
Dear Ms. Romley:

On behalf of the American Bar Association (“ABA”) Section of Public Contract Law (“Section”), I am submitting comments on the draft memorandum cited above. The Section consists of attorneys and associated professionals in private practice, industry, and government service. The Section’s governing Council and substantive committees include members representing these three segments to ensure that all points of view are considered. By presenting their consensus view, the Section seeks to improve the process of public contracting for needed supplies, services, and public works.

The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the ABA and, therefore, should not be construed as representing the policy of the ABA.

Mary Ellen Coster Williams, Section Delegate to the ABA House of Delegates, and Anthony N. Palladino and Heather K. Weiner, members of the Section’s Council, did not participate in the Section’s consideration of these comments and abstained from the voting to approve and send this letter.

This letter is available in pdf format at http://www.americanbar.org/groups/public_contract_law/resources/prior_section_comments.html under the topics “Acquisition Reform and Emerging Issues.”
I. BACKGROUND AND INTRODUCTION

The Section is pleased to offer comments on the Office of Management and Budget (“OMB”) draft memorandum, “Category Management Policy 16-2: Improving the Acquisition and Management of Common Information Technology: Mobile Devices and Services” (“Draft Memo”). See 81 Fed. Reg. 17739 (March 30, 2016) (notice); https://mobile.cio.gov/MobileDevicesandServicesMemo.pdf (Draft Memo). Citing the Federal Information Technology Acquisition Reform Act (“FITARA”), and the Administration’s adoption of category management, the Administrator of the Office of Federal Procurement Policy (“OFPP”) and the Administrator of the Office of the Federal Chief Information Officer propose “to improve the acquisition and management of mobile devices and services through the consolidation of contracts, mandated use of one or more government-wide best-in-class contract solutions, improved demand management, and increased accountability of agency officials.” 81 Fed. Reg. at 17739. This is the third such category management memorandum issued in the past year.

The Section agrees with the Draft Memo’s stated goals of improving acquisition and management of mobile devices and services, promoting competition to reduce costs, improving services and supplies, and increasing the accountability of agency officials. Mobile devices and services are ubiquitous throughout the Government, providing personnel with the necessary tools to conduct public business. Nevertheless, the Section is concerned with the OMB’s process for implementing these policies. Three times now OMB has published memoranda that direct sweeping changes in major government buying categories. Changing current contracting methods in the middle of so many contracts, by directing agencies to terminate existing contracts and consolidate purchasing under an interim or final single procurement vehicle, could result in unintended consequences for the Government and its contractors, including a significant number of small businesses. This undertaking also ultimately could result in increased costs and decreased availability of needed advances in mobile communications. Accordingly, the Section believes that before finalizing directions to terminate existing contracts and schedule the consolidated procurement of mobile devices and services across all agencies, OMB should first take steps to understand agencies’ true needs; to assess the inventories that exist and that will be needed in the future; and to survey the supplies, services, and contract vehicles potentially available for use to competitively source the desired mobile devices and services. Once the data are available and shared with relevant stakeholders, including industry, the appropriate acquisition approach can be defined.

5 The Draft Memo notes that the Government currently manages over 1,200 separate agreements, although the majority of its spending is paid to four carriers. Draft Memo at 1. The Section agrees that efficiencies and economies can be achieved by winnowing down the number of agreements held by each carrier.
II. COMMENTS

A. OMB Should Expand Its Efforts to Obtain Input and Feedback from Stakeholders.

As noted above, the Draft Memo is the third such memorandum directing agencies to overhaul the current processes and procedures used to acquire and manage widespread technologies. The Section is uncertain whether and to what extent any of these memoranda were coordinated with industry or with the Government’s acquisition and program community to understand the effect that such sweeping changes will have on these procurement channels. Thus, the Section is concerned that OMB is limiting itself to only thirty days’ feedback before finalizing what will be significant changes. The Section recommends that OMB open up its approach by expanding the policies to include requirements for additional data collection through requests and open forums before defining the solution for enhancing how the Government acquires mobile devices and services—as well as other segments of the Government’s category-management approach.

