

# LEGAL ADVISOR



## A PilieroMazza Update for Federal Contractors and Commercial Businesses

### GOVERNMENT CONTRACTING

#### Category Management: What Contractors Need to Know

By Michelle Litteken



In December 2014, the Office of Management and Budget (OMB) announced a new initiative called Category Management. This policy could dramatically change the way the federal government purchases goods and services. For this reason, contractors should be aware of Category Management and the recent developments associated with it.

Category Management is a successor to the Federal Strategic Sourcing Initiative (FSSI) which was implemented in 2010. Category Management has three primary goals: increase savings, reduce the number of new contracts, and increase the amount of spending that is subject to government-wide management. Under Category Management, purchases are divided into groups, and the acquisition process is streamlined by using fewer and more efficient contract vehicles. The Category Management Leadership Council, which is composed of procurement specialists from across the government, established the following ten categories: Information Technology (IT), Professional Services, Security and Protection, Facilities and Construction, Industrial Products and Services, Office Management, Transportation and Logistics Services, Travel and Lodging, Human Capital, and Medical. In 2014, the government spent \$428 billion across these categories. Each category team is expected to gather and compile procurement data, analyze and assess the data, and identify opportunities to use Category Management strategies.

Most of the developments in Category Management have occurred in the area of IT, where Category Management has coincided with the implementation of the Federal Information Technology Acquisition Reform Act (FITARA). FITARA required the government to develop a streamlined approach to acquiring IT goods and services – a requirement that directly aligns with Category Management. OMB has issued three policy memoranda that aim to achieve this requirement; the most recent concerning software licensing.

OMB issued Category Management Policy 16-1: Improving the Acquisition and Management of Common Information Technology: Software Licensing on June 2, 2016. OMB explained that agencies buying and managing licenses in a decentralized manner have difficulty maintaining accurate inventories, often purchase unneeded capabilities, and do not share information pertaining to pricing, terms, or conditions. The memorandum announced new policies and procedures intended to address these issues and fragmentation.

As explained in the memorandum, the Enterprise Software Category Team (ESCT) will guide the development of government-wide software license agreements for mandatory agency use. At least two new enterprise software agreements will be implemented by the end of 2016 and 2017, and the ESCT will establish biannual targets for future years. As part of this process, the ESCT will be identifying and promoting best-in-class agreements and posting standard pricing, terms, and conditions on the Acquisition Gateway. The memorandum directed agencies to develop plans to transition from existing agreements

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to the mandated government-wide agreements. And, agencies will be required to justify and obtain ESCT approval to pursue a new agreement that overlaps or conflicts with the ESCT mandated agreements.

The movement toward government-wide software license agreements has already begun. The ESCT recently negotiated a government-wide agreement with Environmental Systems Research Institute, a geospatial software provider. The government spends \$294 million on geospatial software licenses each year, and \$74 million goes to Environmental Systems Research Institute. The new agreement implemented a single set of terms and conditions for all of the government, provided tiered discounts, and required pricing transparency. This new agreement resulted in a 14 percent savings over prior orders, and is expected to save \$1.5 million in 2016; \$3 million in future years. Future government-wide agreements are expected to obtain comparable levels of savings.

The memorandum also announced several actions that agency Chief Information Officers (CIO) must take. First, within 45 days of the memorandum, each CIO must appoint a software manager who will be responsible for managing all agency-wide commercial and commercial-off-the-shelf (COTS) software agreements and licenses. Then, by September 30, 2016, each agency must compile a baseline inventory of commercial and COTS software licenses purchased, deployed, and in use. This inventory will be analyzed to consolidate redundant applications, identify opportunities for savings, and ensure compliance with software license agreements. As of November 30, 2016, agencies will be required to report all costs savings and cost avoidance attributable to software license management to OMB.

Although efficiency and savings are laudable goals, the software memorandum, and Category Management in general, raise several concerns. Category Management emphasizes government-wide contract vehicles. The procurements for government-wide agreements are extremely competitive and tend to occur infrequently. Businesses that are not selected for these vehicles may be shut out of a large segment of federal procurement. There are also concerns specific to software. The policy

did not address small businesses that resell software licenses through existing government contracts. Additionally, the policy conflicts with aspects of the FAR. Namely, FAR 12.212(a) states that commercial software “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.” The requirement to develop mandatory government-wide software license agreements seems to contradict that provision. And, because the government is often not the driver for commercial software development, requirements unique to the government may impose additional costs and slow development. This can be particularly problematic for small businesses. In comments submitted on the draft policy, several industry groups advocated for agency-wide agreements instead of government-wide agreements. Agency-wide agreements would provide more flexibility and allow agencies to develop license agreements that fit their specific missions.

In less than two years, Category Management has begun to reshape aspects of federal procurement, but its final impact is still unclear. Although most of the changes to date have been in the IT sector, there has been some activity in other areas. On July 1, 2016, OMB issued a memorandum directing all agencies to use a government-wide blanket purchase agreement when procuring identity protection services. If this recently-announced policy and the IT policies issued so far are successful, they may spur similar efforts in other categories. For this reason, it is critical that these early policies include and address the small business community. Incorporating small businesses now will provide a framework to use going forward.

A recently-announced proposed rule provides an opportunity for small businesses to express concerns about Category Management and the need to consider small businesses. On June 20, 2016, the government proposed to amend FAR 8.0004 by adding a provision that would require contracting officers to conduct an analysis when a service or supply is offered under the FSSI, but the FSSI is not used. The analysis must address the comparative value, including price and non-price factors, between the supplies and services offered

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under the FSSI and those offered under the source(s) to be used. The notice for the proposed rule stated that the rule could lead to more sales for small businesses that are under the FSSI, but it failed to recognize that small businesses that are not on the FSSI may be adversely affected. Comments to the proposed rule are due on August 19, 2016.

Small businesses are encouraged to submit comments. Please contact us if you would like help preparing your comments.

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