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November 7, 2016

VIA FEDERAL E-RULEMAKING PORTAL

Ms. Darbi Dillon
Office of Federal Procurement Policy
1800 G Street NW
Washington, DC 20006

Re: Proposed New OMB Circular A-xxx

Dear Ms. Dillon:

We are writing to submit comments on the above-referenced proposed Office of Management and Budget (“OMB”) Circular, issued on October 7, 2016, 81 Fed. Reg. 69,860. Our firm represents small business federal contractors. We submit these comments to assist the Office of Federal Procurement Policy (“OFPP”) in drafting and implementing a Circular that is fair and workable for small businesses.

Aspects of the Circular Require Clarification

The proposed Circular aims to institutionalize Category Management and establish a government-wide approach to acquiring common goods and services. The Circular defines “common goods and services” as “those items and services that all or most federal agencies procure and are not unique to the mission of an individual agency. These goods and services are interchangeable between agencies and are generally available commercially.” 81 Fed. Reg. 69,861. In FY 2015, the Government spent \$272 billion on common goods and services. As such, if implemented, the Circular would have a significant impact on the federal procurement system and businesses that sell common goods and services to the Government.

The impact of Category Management has already been seen in the information technology (“IT”) sector. In October 2015, OMB released Category Management Policy 15-1: Improving the Acquisition and Management of Common Information Technology: Laptops and Desktops. Under that policy, agencies were directed to procure laptop and desktop computers from three best in class solutions.¹ As part of this effort, OMB aimed to reduce the number of contracts used to purchase computer workstations by 20% by the end of FY 2016. OMB reported that the initiative has led to computer prices dropping by as much as 50%. OMB issued

¹ The vehicles identified in Category Management Policy 15-1 were: NASA Solutions for Enterprise-Wide Procurement (“SEWP”), General Services Administration (“GSA”) IT Schedule 70, and Department of Health and Human Services, National Institutes of Health, NITAAC Chief Information Officer-Commodities and Solutions (“CIO-CS”).

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similar policy memoranda for software, mobile devices and services, and identity protection services. In all, OMB has reported more than \$2 billion in savings because of Category Management.

We recognize that OFPP sees a value in Category Management and intends to institutionalize Category Management principles across the Government. However, clarification of the Government's approach, as set forth in the proposed Circular, is needed. As an initial matter, the Circular states that Government-wide Category Managers will identify best in class ("BIC") sourcing solutions, which will be designated as either preferred or mandatory. OMB will approve mandatory BIC designations, which will be "mature and market-proven." 81 Fed. Reg. 69,863. The Circular does not indicate what criteria or factors will be considered in designating a contract vehicle as BIC. Likewise, the Circular does not explain what makes a contract "mature and market-proven." Conceivably, the GSA schedules could be deemed to be mature and market-proven. And, government-wide acquisition contracts ("GWACS"), such as Alliant, OASIS, and ENCORE could also be deemed mature and market-proven. Under the proposed Circular, mandatory BIC solutions will be used for a large proportion of federal acquisitions. More information is needed to understand how these contract vehicles will be selected.

The Circular is also silent on the procedures that will be undertaken before a sourcing solution is designated as mandatory. The Circular states that OMB will issue a policy to explain migration to a mandatory BIC solution and the process to justify an exception, but the Circular does not address how a given solution will be designated as a mandatory BIC solution. At the same time, OFPP has consistently emphasized the importance of collaborating with vendors. See 81 Fed. Reg. 69,864. When GSA released the Professional Services Strategic Plan in August 2016, it solicited industry feedback through an online questionnaire. GSA recognized the importance of consulting stakeholders when making changes to procurement policy. Likewise, the businesses that serve the Government should have a role in designating a sourcing solution as a mandatory solution, through notice and comment or a similar mechanism.

The Circular is unclear with respect to an individual agency's obligations and responsibilities in implementing Category Management. The Circular addresses the roles and responsibilities of the Category Management Leadership Council, OFPP, GSA, Center of Excellence, Government-wide Category Managers, and Category Teams. However, the Circular does not fully address the role of executive agencies. Currently, agencies often develop GWACs, and it is unclear whether OFPP intends for that practice to continue. The Circular states that all agencies must have a Category Management program "that promotes maximum adoption of key principles, strategies and requirements of [Category Management]," but the Circular does not provide any detail concerning the required program. 81 Fed. Reg. 69,861.

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Lastly, the Circular does not address how “the unique characteristics and requirements of each agency” will be considered. Although agencies may acquire some of the same goods and services, there are often subtle differences in an agency’s requirements. This concern was raised in response to Category Management Policy 16-1: Improving the Acquisition and Management of Common Information Technology: Software Licensing. Agencies have unique needs, often related to their missions. The Federal IT Acquisition Reform Act recognized this and exempted specific agencies from the Act’s software requirements because a one-size-fits-all-model does not work for agencies that need to be on the forefront of technology. Similarly, industry feedback expressed concern over moving toward a lowest common denominator or creating a baseline for bulk commodity software buys. This approach could reduce the overall quality of the software products and potentially leave the Government unable to meet its needs. These concerns exist for multiple types of goods and services, but the Circular does not address how to meet each agency’s unique needs.

