
ACQUISITION REFORM WORKING GROUP

April 4, 2005

Ms. Marcia Madsen
Chairman
Acquisition Advisory Panel
c/o General Services Administration
1800 F Street, N.W. Room 4006
Washington, D.C. 20405

Dear Madam Chairman:

The Acquisition Reform Working Group (ARWG) concentrates on issues related to the Federal acquisition process. The changes made since enactment of the 1994 Federal Acquisition Streamlining Act, the 1996 Clinger-Cohen Act and, more recently, the 2003 Services Acquisition Reform Act are important. Yet, these reforms represent only the proverbial tip of the iceberg of what is required to truly transform the procurement process.

The aim of ARWG is to reduce costs, enhance efficiencies and promote quality management as the Federal government expands the use of commercial practices and reaches out more to the private sector to acquire goods and services.

To further these reforms, we believe that additional changes are needed in order to achieve the degree of improvement, cost savings and comprehensive reform envisioned. Toward that end, the undersigned members of ARWG, representing virtually every element of the Government contracting community – including large and small businesses, manufacturers and service companies – has developed a package of legislative proposals for 2005. These proposals are aimed at sustaining our national technology and industrial base, and improving Government access to commercial technologies.

The attached material includes a brief executive summary of the 2005 ARWG legislative proposals, along with extensive background papers on each issue. We hope that the Panel will find these proposals useful as it moves forward with its review of commercial practices and Government contracting. These papers also have been submitted to the relevant congressional committees and Federal agencies.

In the meantime, should you have any questions or require additional information, please have your staff contact Cathy Garman, at the Contract Services Association (703-243-2020), who serves as our central point of contact for these issues.

Thank you for your time and consideration.

Sincerely,

*Aerospace Industries Association
American Consulting Engineers Council
American Council of Independent Laboratories
AeA
Contract Services Association
Electronic Industries Alliance
Information Technology Association of America
National Defense Industrial Association
Professional Services Council*

ACQUISITION REFORM WORKING GROUP 2005 LEGISLATIVE PACKAGE

EXECUTIVE SUMMARY

INTRODUCTION

Since 1994, the Congress and the Administration has embarked on several major acquisition reform initiatives. This has resulted in enactment of the 1994 Federal Acquisition Streamlining Act, the 1996 Clinger-Cohen Act, the FAR Part 15 rewrite, and most recently the 2003 Services Acquisition Reform Act (SARA), as well as portions of the 2004 Acquisition Streamlining Improvement Act. However, more can be accomplished in order, as the House Government Reform Committee noted in its report on SARA, to *“leverage the best and most innovative services and products our vigorous private-sector economy has to offer. It has not kept up with the dynamics of an economy that has, over the last few years, become increasingly service and technology oriented.”*

The Acquisition Reform Working Group (ARWG) strongly supports these acquisition reform initiatives, which are aimed at giving Government contracting officials the tools needed to be buy “better, cheaper, faster” without sacrificing quality or the necessary oversight to ensure that the taxpayers’ interests are protected. To that end, ARWG recommends that the provisions described below be enacted. These are more fully discussed in extensive background papers (available upon request).

COMMERCIAL ACQUISITION PRACTICES

In recent years, the Government has attempted to realign its purchasing processes to lower costs and to gain access to new commercial technology by eliminating, or at least lowering, barriers that make doing business with the Government overly cumbersome and unattractive to commercial firms, and inhibit greater integration of commercial and military production lines. The Government must make this transition to commercial practices while maintaining proper stewardship of the public dollar.

The 1994 Federal Acquisition Streamlining Act (FASA), the 1996 Clinger-Cohen Act and, more recently, the 2003 Services Acquisition Reform Act (SARA) enabled major changes in the way the Federal government buys commercial items. However, to truly reap the full savings in cost and efficiency – and expand Government access to commercial items – envisioned by these legislative reform measures, we must continue to “push the envelope.” This is especially true in the services contracting arena. ARWG has outlined several areas in which the full potential of existing commercial practices has not been recognized and employed, either because of legislative or regulatory restrictions, or failure to use the flexibility provided.

