IT Alliance for Public Sector
A Division of ITI

January 21, 2016

The Honorable Anne Rung
Administrator of the Office of Federal Procurement Policy
The Honorable Tony Scott
Administrator of the Office of the Federal Chief Information Officer
Office of Management and Budget
ATTN: Mr. Paul Oliver
725 17th Street, NW
Washington, DC 20503

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

Dear Administrator Rung and Administrator Scott:

On behalf of the Information Technology Alliance for Public Sector[1] (ITAPS), we appreciate this opportunity to comment upon the December 22, 2015, Federal Register Notice of the draft procurement policy Category Management Policy 16-1: Improving the Acquisition and Management of Common Information Technology: Software Licensing aimed at consolidating the government's buying power for commonly used software. This policy seeks to implement Section 837 (the software licensing provisions) of the Federal IT Acquisition Reform Act (FITARA).

I. Effective Management of Software Licenses

Improving the management of agency contracts and licenses for commercial software to benefit the federal government and the commercial software companies who participate should be the goal of software category management program.

Appointment of an agency software manager

The appointment of an agency software manager reporting to the CIO with responsibility to develop and implement management of software licenses and designed to increase the use of government and agency-wide enterprise license agreements could be problematic without an adequate assessment of the needs and missions of the agencies involved and a definition of the enterprise based on those needs and mission assessments. Clearly, every effort should be made to reduce unnecessary contract duplication, but reducing such duplication is a step toward facilitating the efficiency of agency mission fulfillment. It is not an endpoint in and of itself.

Failing to assess and size the enterprise according to agency needs and missions, or worse, having agencies default to a simplistic assessment of the government as one single enterprise, risks setting the government back decades, to a point in time when it sought to acquire all IT lock-step through a single entity and process. That approach was

[1] **About ITAPS**. ITAPS, a division of the Information Technology Industry Council (ITI), is an alliance of leading technology companies building and integrating the latest innovative technologies for the public sector market. With a focus on the federal, state, and local levels of government, as well as on educational institutions, ITAPS advocates for improved procurement policies and practices, while identifying business development opportunities and sharing market intelligence with our industry participants. Visit itaps.itic.org to learn more. Follow us on Twitter @ITAlliancePS.

not successful, generated efforts to extricate agencies from it in order to reduce delay, inefficiency, the deleterious impact on competition, and the limitation on access to technology[2], and, ultimately, was eliminated[3]. Thus, care needs to be taken to assure that vehicles for shared use indeed are made "available," not mandated, "to the maximum extent practicable and as appropriate." [4]

Recognizing the foregoing, the proposed new program also discusses the establishment of an Enterprise Software Category Team (ESCT), co-managed by DoD, GSA, and OMB, which is a subgroup of the Category Management Leadership Council. It is unclear how the newly appointed software manager would fit into this process. Greater clarity regarding roles and responsibilities would be welcome.

License inventories

Many software providers have found instances of agencies sharing or otherwise misusing software licenses. We believe the proposed policy that requires agencies to maintain annual inventories of software licenses and subscriptions can be a valuable tool. To this end, the use of software vendor dashboards could be used to track software deployments, utilization, updates, and patches. The policy does not assign responsibility for conducting the annual license inventory assessments, other than to require agencies to "leverage CDM tools," and we have some reservations as to whether or not CDM tools can handle the required task. We want to ensure that the policy, as finalized, does not place an undue and unfair burden on commercial software companies.

Cloud vs. Enterprise Licenses

The language in the proposal makes no distinction between software licenses and the types of agreements, specifically Service Level Agreements or "SLA's" that are used by Software as a Service Providers in the cloud environment. These two types of agreements have fundamental differences. To the extent that this category management proposal intends to cover both of these two very distinct business models for software acquisition and deployment, it should distinguish and describe those differences with greater clarity, and address how the program would manage and establish acquisitions of SaaS-based deployments versus traditional software deployments.

As for cloud services, most cloud providers have invested heavily in capabilities to quickly launch a wide range of solutions and the policy needs to be clearly defined and handled differently than that for traditional software licensing.

- The policy should recognize that government is typically is not a market driver in these cases, and the burden of Government-unique practices and reporting requirements can be particularly onerous, especially for small businesses.
- The policy should not seek to control XaaS offerings through mandated government-wide licenses but rather by curating the growing set of options in the software marketplace.

