314) is repealed.

Suggested Report Language:

Repeal of Certain Determinations Required for Grants of Exceptions to Cost or Pricing Data Certification Requirements (Sec. ___)

"This section would repeal section 817 of the Bob Stump National Defense Authorization Act for Fiscal Year 2003 (Public Law 107-314) regarding determinations required to grant an exception to the submission of certified cost or pricing data.

The committee believes that the Truth in Negotiations Act is an important safeguard to ensure that the U.S. Government purchases supplies and services from responsible sources at fair and reasonable prices. The committee also supports a reasonable amount of flexibility to enable contracting officers to use good judgment in the amount and nature of data required to support the waiver process. The committee notes that the repeal of Section 817 of the Bob Stump National Defense Authorization Act for Fiscal Year 2003 (Public Law 107-314) would create parity in the treatment of waivers between the Federal Acquisition Regulation and the Defense Federal Acquisition Regulation Supplement. The committee encourages the head of a defense procuring activity to consider waiving the requirement for certified cost or pricing data if the price can be determined to be fair and reasonable without submission of certified cost or pricing data. The committee expects the Secretary of Defense to update the Defense Federal Acquisition Regulation Supplement accordingly."

INCREASING THE MICRO-PURCHASE THRESHOLD

Issue:

Section 806 of the National Defense Authorization Act for Fiscal Year 2018 raised the micro-purchase threshold for the civilian agencies to $10,000 but did not raise the threshold for the Department of Defense (DOD), which was raised to $5,000 in the National Defense Authorization Act for Fiscal Year 2017. This creates a discrepancy in authorities between DOD and the rest of the civilian agencies. It also creates a discrepancy between most DOD contracts and those awarded for basic research or by DOD Science and Technology Reinvention Laboratories, which operate under a $10,000 micro-purchase threshold (10 U.S.C. 2339).

Background:

ARWG commends Congress for providing additional flexibility to the civilian agencies to make small purchases using greatly simplified methods, enabling the acquisition workforce to focus on more complex, higher risk procurements. This same level of flexibility should be extended to DOD, enabling the defense acquisition workforce to focus on higher risk procurements critical to the Department's missions, and increasing the speed and flexibility with which the private sector can deliver needed products and services. This change will also facilitate consistency across the federal government, reducing the need to create separate sets of regulations and implementing guidance for DOD and the civilian agencies. This change is also consistent with Congress' increase to the simplified acquisition threshold for both DOD and the civilian agencies in Section 805 of the National Defense Authorization Act for Fiscal year 2018.

Recommendation

ARWG recommends increasing the micro-purchase threshold for DOD to $10,000.

Proposed Legislative Language

SEC__ INCREASE IN THE MICRO-PURCHASE THRESHOLD
Section 2338 of title 10, United States Code, is amended by striking "$5,000" and inserting "$10,000."

IMPROVING THE SECURITY CLEARANCE BACKLOG THROUGH REQUIRED USE OF CONTINUOUS EVALUATION

Issue:

The National Background Investigation Bureau (NBIB) currently reports that over 710,000 applications for investigations are backlogged in their processes, including hundreds of thousands of applicants for initial security clearances and subsequent periodic reinvestigations of current clearance holders. Industry has faced challenges with the security clearance process for decades and would encourage Congress to continue their focus on addressing these challenges, to include the current backlog, the lack of reciprocity of clearance within agencies and between departments, and requirements for multiple background checks, among others. One means of addressing these challenges is to utilize continuous evaluation capabilities already deployed for reinvestigations, as it can and should be leveraged and utilized to immediately reduce the number of backlogged reinvestigations.

Discussion:

Continuous evaluation (CE) has been a long-stated goal of the Department of Defense (DOD), even pre-dating the Office of the Director of National Intelligence's (ODNI) desire to implement the process throughout the executive branch. DOD testified last year at a hearing before the House Oversight and Government Reform hearing that CE has provided an equal, if not better, outcome for purposes of identifying factors that could indicate a change in the trustworthiness of a clearance holder. With DOD having 500,000 employees enrolled by December 2016, a stated goal of 1,000,000 enrolled by the end of December 2017, and a target of department-wide implementation by the end of Fiscal Year 2021, the time is ripe not just to learn from DOD's years of pioneering this process, but to hold all of government to this standard for a more secure, consistent and efficient security clearance apparatus.