Clarify Non-applicability of Cost Accounting Standards to Time and Material Commercial Contracts

Section 1432 of the 2003 Services Acquisition Reform Act (SARA) authorizes the use of Time and Material (T&M) and Labor Hour (LH) contracts for the procurement of commercial services in certain circumstances. The Federal Acquisition Regulatory (FAR) Council in late September 2004 issued an advance notice of proposed rulemaking published in the Federal Register (69 F.R. 56316-56322). During a public hearing, questions were raised regarding the applicability of cost accounting standards to these contracts. While ARWG believes that the statute is clear that the

cost accounting standards do not apply to T&M contracts for commercial services that meet the requirements of Section 1432, we recommend that the Congress reiterate this intent in report language accompanying the FY06 defense authorization bill.

Curb Proliferation of Government-unique Requirements Applicable to Commercial Prime Contracts

The proliferation of Government-unique requirements imposed on companies wanting to sell commercial products directly to the Government undermines the Congressional objectives aimed at enabling the use of commercial items. ARWG recommends that Congress enact a legislative mandate limiting, for commercial acquisitions, the imposition of unique Government clauses except those required to implement law or executive orders.

Expand Cooperative Purchasing and Schedules for Homeland Security

Section 211 of the 2002 E-Government Act authorizes the Administrator of GSA to provide state and local governments with access to the GSA Federal Supply Schedules 70 for purchasing information technology. ARWG recommends amending the 2002 E-Government Act to expand the cooperative purchasing authority to allow state and local governments to use all of the GSA Schedules (not just Schedule 70). The authority, however, would be limited to the purchase of goods and services that are designed to facilitate defense against or recovery from terrorism or nuclear, biological, chemical or radiological (NBC) attack.

Improve Protection of Commercially Developed Intellectual Property Rights After Submission to the Government

As the Federal government relies more and more upon research and development (R&D) performed by the private sector, it also has determined that it must reduce the barriers for private organizations to enter into contracts with the Federal government for the results of that R&D effort. ARWG recommends amending current technical data rights law (e.g., 10 U.S.C. 2320 and 41 U.S.C. 418a) in order to address issues related to the Government's right to commercially developed intellectual property.

Make Permanent the Application of Simplified Acquisition Procedures to Certain Commercial Items

The 1996 Clinger-Cohen Act established a test program for the use of simplified acquisition procedures when acquiring commercial items up to \$5,000,000. This authority has been extended five times, most recently in the FY05 National Defense Authorization Act. ARWG recommends making this authority permanent.

Provide Trade Agreements Act Exemption for Commercial Off-the-Shelf Items

The Trade Agreements Act requires that all products being delivered to the Government be U.S. made or substantially transformed in a designated country, Caribbean Basin country or NAFTA country. In order to grant Government access to highly critical, state-of-the-art, commercial-off-the-shelf (COTS) items, ARWG recommends that a class waiver be granted for the Trade Agreements Act, as well as for the Buy American Act, for all COTS products.

BUSINESS PROCESS STREAMLINING

There are two key goals of acquisition reform. The first is to streamline and simplify the procurement process in order to reduce development and production cycle times as well as program costs. The second is to strengthen the technology and industrial base through increased Government access to, and use of, commercial items incorporating advanced technologies. This also should include expanding the use of multi-year contracts as a means of providing defense companies with stable revenue and cash flow – particularly in the developmental phase. Multi-year contracts result in lower unit costs since the contractor can build in more economical lot sizes with some assurance of recovering non-recurring costs over the life of the contract. A reduction in the uncertainty of ongoing Government business enables the

contractor to build a more professional, stable workforce, thus potentially enhancing the quality of performance.

ARWG has focused on several critical areas that should be addressed to allow for more efficient Federal purchasing. We recommend changes to current statutes in the following areas:

Encourage Prudent Use of Exceptional Waivers of Cost and Pricing Data

The Truth in Negotiations Act (TINA) has been a long-standing and valuable tool for assuring that the Government pays reasonable prices for goods and services on applicable acquisitions. However, the FY03 National Defense Authorization Act imposed strict limits on the Department of Defense's (DOD) ability to exercise any TINA waiver authority, even for follow-on requirements. ARWG recommends revising the criteria under which the waiver is granted.

