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Subject: Category Management Policy 16-1: Improving the Acquisition and Management of Common Information Technology: Software Licensing

Dear Administrator Rung and Administrator Scott,

Thank you for the opportunity to provide comments in response to the draft *Category Management Policy 16-1: Improving the Acquisition and Management of Common Information Technology: Software Licensing.* The Coalition for Government Procurement ("the Coalition") sincerely appreciates the opportunity to review and provide input to OMB on the draft policy. These comments are being submitted pursuant to Federal Register notice 80 FR 79615, dated December 22, 2015, which stated:

> *The 30-day public comment period on the draft memorandum begins on the day it is published in the Federal Register and ends 30 days after date of publication in the Federal Register.*

The Coalition recognizes the discrepancy in the comment deadline between the Federal Registrar and OMB's website, which stipulates that comments be submitted within 30 days of December 21, 2015. Confusion surrounding the deadline is a result of requesting input from industry through multiple outlets with unclear direction as to the due date. The Federal Register has customarily been the mechanism by which comments are submitted, and thus, the Coalition is submitting these comments pursuant to the deadline specified in the Federal Register notice 80 FR 79615.

The Coalition for Government Procurement is a non-profit association of firms selling commercial services and products to the Federal Government. Our members collectively account for a significant percentage of the sales generated through General Services Administration ("GSA") contracts including the Multiple Award Schedules program. Coalition members are also responsible for many of the commercial item solutions purchased annually by the Federal Government. Coalition members include small, medium, and

large business concerns. The Coalition is proud to have worked with Government officials for more than 35 years towards the mutual goal of common sense acquisition.

The Coalition supports overall efforts by the Office of Management and Budget (OMB) to improve the acquisition, shared use, and dissemination of software in accordance with the Federal IT Acquisition Reform Act (FITARA). We agree that efficiencies and costs savings can be achieved by 1) having a central point of contact within each agency for software licenses that reports to the CIO, 2) increased training on IT software management, 3) improving relationships with suppliers, and 4) increasing understanding of the commercial market by personnel involved in software license management. The Coalition applauds and also highly supports the Office of Federal Procurement Policy's efforts to reduce contract duplication government-wide through the Category Management Initiative.

The Coalition, however, is very concerned about the following elements of the proposed mandatory government-wide software licensing policy:

1. The policy does not meet the needs of Federal agencies that have legitimate unique software licensing requirements
2. Mandatory use is inconsistent with current law and regulation that requires the Federal government to utilize commercial items and terms to the maximum extent practicable
3. "Best in-class solutions" for software licenses that agencies will be directed to use are to be defined and determined by members of the Enterprise Software Category Team (ESCT), apparently without transparency or opportunity industry input
4. The investment made in already existing Strategic Sourcing programs, such as Department of Defense (DoD) Enterprise Software Initiative, may not be appropriately leveraged
5. Lack of clarity and unanswered questions on critical issues related to the application to cloud-based licensing models, cybersecurity, and how the policy will be implemented in alignment with existing contract regulations in the Federal Acquisition Regulation (FAR)

I. Inflexibility for Federal Agencies with Unique Requirements

The Coalition applauds OMB's ongoing initiatives to reduce contract duplication. As stated in the draft software licensing policy, such efforts, "…can reduce underutilization and maximize the use of best-in-class solutions."[1] The draft policy, however, does not recognize the existence of legitimate reasons for Federal agencies to have separate license agreements under certain conditions. The Federal IT Acquisition Reform Act (FITARA) recognizes that despite the perceived benefits of a consistent implementation approach government-wide, Federal agencies have unique missions and therefore it is inevitable that some will have a cluster of requirements that are individual to them. The exemption provided to the National Labs serves as a noteworthy example.

[1] *Category Management Policy 16-1: Improving the Acquisition and Management of Common Information Technology: Software Licensing* draft policy

Title III, Section 312 of Senate Bill 2129 states:

> Notwithstanding any other provision of law, the provisions of 40 U.S.C. 11319 shall not apply to funds appropriated in this title to Federally Funded Research and Development Centers sponsored by the Department of Energy.[2]

Senator Lamar Alexander set forth the following rationale:

> One-size-fits-all models don't work well, and I am concerned that this well-intentioned law could make it more difficult to develop the technology we need to support the Department of Energy's research and national security missions." [3]

Although reducing duplication is a positive goal, any acquisition policy implemented government-wide must allow for agency flexibility in meeting the agency mission objectives and policy objectives. As written, the draft policy does not appear to recognize the validity of such circumstances. Therefore, the Coalition recommends that OMB revise the draft policy to allow for greater flexibility so that agencies are encouraged to purchase software licenses that incorporate certain *best practices* established by the ESCT, but not specific software licenses mandated by the ESCT.