Consideration of Small Businesses Should Be Required

Although we appreciate that the Circular discusses the role of small businesses, more consideration of this vital segment is needed. The Circular outlines a process where an agency will first consider whether the good or service to be acquired must be obtained from a mandatory source. 81 Fed. Reg. 69,863. If there is no mandatory source requirement, the agency is to consider a BIC solution. The Circular does not mention small businesses as a mandatory source. Small businesses are often a mandatory source “otherwise provided by law.” Under the Small Business Act, 15 U.S.C. § 631 *et seq.*, a federal agency shall set-aside a procurement for small businesses if the Rule of Two is satisfied or if the anticipated value of the goods or services is less than \$150,000. And, as the Supreme Court recently stated, “‘shall’ imposes a mandatory duty.” Kingdomware Technologies, Inc. v. United States, 579 U.S. ___, slip op. at 9 (2016) (citing United States ex rel. Siegel v. Thoman, 156 U. S. 353, 359-60 (1895)). Indeed, it is U.S. policy to promote small businesses. The Small Business Act states:

It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns in order to preserve free competitive enterprise, to insure that a fair proportion of the total purchases and contracts or subcontracts for property and services for the Government (including but not limited to contracts or subcontracts for maintenance, repair, and construction) be placed with small-business enterprises, to insure that a fair proportion of the total sales of Government property be made to such enterprises, and to maintain and strengthen the overall economy of the Nation.

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15 U.S.C. 631(a). The Circular should specifically address small businesses as a mandatory source.

The Circular also includes small business participation as a metric to be measured. Although we appreciate that OFPP will give consideration to small business utilization, small businesses should be listed as a mandatory source. Furthermore, the metrics proposed to measure small business participation are insufficient. The Circular states:

Increasing the participation of small businesses in the government's [Category Management] initiative is a top priority. Proposed solutions must baseline small business use under current strategies and set goals to meet or exceed that baseline participation under any new solutions. The [Category Management Leadership Council] will review each proposed strategy to ensure competitive small businesses have a high degree of participation to the maximum extent practicable, and will monitor actual small business participation by category. In developing strategies, [Government-wide Category Managers] will comply with the small business reservation requirement for purchases between the micropurchase threshold and the simplified acquisition threshold, increase access to Federal procurement opportunities for small businesses, and use all authorities available to maximize small business participation. [Government-wide Category Managers] will take corrective action if participation falls below expectations.

81 Fed. Reg. 69,865. It appears that OFPP is focusing on the percentage of spending that goes to small businesses.² However, the number of small businesses participating in these transactions is an equally important consideration.³ Utilizing a small number of specific contracts will likely result in few hundred small businesses fulfilling set-aside requirements, rather than the tens of thousands that currently do business with the Government.

² Concerns regarding small business participation are evidenced by statistics pertaining to the Federal Strategic Sourcing Initiative ("FSSI"), the predecessor to Category Management. As of June 2016, there were 78 small businesses under the FSSI. Yet, 43,545 unique small business entities were awarded federal contracts in FY 2014. This means that less than one percent of small federal contractors are on the FSSI.

³ Importantly, the Fiscal Year 2016 National Defense Authorization Act (P.L. 114-92) requires agencies to measure small business participation by industry and does not rely solely on small business spending to assess whether an agency is meeting its small business goals.

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The Small Business Act also provides that “a fair proportion of the total purchases and contracts for property and services for the Government in each industry category” and “a fair proportion of the total sales of Government property” should be placed with small business concerns. 15 U.S.C. 644(a). Small business utilization and participation are critical to the economy. OFPP should measure small business spending and the number of firms who engage in Category Management transactions. These metrics should be assessed annually, if not more frequently. To the extent that the proposed Circular does not take this important policy mandate into account, it is inconsistent with the Small Business Act.

BIC Sourcing Solutions Must Be Readily Attainable

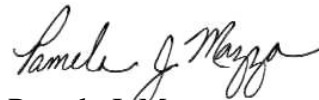
The Circular does not address how competitions for BIC preferred and BIC mandatory sourcing solutions will be conducted. From the Category Management policy memoranda that have been issued to date, it appears that many of these preferred and mandatory sourcing solutions will be GWACs. This is disconcerting, particularly for small businesses. These vehicles are highly competitive, with hundreds of offerors competing for relatively few awards. The requirements to obtain one of these GWACs are onerous that only a select few can qualify, excluding thousands of ready, willing, and able companies. And, because the contracts have long terms, there are infrequent opportunities to compete. With more and more federal dollars moving to these contracts, it will become increasingly important for businesses to obtain these contracts. Imagine a small business that specializes in providing computers to the Government. If that contractor does not hold one of the three designated BIC contracting solutions, it will be largely shut out of the federal marketplace. As Category Management spreads to more industries and types of goods and services, more and more businesses will be placed in this precarious position. This concern is significant for small businesses because of the relatively small number of GWACs that are set aside for small businesses.

It is a fundamental tenet of the procurement system that competition should be full and open. See 41 U.S.C. § 253(a). Limiting the companies able to sell common goods and services to a few select vendors that are able to obtain BIC sourcing solutions is inconsistent with that goal. And, competition drives innovation, reduces prices, and ensures a viable industrial base. Category Management should be implemented in a way that is consistent with the goals of the procurement system. If the Government determines that common goods and services should be acquired primarily using GWACS, then competitions for GWACs should be structured so that contractors can obtain a GWAC vehicle at any time, rather than every five or ten years. This is just one example of a step OFPP should take to ensure that a substantial number of contractors are able to hold BIC sourcing solutions.

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Please do not hesitate to contact Pamela Mazza, Tony Franco, Jon Williams, or Michelle Litteken at (202) 857-1000 if you have any questions about these comments.

Very truly yours,



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