Ensure Compatibility of Thresholds for TINA and CAS

The threshold for contracts covered under the Cost Accounting Standards (CAS) is currently \$500,000. The threshold for the Truth in Negotiation Act (TINA), however, is periodically revised to reflect the impact of inflation. As a result, the threshold was recently increased from \$500,000 to \$550,000. ARWG recommends a simple technical amendment to raise the CAS threshold to bring it into alliance with TINA, thus eliminating any confusion in the application of the appropriate thresholds.

Extend Prompt Pay Act Interest Payments Beyond 12 months

Under the Prompt Payment Act, agencies that fail to make timely payment on proper invoices submitted for payment are required to automatically pay interest on those late payments – but only for the first twelve months. ARWG recommends eliminating the cap on a Federal agency's obligation to pay interest on overdue proper invoices under the Prompt Payment Act beyond the 365 day limit.

Establish Uniform Payment Standards for Contract Financing

The Department of Defense has established payment terms for contract financing that lower contractor working capital investment requirements. ARWG recommends that the Congress direct the establishment of uniform payment terms/standards for contract financing not covered by other Public Laws that are consistent with those already established in the Defense Federal Acquisition Regulations.

Improve Efficient Payment

Cash flow and contract payments are critical issues affecting the financial health of Government contractors, of any size. They also affect a contractor's (especially a commercial company) willingness to do business with the Government. ARWG recommends that the Congress establish a requirement that all Federal agencies deploy electronic invoicing systems for contractor billings by the end of FY06. Also, Congress should establish a requirement for contractors to utilize the electronic invoicing system(s) for contracts awarded after 1 October 2007

Reauthorize "Share-in-Savings" initiative for information technology

Section 210 of the E-Government Act authorizes Government-wide use of Share-in-Savings (SIS) contracts for information technology (IT). Such contracts offer an innovative approach for encouraging industry to share creative technology solutions with the Government. Currently, the authority for SIS contracts expires at the end of FY05. In a report to Congress on December 17, 2004, the Office of Management and Budget (OMB) recommended that the authority be extended for another three years. ARWG also supports extension of this authority.

Remove expiration of NASA administrator's authority to grant indemnity to developers of experimental aerospace vehicles under the space act

Current law authorizes the NASA Administrator to provide liability insurance for or indemnification to developers of experimental aerospace vehicles (EAVs) developed or used under an agreement between NASA and the vehicle developer. This authority, however, expires in 2005. ARWG recommends extending this authority through 2008.

Treat Sales to Foreign, State, and Local Governments as Commercial Sales

For decades, direct commercial sales to foreign governments, and state and local government sales, were considered sales to the general public and, therefore, not U.S. Government sales for the purpose of determining commerciality of an item or service. Such sales were defined for “non-governmental” purposes. However, changes in the commercial items definition has resulted in confusion as to the treatment of direct commercial sales to foreign governments and sales to state and local governments; for commercial items determinations, the change exacerbated rather than resolved any confusion. ARWG recommends legislation to correct this problem.

LIMITATIONS ON GLOBAL COMPETITION

The current **export control system** and its processes do not support today’s business demands. Unless the system is streamlined and aligned with today’s objectives, the industries on which the U.S. security depends will be impacted. ARWG recommends that the Congress establish higher monetary thresholds for congressional notifications of defense exports, and create a more predictable and transparent process for notifications of export licenses. Additionally, ARWG recommends that the Congress press for measures that would streamline transactions involving allies, thus re-energizing the concept behind the Defense Capabilities Initiative.

The Defense Export Loan Guarantee (DELG) Program was initiated by the Congress in 1996, but it has inherent limitations that reduce its usefulness. ARWG has identified several changes that would result in the DELG being a more effective program by more closely mirroring the provisions that apply to the Export-Import Bank.