II. Development of Government-wide Software License Agreements for Mandatory Use

A critical component of the draft policy is the establishment of the roles and responsibilities of the ESCT. The team, which operates under shared leadership from OMB, DoD, and GSA, is charged with developing and implementing a government-wide strategic plan for software license acquisition, providing recommendations for policy changes, and monitoring agency progress. Significantly, the draft policy provides that:

> *The ESCT shall support GSA and OMB* ***to establish and mandate new governmentwide enterprise software agreements.*** *At least two new enterprise software agreements will be in place by the end of calendar years 2016 and 2017; the ESCT will establish bi-annual targets thereafter. To move agencies away from issuing redundant contracts, within 90 days,* ***the ESCT shall post on the Acquisition Gateway a new business case review process that agencies will be required to use*** *when acquiring software that would overlap with software covered by any of these enterprise software agreements.*[4]
> **[Emphasis Added]**

[2] S.2129 https://www.congress.gov/bill/114th-congress/senate-bill/2129/text
[3] https://fcw.com/articles/2015/12/16/mazmanian-noble-spending-bill.aspx
[4] https://whitehouse.github.io/software-policy/CategoryManagementSoftware.pdf --Page 5

As described previously, the utilization of government-wide software license agreements for mandatory use is deeply concerning because it would not allow Federal agencies with unique requirements the flexibility they need to achieve end-mission goals. In addition, the use of mandatory approaches has been tried in the past and resulted in a host of difficulties for agencies and contractors, including, reduced competition and agency inaction due to the insulated exclusivity of the identified government entities.

If the concept of mandatory use seems familiar, that is because the government has undertaken the centralized management and procurement of the government's Automatic Data Processing (ADP) resources under the authority of a single agency before.[5] [6] By 1981, that centralized management and procurement process came under scrutiny in a series of reports and studies regarding its efficiency and practical utility.[7] As a result, Congress provided an exemption to meet the agency's, in this case, DoD's, specialized needs via "a more streamlined procurement process."[8] It recognized that certain unique requirements need more flexibility to achieve end-mission goals, flexibility not provided through the centralized process. Moving into the acquisition reform movement of the 1990s, legislators and policy experts continued to expand flexibility, ultimately leading to the elimination of that mandatory process.

In addition, it should be recalled that the Federal Acquisition Streamlining Act ("FASA") promotes commercial item contracting and the streamlining of the acquisition process. Significantly, the draft policy appears to be inconsistent with FASA's requirements for agencies to utilize commercial items and terms, "to the maximum extent practicable."[9] Specifically, FAR 12.212, which implements these requirements, states:

> *(a) Commercial computer software or commercial computer software documentation* ***shall be acquired under licenses customarily provided to the public*** *to the extent such licenses are consistent with Federal law and otherwise satisfy the Government's needs. Generally, offerors and contractors shall not be required to— (1) Furnish technical information related to commercial computer software or commercial computer software documentation that is not customarily provided to the public; or (2) Relinquish to, or otherwise provide, the Government rights to use, modify, reproduce, release, perform, display, or disclose commercial computer software or commercial computer software documentation except as mutually agreed to by the parties. (b) With regard to commercial computer software and commercial computer software documentation, the Government shall have only those rights specified in the license contained in any addendum to the contract.*[10]
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> **[Emphasis Added]**

[5] H. Rep. No. 97-71, at 22 (1982)
[6] H. Rep. No. 97-311, at 123 (1981)
[7] S. Report No. 97-58, at 142 (1981)
[8] S. Report No. 97-58, at 143 (1981)
[9] FASA
[10] FAR

The draft policy's development of uncustomary, mandatory government-wide software license agreements seems to contradict the existing statutory and regulatory requirements of FASA and the FAR which emphasize the use of commercially available solutions. Standard commercial license terms already include software license agreements, and thus, the government should not be drafting or mandating custom software license agreements when customary commercial terms are available for their use. Further, the draft policy also seems to contradict FITARA. Sec. 837(b) of the statute states:

> *(b) Governmentwide User License Agreement.--The Administrator, in developing the initiative under subsection (a), shall allow for the purchase of a license agreement that is available for use by all Executive agencies (as defined in section 105 of title 5, United States Code) as one user* ***to the maximum extent practicable and as appropriate.***[11]
> **[Emphasis Added]**

The Coalition recommends that OMB revise the draft policy and choose not to simply turn back the clock to a previous eliminated approach. Instead, the Coalition recommends that OMB adopt a more flexible policy consistent with existing statutes and regulations.

III. Lack of Transparency in Determining "Best In-Class Solutions"

The draft policy currently proposes that the ESCT have sole responsibility in determining the "best in-class solutions" to be adopted by Federal agencies. As stated in Appendix A, the ESCT will "establish the best-in-class criteria standards for populating content in the software category hallways of the Acquisition Gateway." Further, the ESCT is to publish initial guidance identifying best in-class software licensing agreements on the Acquisition Gateway within 120 days, including standard terms and conditions for use in agency-level agreements.

It appears that the ESCT is to develop government-unique software licensing terms for commercial software that will be mandatory for all federal agencies, and, thus, in addition, unless a commercial software vendor agrees to the government-unique terms, it will not be able to sell its software to the federal government.

In the draft policy, it is unclear how "best in-class solutions" will be defined by the ESCT, as well as the criteria that will be used to determine what software license agreements would qualify. The Coalition is very concerned about the lack of transparency in the development of the criteria for "best-in-class solutions" given the immense impact it will have on the subset of software licenses to which agencies will be allowed access, the impact on innovation, and the consequences for the Federal supply chain (especially small businesses). In the past, commodity teams developing government-wide strategic sourcing strategies have been opaque and unavailable for myth-buster's dialogues with industry about current commercial practices and technologies that could be of great value to the government. The Coalition is concerned that providing the ESCT with sole responsibility to define and determine the criteria for "best in-class solutions" is not in the interest of Federal end customers or taxpayers. Instead, we recommend that the ESCT seek input from industry stakeholders on best practice guidelines for

[11] FITARA

commercial software licensing terms that could be shared with agencies through the Acquisition Gateway. Further, the development of specific terms and conditions for software licenses to be used government-wide should go through the rule making process.

IV. Investments in Already Existing Strategic Sourcing Programs

The Coalition supports OMB's efforts to reduce contract duplication through Category Management by maximizing use of already existing contract programs. To implement FITARA Sec 837, we suggest that OMB first look to already existing strategic sourcing programs for software licensing. Two examples of programs in which the government already has made significant investment are DoD's Enterprise Software Initiative (ESI) and GSA's SmartBUY BPAs for Software. Both programs were designed to enhance government-wide acquisition, promote shared use, and achieve lower pricing by leveraging the government's overall buying power. DoD's experience providing certain software licenses for broad use by DoD program offices and contracting officers dates back to the late 1990's. When the SmartBUY BPAs were developed in 2003, GSA worked with DoD to identify the strengths of the program and built upon the lessons learned from DoD ESI. For purposes of developing a Category Management policy for Software Licensing, the Coalition recommends that OMB use a similar approach by first having the ESCT assess these two programs to identify elements of the programs that are working and promote these best practices to the extent practicable.

V. Questions

The Coalition would appreciate if OMB could provide clarification on the following questions regarding the draft policy raised by members.

Topic	Questions	Notes
Handling of Emerging Licensing Models	How does the draft policy apply to cloud-based licensing models?	Cloud technology is a relatively new innovation, and thus, relies on a licensing model that is rapidly evolving in response to the technology's fast changing capabilities. The draft policy's applicability to this constantly evolving, software-as-a-service model of the cloud is unclear. Further clarification as to the policy's application to cloud-based licenses is necessary. If OMB includes cloud technology in its policy, it will be critical to seek industry's input to ensure that it is up to date and allows flexibility for emerging cloud services. We also ask OMB to consider that in many cases the vendor holds the license (no transfer to the govt) and provides a service that is provisioned as needed in the solution. Often Software as a Service is a combination of "services" making it very difficult to standardize.
Aggregation of Agency Requirements and Funding	How will the aggregation of agency	Pursuant to the draft policy, it is unclear how agency requirements will be aggregated and how government-wide software licenses would be funded by multiple agencies. Will contractors that offer these licenses be