Further, the Section recommends that the Government provide additional transparency in the process by, for example, publishing the calculations supporting its economic analysis and decision-making. The Draft Memo directs the collection of information on the contracts, terms, supplies, services, and costs associated with the proposed changes and consolidation. Draft Memo at 2. Performing the data collection, analyzing the information, and engaging in the associated terminations and procurements of what the Draft Memo estimates to be more than $1 billion in current procurements in such a short timeframe is an enormous task, one with significant risks, and one that will require careful analysis and execution to ensure that requirements can be satisfied and loss of government capabilities avoided or at least mitigated. Given the vast numbers of contracts and orders involved and the timing, the Section is concerned that this effort may not result in the desired meaningful interim or long term cost savings. Public scrutiny is needed.

Then, with a vetted set of estimates, OMB and each impacted agency can determine the true needs of a consolidated strategically sourced procurement and the costs of consolidation. As the Draft Memo states: “The Federal Government cannot efficiently and effectively buy mobile services if it does not have visibility into what it buys today or know what it really needs to help deliver agency missions.” Draft Memo at 2. This consideration highlights the importance of compiling and analyzing the appropriate data prior to initiating the actions set forth in the Draft Memo. It similarly highlights the importance of sharing with industry the Government’s findings and analysis.

---

6 If adopted as currently formulated, the Draft Memo effectively vitiates agency discretion to use procurement strategies based on FAR Part 12, 13 or 15, or DFARS Subpart 239.74, and mandates use of government-wide procurement strategies based on FAR Part 8. The Draft Memo would require agencies to obtain a waiver to use FAR Part 12 or 15 procurement strategies.

7 All data and calculations should be published in ways that protect all competitively sensitive information.
The Section recognizes that OMB plays a central and critical role in directing government-wide policy that makes federal procurement more efficient and promotes cost-savings to benefit taxpayers. The Section also recognizes that FITARA authorizes agency chief information officers (“CIOs”) to play a larger role in the federal procurement of information technology products and services, such as mobile devices and wireless services. Still, while the Section agrees that reducing unnecessary fragmentation and duplication of mobile contracts is a laudable goal, such a profound shift in procurement practices for mobile devices and services (and similar categories) first requires more consideration, analysis, and feedback from the public.

B. OMB’s Directions Would Benefit from Adjustments.

1. The OMB Memo Would Direct Use of an Acquisition Vehicle that Does Not Address All Needed Mobile Devices and Services Requirements.

The Draft Memo directs covered agencies to look to the “existing [General Services Administration (“GSA”)] wireless solution” on its Federal Strategic Sourcing Initiative (“FSSI”) program to satisfy their requirements in the interim, as a path towards the consolidation effort. Draft Memo at 5. The GSA FSSI program does not encompass all of the defined devices and services that will be consolidated under the direction of the Draft Memo, however. For example, the FSSI program does not include two-way radios, pagers, and other similar messaging systems, or maintenance services. Agencies thus may be without interim solutions for these items, which may be too low-volume to warrant inclusion in the FSSI program. Given this, narrowing of the scope of this proposed consolidation to permit purchases through other competitors should be considered. At a minimum, OMB should clarify how all these requirements will be satisfied while the Government develops a single procurement vehicle for rollout in 2018.

8 41 U.S.C. §§ 1101(b), 1121.
9 The Government Accountability Office (“GAO”) similarly noted that appropriate information on current inventories and usage is needed to conduct effective strategic sourcing and improving the efficiency of the Government’s spending on mobile devices and services. See GAO-15-431, Telecommunications: Agencies Need Better Control to Achieve Significant Savings on Mobile Devices and Services, May 2015, at 9 and 16. Further, based on data recently released by GSA, use of GSA’s FSSI wireless blanket purchases increased 500% from FY14 to FY15. Mary Davie, “FY 2015 Sees Agencies Saving Dollars on Wireless,” available at http://gsablogs.gsa.gov/technology/2016/01/15/fy-2015-sees-agencies-saving-dollars-on-wireless. Hence, it appears that the transition to GSA’s government-wide vehicles to procure wireless devices and other services may be currently underway without having first gone through meaningful consideration, analysis and public discussion.

10 The Draft Memo explains that “[f]or the purposes of this memo, mobile devices and services cover non-desktop, non-laptop, and small form factor wireless end user devices including hardware . . . and associated software, maintenance, service . . . labor costs including FTE, contract support, managed services, and other elements, but excluding help desk costs” Draft Memo at 1 n.1.