STREAMLINING SOCIO-ECONOMIC REQUIREMENTS

There are a number of statutes that focus on important socio-economic issues. Acquisition reform should bring structure and coherency to these initiatives in order to promote clear goals and objectives and streamline acquisition procedures. In particular, the following statutes and programs should be addressed:

Enhance Implementation of Subcontracting Goals

It is the policy of the Federal government to ensure that small businesses have maximum practicable opportunity to participate in Federal procurement. Looking at subcontracting opportunities, in addition to prime contracts, would provide a more accurate picture of the extent of small business participation. ARWG recommends that the Congress allow for the value of first-tier subcontract awards to be considered as a prime contract when assessing the dollar value of all contract awards for purposes of goal achievement.

Simplify Small Disadvantaged Business Certification Requirement

The requirement for small disadvantaged business (SDB) re-certification is eroding industry’s ability to award contracts to SDBs. ARWG proposes a legislative clarification to the Third Party Certification issue that would relieve contractors of the requirement to count only certified SDBs in their subcontracting reports. As a short-term step toward resolving this problem, ARWG proposes that the Congress revise the rules for calculating the net worth of economically-disadvantaged individuals.

ACQUISITION REFORM WORKING GROUP

Aerospace Industries Association * American Consulting Engineers Council * American Council of Independent Laboratories
* AeA * Contract Services Association of America * Electronic Industries Alliance * Information Technology Association of
America * National Defense Industrial Association * Professional Services Council *

LEGISLATIVE PACKAGE For the Year 2005 (Background Papers)

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ISSUE: CLARIFY NON-APPLICABILITY OF COST ACCOUNTING STANDARDS TO TIME AND MATERIAL COMMERCIAL CONTRACTS

PROBLEM STATEMENT:

Section 1432 of the 2003 Services Acquisition Reform Act (SARA) authorizes the use of Time and Material (T&M) and Labor Hour (LH) contracts for the procurement of commercial services. Section 1432 amends section 8002(d) of the 1994 Federal Acquisition Streamlining Act (FASA). As amended, section 8002(d) places certain conditions on the use of T&M and LH contracts for purchases of commercial services under FAR Part 12, namely: (1) the purchase must be made on a competitive basis; (2) the service must fall within certain categories as prescribed by section 8002(d); (3) the contracting officer must execute a determination and findings (D&F) that no other contract type is suitable; and (4) the contracting officer must include a ceiling price that the contractor exceeds at its own risk and that may be changed only upon a determination documented in the contract file that the change is in the best interest of the procuring agency.

The Federal Acquisition Regulations (FAR) Council issued an Advance Notice of Public Rule Making (ANPR) in September 2004, with a public hearing held in October. The purpose of the ANPR and the public meeting were to receive public comments on how best to implement Section 1432. Among the issues that the FAR Council was considering was the impact there would be if the Cost Accounting Standards (CAS) were applied to these contracts.

NEED FOR CHANGE:

In the view of ARWG, CAS does not apply to T&M and LH contracts for commercial services awarded under the authority of Section 1432 of SARA. The 1996 Clinger-Cohen Act provided a broad exemption for contracts and subcontracts for the acquisition of commercial items (ref. Section 4205).

In addition to making several substantive changes to the law in regard to acquiring commercial items, the 1994 Federal Acquisition Streamlining Act (FASA) also included provisions addressing the non-applicability of the Cost Accounting Standards (CAS) to commercial items. In this regard, section 8301(d) of FASA (P.L. 103-355) stated that the CAS do not apply to “contracts or subcontracts where the price negotiated is based on established catalog or market prices of commercial items sold in substantial quantities to the general public.” That provision also made the CAS inapplicable to “any other firm fixed-price contract or subcontract (without cost incentives) for commercial items.”

Two years after it had enacted FASA, Congress passed the 1996 Clinger-Cohen Act (P.L. 104-106). Section 4205 of that Act (“Inapplicability of Cost Accounting Standards to contracts and subcontracts for commercial items”) clearly and unambiguously stated that the CAS do not apply to “contracts or subcontracts for the acquisition of commercial items.” Thus, Clinger-Cohen broadened the category of contracts for commercial items that are not subject to the CAS by exempting all contracts for commercial items from CAS coverage.