Regardless of which vehicle the government uses to acquire software, the Federal Acquisition Streamlining Act (FASA) has not been repealed[5]. It still requires that agencies maximize the use of commercial items and terms. In relevant part, it is implemented in FAR 12.212, which states, among other things, that software shall be acquired

[2] *Cf.* S. Rep. No. 58, 97th Cong., 1st Sess. (1981) at 142-43.
[3] *See* Pub. L. No. 104-106 at Sec. 5101 (1996).
[4] *Cf.* Pub. L. No. 113-291 at Sec. 837 (2014) [Emphasis added].
[5] *See* 41 USC 3307.

under licenses customarily provided to the public, and contractors shall not be required to furnish technical information not provided to the public. It is not clear how these draft requirements will be reconciled with current law, but in the face of recent case law reinforcing FASA and the use of commercial terms, we recommend that that clarification be addressed beforehand.

Further, it also is not clear how existing, long-term agreements will be addressed under this new regime. A number of the items being considered likely would constitute cardinal changes to those agreements and, thus, necessitate re-negotiation in order to avoid the risk of claims. The game plan and timeframes for addressing these matters should be set forth and executed to assure continuity and avoid disruption to long-term, complex existing programs.

II. Aggregate Agency Requirements and Funding

The idea of aggregating agency requirements and funding appears, on its face, to simplify the software contracting process. As alluded to above, in the process of determining what is "practicable" and "appropriate," it is critical that this provision not be intended to restrict, or implemented in a manner that restricts, the ability of agency customers to acquire the software products needed to accomplish their missions. First and foremost, to sustain and facilitate agency missions, the policy must allow for flexibility in the acquisition of software packages over a one-size-fits-all-approach. If the policy were to drive toward a "lowest common denominator" or simply create a baseline for bulk commodity software buys, the overall quality of the software products would suffer and potentially leave the government unable to meet its needs. [6]

Furthermore, for success, this policy should ensure that the Category Management program is backed up by genuine business opportunities for the vendor community. The office cannot achieve favorable terms, like competitive pricing without offering genuine opportunities for the vendor base to provide those terms. Without such incentive, vendors will have no basis for undertaking the upfront investment necessary to participate in the government market. Failure to address this incentive will challenge the ability of this effort to succeed.

Thus, we recommend that instead of mandating government-wide software BPA's, OMB and OFPP encourage agency-wide enterprise license agreements, as they present the best software acquisition fit and model "appropriate" for each particular agency. They also produce the most cost savings, cost avoidance, and efficiencies[7], especially when balanced against agency needs and mission drivers. Further, as OMB is well aware, many of the successes the government has achieved in software licensing have come at the agency-level, as opposed to government-wide. Allowing agencies the flexibility to enter into agency-wide contracts, leveraging category management principles, will provide the government with significant economies of scale, increased transparency and efficiency, standardized terms and conditions, along with pricing transparency, while ensuring the agency can acquire software products to meet their specific needs. This approach strikes the proper balance between cost savings, the need for a more innovative approach to software licensing, and the primary goal of fulfilling agency missions.

III. Open Standards

The proposed policy requires consideration of proprietary, open source, and mixed source technologies. While we have no direct objection to this language, we believe that, more than highlighting specific technologies, it is

[6] *See* note 2, *supra.*
[7] See GAO report 14-413 highlighting DHS enterprise software license agreement case studies. http://www.gao.gov/assets/670/663560.pdf

imperative that the policy emphasize the importance of "open standards" to promote technology neutrality and interoperability.

Over time, this approach may afford the government increased choice and lower prices for consumers. Proprietary, open source, and mixed source technologies are all viable options for agencies, and no preference should be granted, as each must be critically examined, validated, and reviewed from a total cost of ownership perspective in the context of specific agency requirements. To this end, the government should recognize open standards that are:

- Technology neutral and can be implemented on any technology, allowing innovation by connecting interoperable components and systems and avoiding lock-in to any one technology ecosystem.
- Interoperable, because they specify how a component of a system should communicate and respond so other components can rely on it, without having to know how the component is implemented.
- Essential to software quality; open standards must be high quality to be successful in the marketplace. This generally is achieved through oversight by standards-setting organizations that provide transparency, committee structure, voting rules, and other due process-based checks and balances to ensure that the standards they produce benefit a wide implementing community.

IV. Pricing Transparency

Although we recognize that the government believes that pricing transparency is critical to government achieving cost consistency across government, sharing prices across government without context could be problematic because different agencies pay different prices depending on a variety of circumstances, including volume, different requirements, past experience with the customer, SLAs, upfront investment by the government, and performance-related uncertainties.

Existing GSA schedules, such as IT-70, provide for public disclosure of vendor pricing in a manner that safeguards vendor proprietary information. As a result, the government currently has insight into what prices are currently charged for commercial software. Beyond what is currently available (versus what is proposed here), appropriately posting publicly available prices on an open portal for agencies will drive additional transparency. Again, however, the policy must provide flexibility for software providers and protect their ability to offer proprietary pricing models to address specific agency needs. Otherwise, the government will receive nothing but volume-based commodity offerings, lose access to innovative packages that include specialized features, or worse, will chase from the government market vendors that fear having their competitive model exposed and undermined.