and Its Role in Pricing	requirements and funding take place? How will pricing be established for a particular product software license?	allowed to compete to meet an agencies' requirements? The DHS CDM and CMaaS program is based on volume discounts over the life of the BPA and requires onerous tracking of software licenses both on the vendor and GSA. It's a very large and costly administrative task tracking price bands for each part number, while resulting pricing has been driven down by competition rather than actual placement on a price band. Competition has actually driven better results than volume discounts. In addition, it is unclear whether pricing would be a factor in determining which software licenses or terms are accepted by the ESCT as a best in-class solution and whether participating vendors would have adequate incentive to justify their participation in the Federal market.
Implications for Cybersecurity	What are the cybersecurity implications of the draft policy?	The draft policy does not sufficiently address its implications regarding cybersecurity. The Coalition requests clarification as to how cybersecurity risk would be assessed under the policy and what cybersecurity protections OMB would require.
Basis of Determinations	What is the meaning of "in the context of developing requirements for software…alternatives should include proprietary, open source, and mixed source technology"? What is the basis for prohibiting the acceptance of software terms and conditions that restrict sharing of all prices, terms, and conditions with other government entities	OMB should clearly establish the basis for prohibiting the acceptance of software terms and conditions that restrict sharing of all prices, terms, and conditions with other government entities without exceptions for contractors acting on behalf of those entities. In addition, OMB should provide more information regarding how the two new enterprise agreements, which would be required at the end of 2016 and 2017, will be identified. Further, once an item is placed on an "endorsed government-wide or multi-agency agreement," more guidance is needed to describe how OMB will determine its classification as newly formed or under existing. We also ask that OMB address whether the draft policy obviates the need for contractors to have software

	without exceptions for contractors acting on behalf of those entities? Once an item is placed on an "endorsed government-wide or multi-agency agreement," how will it be determined if it is newly formed or under existing?	licenses available through other government contracts if they are not selected as a best in-class solution by the ESCT.
Impact on Small Business	What impact will the draft policy have on small businesses who resell these product licenses? How will the policy allow Federal agencies to meet their small business goals?	The draft policy does not adequately address small businesses who resell software licenses through existing government contracts. OMB needs to provide additional information regarding these vendors and how the policy would impact them.
Implementation from a Contracting Perspective	Who will do the contracting?	We ask OMB to clarify who will develop the contracting strategy to implement the policy and ensure that acquisition regulations are adhered to appropriately.

V. Recommendations

In order to promote the strategic sourcing and shared use of software in accordance with FITARA, the Coalition submits the following recommendations to enhance the Category Management Software Licensing policy. These recommendations include industry suggestions and proposals from the existing draft policy.

1. Have the ESCT identify Best Practices for Software License agreements to share with Federal agencies through the Acquisition Gateway.
2. Identify a central point of contact reporting to the agency CIO who is responsible for:
    a. Training on IT software management for all relevant agency personnel
    b. Developing an inventory of all software licenses at the agency-level

c. Identifying opportunities to reduce duplication of software licenses based on ESCT best practices

3. Promote commercial terms and conditions to the maximum extent practicable consistent with FASA and existing regulations. For example, the government should procure Service Level Agreements (SLAs) following commercial terms rather than mandating custom SLAs. Standard commercial license terms include SLAs. The value should be on the strength of the SLAs and on the technical capabilities of the software.
4. Assess existing strategic sourcing vehicles like DoD ESI and GSA SmartBUY to identify elements of the programs that are working and promote these best practices to the maximum extent practicable.
5. Host regular outreach to industry to better understand evolving commercial practices in software licensing.
6. Recognize that mitigating duplication is a means toward facilitating the missions/requirements of agencies, not a goal unto itself.
7. Ensure that the development of specific terms and conditions for software licenses for government-wide use go through the Federal rulemaking process.

Thank you for the opportunity to provide public comments in response to the draft software licensing policy. If there are any questions, please contact me at (202) 331-0975 or rwaldron@thecgp.org.

Sincerely,

Roger Waldron
President