Unfortunately, the CAS Board issued a more limited exemption under its own rules – to only firm fixed-priced and fixed-price with economic price adjustment (provided that price adjustment is not based on actual costs incurred) contracts and subcontracts for the acquisition of commercial items (ref. CFR 9903-201(b)(6)). Industry had objected to the CAS Board’s action because it more narrowly defined contracts than had been permitted by FASA. This conflict must be remedied in favor of full implementation of the statute.

Setting aside the question of applicability, the Government gains little from the application of CAS to contracts awarded under SARA section 1432. From an accounting standpoint, a T&M and LH contractor is mostly concerned with labor charging and material charging. There is little concern, if any, with cost measurement, assignment, and allocation, which are the principal accounting concerns of CAS. All that should be required is that the contractor has an adequate accounting system for recording hours and material purchases.

RECOMMENDATION:

The ARWG requests that the Committee direct the Administrator of the Office of Federal Procurement Policy (OFPP) to review the current CAS Rules and their applicability. Necessary modifications should be made that would result in the exemption of Time and Material and Labor Hour Contracts (awarded under SARA section 1432) from the provisions of the CAS in all commercial contracts awarded under FAR Part 12.

The Committee directs the Office of Federal Procurement Policy (OFPP), as chair of the Cost Accounting Standards (CAS) Board, to review the current CAS Rules and make the necessary modifications that would result in the exemption of Time and Material and Labor Hour Contracts from the provisions of the Cost Accounting Standards in all commercial contracts awarded under FAR Part 12. The Committee notes that in addition to making several substantive changes to the law in regard to acquiring commercial items, the 1994 Federal Acquisition Streamlining Act (FASA) included provisions addressing the applicability of the CAS to commercial items. In this regard, P.L. 103-355, section 8301(d) made the CAS inapplicable to "any other firm fixed-price contract or subcontract (without cost incentives) for commercial items." The Congress subsequently enacted the 1996 Clinger-Cohen Act (P.L. 104-106). Section 4205 of that Act ("Inapplicability of Cost Accounting Standards to contracts and subcontracts for commercial items") clearly and unambiguously stated that the CAS do not apply to "contracts or subcontracts for the acquisition of commercial items." Thus, Congress has made it clear that all contracts for commercial items, not just firm-fixed price or fixed price with economic price adjustment contracts are exempt from all CAS requirements. This also applies to those commercial contracts authorized under Section 1432 of the FY04 National Defense Authorization Act (P.L. 108-136).

ISSUE: CURB PROLIFERATION OF GOVERNMENT-UNIQUE REQUIREMENTS APPLICABLE TO COMMERCIAL PRIME CONTRACTS

PROBLEM STATEMENT:

The Government's acquisition policies of maximizing competition and supporting the use of commercial products and processes depend on the availability and willingness of commercial firms to do business with the Government. These policies have been in existence for years, and were further supported in the passage of the 1994 Federal Acquisition Streamlining Act (FASA) and the 1996 Clinger-Cohen Act. The implementing regulations (FAR Part 12 and DFARS Part 212) were intended to require only the minimum number of Government-unique provisions in contracts of commercial firms offering commercial products and services. However, over the past several years nearly a dozen Government-unique optional clauses have been added to the checklist at FAR Part 52.212-5. These clauses apply to prime contractors but not subcontractors selling commercial items to the Government.

NEED FOR CHANGE:

The proliferation of Government-unique requirements imposed on companies wanting to sell commercial products directly to the Government undermines the congressional objectives aimed at enabling the use of commercial items, including:

- Attracting non-traditional, commercial sources to Government business;
- Encouraging innovative small businesses;
- Increasing the likelihood that the best American technology can be acquired for the Government.

Insertion of extraneous, Government-unique FAR clauses in commercial prime contracts strongly discourages commercial companies from doing business with the U.S. Government other than as a subcontractor to a traditional Government prime contractor. This unnecessarily limits competition at the prime contract level, and also discourages small and innovative businesses from being prime contractors.