In implementing CE for all clearance holders, the benefits will be two-fold:

- Short term - quicker than expected drawdown of the current security clearance backlog by moving all individuals up for periodic reinvestigation out of the reinvestigation process and instead relying more on CE, allowing CE to be fully leveraged and freeing investigators for initial clearance interviews and follow up actions triggered by CE flags.
- Long term – a standardized, government-wide, process that will allow for reciprocity between agencies and departments and collection of historical and current data to build trusted user profiles that follow employees from mission to mission, job to job, and employer to employer

Security clearances are to be managed through risk, much like physical security to a government property. There are force protection conditions, scalable in nature, meant to manage physical security of employees. So, too, should be the case for security clearances and CE can be an

effective tool in managing risk. Arbitrary timelines imposed through current, explicit regulation for reinvestigation increase the risk the government assumes by simply providing a snapshot in time. Most recently, an arrest warrant was issued for a contractor regarding allegations stemming from work performed for the National Reconnaissance Office. The government filed the warrant claiming the individual stole $340,000 worth of military equipment and posted classified code online. Additionally, the individual had three arrests for driving while under the influence that had gone unreported and were discovered during his periodic reinvestigation. By automating and technologically enabling the security clearance process, such felonious actions would be detected at the time of the event and identified as cause for immediate reinvestigation. Continuous evaluations lower the risk the government bears and provides the government with the ability to catch individuals before nefarious acts are committed.

Continuous evaluation benefits are irrefutable, as highlighted above. From physical breaches to electronic, historic events even more notable have occurred over the past twenty years, highlighting that those with security clearances are not immune from committing exceedingly damaging attacks. Events such as the Fort Hood shooting perpetrated by Nidal Hassan; the Wikileaks security breach committed by Edward Snowden; the 2001 anthrax attacks allegedly carried out by senior biodefense researcher, Bruce Ivans, at the United States Army Medical Research Institute of Infectious Diseases; and Hasan Akbar, a United States Army soldier that committed a premeditated attack on March 23, 2003, at Camp Pennsylvania, Kuwait, during the start of the United States invasion of Iraq that left two fellow soldiers dead and fourteen injured, would all have presumably been prevented by utilizing a robust CE infrastructure. An arbitrary date, five and ten years in current regulation for secret and top secret, does not take in to account emotional, financial, or psychological stressors that may arise soon after an initial clearance is granted. The capriciousness of these timelines does not comport with the security threats of today.

The NBIB, which held the security clearance process for the DOD and nearly all other clearance holders prior to the Fiscal Year 2018 National Defense Authorization Act, sits on a treasure trove of data. Leveraging previous data in NBIB's repository will enhance the effectiveness of the CE process by providing data driven profiles of characteristics, patterns, tendencies, and common actions. It is important to stress that the government shall not dilute the value of CE by developing separate and disparate protocols and criteria. This makes clear the need for the Director of National Intelligence and ODNI to be the Security Executive Agent to oversee all continuous evaluation standards, metrics, and implementation. Representatives from impacted agencies will need to work in close concert with the DNI to effectively implement policies to make CE as robust as possible.

Recommendations:

1) Congress should direct that, in order to immediately reduce the number of individuals in the investigations backlog at NBIB, the requirements governing the investigative process be revised to immediately determine that all individuals currently being evaluated for

trustworthiness using CE shall immediately have all periodic reinvestigation requirements removed from their clearance and shall have their clearance considered "current" for purposes of maintaining a clearance. No further periodic reinvestigation shall be necessary for any clearance holder once they are being monitored through continuous evaluation.

2) For purposes of improving the monitoring and analytic capability, Congress directs that the NBIB, in consultation with other agencies conducting investigations for security clearances, shall develop and deploy data analytics against the historical records of all past and current clearance holder in their data records to identify patterns and characteristics of "trusted users." The results of such an analysis shall be incorporated into all systems applying continuous evaluation to improve the analytic capabilities and further refine and improve the counterintelligence capabilities of the effort.
3) Following the timelines established by the FY18 NDAA, Congress directs that no later than 3 years after the date of enactment of these provisions that all active clearance holders shall be placed under continuous evaluation and that no further periodic reinvestigations shall be authorized.
4) Since DOD's new investigative role will not become operational until 2021 and will only accept new applicants from that point, Congress should ensure that sufficient funding is afforded to NBIB, as they will retain responsibility to manage and draw down the existing backlog of applicants currently in process. Additional resources, as needed to award additional investigative contracts, should be made available to accelerate the process as much as possible.

ABOUT THE ACQUISITION REFORM WORKING GROUP

The Acquisition Reform Working Group (ARWG) is comprised of the Aerospace Industries Association, American Council of Engineering Companies, Financial Executives International, Information Technology Alliance for the Public Sector, National Defense Industrial Association, Professional Services Council, 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 Eminence Griffin of the Information Technology Alliance for the Public Sector at egriffin@itic.org or 202-524-4394.