2. **The Draft Memo Fails to Consider Small Businesses.**

The Draft Memo omits another important consideration. It is silent as to how the planned consolidation will affect small businesses and whether any part of the forthcoming government-wide acquisition will be set aside for small businesses.\(^{12}\) OMB should analyze the impact on current small-business contractors (such as those offering the small-scale devices and services above) and on future entrants in the market for mobile voice and data communications, however those communications are provided five or ten years from now.\(^{13}\) If left with only an FSSI-type vehicle, these small businesses may be unable to compete given the volume and pricing necessary to satisfy consolidated government-wide requirements.\(^{14}\)

OMB’s failure to consider small business in this consolidated strategic sourcing initiative is inconsistent with its strategic sourcing memorandum for Information Technology (“IT”) acquisitions. See OMB Memorandum M-13-02, Improving Agency Acquisition Through Strategic Sourcing. This OMB IT memorandum identified consideration and promotion of the use of small business as an important aspect of the consolidation, and considered the impact on small business by seeking to ensure that contract vehicles available to small businesses to compete were used in the IT strategic sourcing consolidation process.\(^{15}\) The Draft Memo should be specifically revised to ensure that it similarly addresses the impact of its proposed strategic consolidation on small businesses so as to avoid unfairly depriving such businesses of fair and meaningful opportunities to compete and win work in this sector.

3. **The Draft Memo Would Cover Tablets, Which Are Already Covered Under a Prior Category Management Memo.**

The Draft Memo appears to include tablets in its definition of covered “mobile devices and services.” See Draft Memo at 1 n.1. The earlier OMB memo on desktop and laptop computers indicated that tablets would soon be covered by that channel to reflect changes in personal computing technology and habits.\(^{15}\) Thus, the dual coverage of tablets could in turn result in duplicative contracting, contracting before a determination of an agency’s true needs

---

\(^{12}\) OMB has recognized that Government-unique practices and reporting requirements, such as those contemplated by the Draft Memo, can be particularly problematic for small businesses. OMB Memorandum, “Transforming the Marketplace: Simplifying Federal Procurement to Improve Performance, Drive Innovation and Increase Savings,” (Dec. 4, 2014), https://www.whitehouse.gov/sites/default/files/omb/procurement/memo/simplifying-federal-procurement-to-improve-performance-drive-innovation-increase-savings.pdf.

\(^{13}\) Under the Small Business Jobs Act and its promulgating regulation (78 Fed. Reg. 61114 (Oct. 2, 2013)), the ordering contracting officer may, but does not have to set aside task orders for small business on multiple award schedules and governmentwide acquisition contracts. To the extent that ultimate solution involves bundling of all or some of the Government’s requirements for mobile devices and services, the agencies involved are required to perform and publish an analysis of the impact a particular bundle would have on small businesses.


\(^{15}\) See Category Management Policy 15-1, supra note 4, at 3, 6.
and appropriate configurations, or both. The Section recommends expressly harmonizing coverage, including through revisions to the earlier laptop/desktop memo as needed.

C. **OMB Should Engage Industry Going Forward.**

The Draft Memo directs category managers to seek input from CIOs and users. Prior category memoranda included similar directions. *See supra* note 4. The Draft Memo does not include a process for engaging with carriers and other industry members. The Section believes that industry input will assist the Government in understanding commercial practices and innovative products and services that would advance agency missions throughout the acquisition lifecycle associated with these products and services. Such an approach also will ensure that agencies have access to appropriate commercial and commercial-off-the-shelf products as well as better insight into planned upgrades to mobile devices and services necessary to support the agencies’ needs.

The Section recommends that OMB and the procuring agencies solicit feedback through broader means to better assess the effects of the proposed interim approach and ultimate acquisition strategy for the overall consolidation on competition, small business, and any anticipated cost savings, as well as to identify potential alternative approaches to ameliorate any anticipated future risks.

**III. CONCLUSION**

The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.

Sincerely,

David G. Ehrhart
Chair, Section of Public Contract Law

cc:
James A. Hughes
Aaron P. Silberman
Kara M. Sacilotto
Jennifer L. Dauer
Council Members, Section of Public Contract Law
Chairs and Vice Chairs, Acquisition Reform & Emerging Issues Committee
Craig Smith
Samantha S. Lee