While it is important for existing Government prime contractors to be able to attract commercial subcontractors and suppliers through minimal flowdown of Government-unique requirements, these same companies also should be encouraged to deal directly with the Government. Needlessly requiring more FAR-unique clauses when the Government buys commercial items or services directly is counterproductive to that goal. To address this issue, Section 4203 of the 1996 Clinger-Cohen Act specifically required the FAR to list certain provisions of law that are inapplicable to contracts for acquisitions of Commercially Available Off-the-Shelf (COTS) Items. The FAR Council issued a proposed rule to implement Section 4203 (January 15, 2004, FAR Case 2000-305), with analysis of the public comments completed on June 18, 2004; the final rule is currently pending approval by the Office of Federal Procurement Policy.

RECOMMENDATION:

ARWG recommends that Congress enact a legislative mandate that for commercial item acquisitions (FAR Part 12), the FAR treat prime contractors similar to subcontractors and limit the applicability of unique Government clauses to those required to implement law or executive orders. The applicability of Government-unique terms and conditions should not be more onerous at the prime level than the subcontract level for FAR Part 12 acquisitions. This, however, is not intended to limit the parties' discretion in invoking Government-unique provisions as may be deemed mutually beneficial to meeting mission needs. The clauses that should still apply include:

- 52.222-26, Equal Opportunity (E.O. 11246);
- 52.222-35, Equal Opportunity for Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible Veterans (38 U.S.C. 4212);
- 52.222-36, Affirmative Action for Workers with Disabilities (29 U.S.C. 793); and
- 52.222-41, Service Contract Act of 1965, as Amended (41 U.S.C. 351 et. seq.)

**ISSUE: EXPAND COOPERATIVE PURCHASING AND ACCESS TO GSA SCHEDULES
CONTRACTS FOR ALL HOMELAND SECURITY PURCHASING**

PROBLEM STATEMENT:

Section 211 of the 2002 E-Government Act authorizes the Administrator of GSA to provide state and local governments access to the GSA Federal Supply Schedules 70 for purchasing information technology (generally automated data processing equipment (including firmware), software, supplies, support equipment, and services). However, the statute is specifically and intentionally limited to information technology purchases. GSA published an interim rule on May 7, 2003, and issued a final rule on May 18, 2004. According to GSA, state and local governments have used this authority to purchase almost \$100 million in information technology goods and services from this single GSA schedule.

NEED FOR CHANGE:

Congress has recognized the special needs for addressing homeland security requirements, and has provided special authority for Federal agencies when purchasing goods and services designed to facilitate defense against or recovery from terrorism or nuclear, biological, chemical or radiological (NBC) attack. For example, title VII of the Homeland Security Act. (P.L. 107-296) provides all Federal agencies procurement flexibility for certain homeland security purchases. These provisions increase the micro-purchase threshold, the simplified acquisition threshold, and the streamlined procedures for the procurement of supplies or services by an Executive agency to be used for certain terrorism or NBC attacks. Of significance in the Act and the regulations is the authority for an agency to treat any acquisition for terrorism or NBC supplies or services as a "commercial item" under FAR Part 12. This authority, however, is only available to Federal agencies.

Since most of the homeland security and first responder requests come from state and local government units, they should be permitted to take advantage of all of the buying leverage that the Federal government already has achieved through the GSA schedules program, and not just for information technology.

RECOMMENDATION:

ARWG recommends amending the 2002 E-Government Act to expand the cooperative purchasing authority of state and local governments to use all of the GSA Schedules (not just Schedule 70), but only for the purchase of goods and services that are designed to facilitate defense against or recovery from terrorism or nuclear, biological, chemical or radiological (NBC) attack. The expanded authority would use the same procedures as GSA already has adopted for Schedule 70 cooperative purchasing.