V. Additional Comments

Software patching and training

Without specific provisions that facilitate the ability of agencies to keep their software up-to-date in a timely and effective manner via the category management program, agencies run the risk of missing critical security and operational upgrades, and perpetuating the recent spectacle of cybersecurity failures. This risk can be minimized when customers implement patches as they are pushed from vendors, or simply when software is acquired under an on-demand cloud model. Training to ensure effective use of software products is also important to minimize risk. Thus, provisions for both software patching and training should be included in the policy, most likely under the responsibilities of the agency software manager.

GSA must cut red tape

From an operational perspective, the Category Management process must streamline acquisition practices and IT asset management. In essence, it must provide value, or it will serve as nothing more than a bureaucratic layer in a system already over-bureaucratized.

Overly-prescriptive and/or government-unique requirements, FAR and other provisions, and agency-specific regulations are a major burden for commercial vendors. As noted above, FAR 12.212, implementing FASA, mandates that the government acquire commercial software under "licenses customarily provided to the public," *i.e.* commercial license terms, but too often, the government inappropriately strays from that requirement[8]. In addition to potentially conflicting with current statutory and case law, these additional requirements can impose immense compliance burdens without any meaningful government benefit or even relevance.

For example, GSA recently issued a FAR deviation to FAR 52.212-4, which substantially undermines commercial license terms and is contrary to statute, case law, OMB directives, and the FAR[9]. This deviation presents major challenges for industry. Aside from representing a cardinal change that may trigger the renegotiation of contracts, it is not commercial practice. As a recent article noted[10], these present potentially significant challenges:

> "As revised, five categories [of the new order of precedence clause clause] are more important than and control over CSAs [Commercial Suppliers Agreements] ("Addenda," including "any license agreements"). This is important because many commercial companies, especially those who sell information technology hardware, services and software, include in such "Addenda" and "license agreements" crucial terms intended to protect their commercially competitive position and to align their performance obligations to commercial norms. Far from being low-ranking appendages, standard commercial EULAs and TOS are routinely included as "Addenda" and/or "license agreements" accompanying federal sales orders. They are often highly nuanced, very carefully crafted and represent key business decisions on allocation of responsibility, cost and risk. Relegating these to the proverbial "back of the bus" changes transaction economics for many commercial sources and will cause some to retreat from federal markets, some to raise prices, and some to push back by insisting upon further negotiations (the avoidance of which was a central purpose of the class deviation).
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> How can it be that "demotion" of such "Addenda" and "license agreements" has such adverse consequences? It is because these now are behind in precedence both "solicitation provisions if this is a solicitation" and "other provisions of this clause" – where "this clause" refers to FAR 52.212-4, the lengthy "Contract Terms and Conditions – Commercial Items" clause which contains no fewer than twenty-four (24) separate categories of subjects – ranging from "Assignment" through "Unauthorized Obligations." Apart from and in addition to the specified terms that are trumped by the new subparagraph (w) of GSAR 552.212-4, a given Contracting Officer can assert that any and all of the 24 items in FAR 52.212-4 now prevail over counterpart terms if included in a contractor's EULA, TOS or other CSA form that is one of those lowly "Addenda" or other "license agreements."

[8] The same can be said for the government's actions in connection with the requirements of DFARS 227.7202-3.
[9] For the GSA deviation, see: https://interact.gsa.gov/sites/default/files/Commercial%20Supplier%20Agreements%20-%20Draft%20Deviation%20Text%2003262015%20(1)PDF.pdf
[10] *Hits and Misses: GSA's Class Deviations for Commercial Supplier Agreements.*

Moreover, the article[11] emphasizes:

> "The downgrading of CSA terms is difficult to reconcile with cardinal principles governing federal procurement of commercial items. The Federal Government, as expressed at FAR 12.101(c), is to "[r]equire prime contractors and subcontractors at all tiers to incorporate, to the maximum extent practicable, commercial items or non-developmental items as components of items supplied to the agency." (Emphasis added.) As concerns solicitation provisions and contract clauses for the acquisition of commercial items, FAR 12.301 again insists that, "to the maximum extent practicable," the Federal Government shall include "only those clauses… [r]equired to implement provisions of law or executive orders applicable to the acquisition of commercial items" or those "[d]etermined to be consistent with customary commercial practice." (Emphasis added.) The cited change to the Order of Precedence clause subverts these principles."

ITAPS appreciates the opportunity to comment on this proposal and would be pleased to meet with you to discuss them in greater details. Should you have any questions about these comments, please contact Erica McCann at emccann@itic.org.

Sincerely,

A.R. "Trey" Hodgkins, III, CAE
Senior Vice President, Public Sector

[11] Ibid.