ISSUE: IMPROVE PROTECTION OF COMMERCIALY DEVELOPED CONFIDENTIAL OR PROPRIETARY INFORMATION AFTER SUBMISSION TO THE GOVERNMENT

PROBLEM STATEMENT:

As the Federal government seeks more and more to build on private sector research and development (R&D), it has found that private organizations perceive that there are significant barriers to entering into contracts with the Federal government that either build on the results of private R&D efforts or would harness the commercial sector's research expertise to explore new Government funded R&D initiatives. Following the terrorist attacks of September 11, 2001, the Federal government has stepped up its outreach to individuals, small businesses, and other organizations in the private sector to assist in developing antiterrorism technologies, making the streamlining of research and development contracting and protection of confidential or proprietary information even more urgent. However, the increasing lack of protection provided to confidential or proprietary information once submitted to the Federal government is increasingly inhibiting the commercial sector's interest in developing technologies for the Federal government.

Federal law (18 USC 1905) requires Federal employees to protect confidential information that they receive in the course of their employment, but the processes increasingly used within the Government cause Federal employees to share virtually all the information they receive with advisory and assistance contractors.

The Federal government may be placing confidential or proprietary information submitted to the Government at risk through its current actions and those planned through proposed rulemaking. In December 2003, for example, NASA published a rule in the Federal Register proposing to eliminate requirements imposed on the contracting officer to protect confidential information, before NASA provides access to other companies' confidential or proprietary information to its advisory and assistance contractors, contract labor, or even other Government contractors. NASA proposes to eliminate the requirement that the contractors enter specific agreements with each of those other companies whose information the contractors will access to protect the information from unauthorized use or disclosure. Currently Non-Disclosure Agreements (NDAs) are required between the contractors (with a copy to the contractor officer) that provide the terms of agreement in supplying and receiving the information. The provider of confidential or proprietary information can file suit under the terms of the NDA against the contractor which accesses its information to enforce the agreement and ask for injunctive relief, damages, or other remedies as provided for in the agreement. NASA has asked for the rule change because NASA is becoming increasingly dependent on contractor support and no longer have the staff to manage the NDAs or the confidential or proprietary information.

The Air Force Material Command has proposed a similar rule.

The Department of Homeland Security (DHS) which is responsible for designation and certification of Qualified Anti-Terrorism Technologies (QATT) under the Support Anti-Terrorism by Fostering Effective Technologies Act (SAFETY Act) also requires submission of confidential or proprietary information to the Government without adequate NDAs in place. DHS contracts out the review of the applications to a 3rd party contractor that, in turn, submits the technical portions of the application for review by additional 3rd parties, including universities and Government laboratories. NDAs with DHS are signed by the various reviewers, but not by the original submitter. Lack of an NDA with the submitter hinders the submitter's private right of action against the reviewers if a misuse or unauthorized disclosure of the information were to occur. Submitters for SAFETY certification are distributors of products or services in the commercial marketplace as opposed to contractors providing products or services to satisfy Government requirements and specifications.

NEED FOR CHANGE:

The Government's R&D budget comprises a much smaller percentage of the total U.S. investment in R&D than it did through the 1980s. As a result, the Government no longer drives technology development as significantly as it did in the past. Many organizations that invest billions of dollars each year in internal R&D refuse to do business with the Government because the Federal government demands broad control over confidential or proprietary

information. Yet, new national security threats and other national needs are increasing the need for Government agencies that fund research and development, or even those that seek to build on existing high tech products, to do business with private organizations that heavily invest in R&D. These commercial organizations recognize the importance of innovation to their profitability. They use technology developed and enhanced during performance of existing contracts to increase their competitive edge. Gaining, enhancing and protecting confidential or proprietary rights are fundamental to the very existence of these highly innovative, technologically sophisticated businesses – exactly the type of businesses that will best support our Government’s R&D efforts. It is these businesses that develop products of most interest to Government agencies. Every project that potentially puts the confidential or proprietary information of such companies at risk puts these companies’ existence at risk.

With the NASA and DHS processes failing to identify the companies as either signatories of agreements or explicitly identified 3d party beneficiaries in the NDA’s, companies likely cannot seek recourse against the Government for breaches by the advisory and assistance contractors or directly against the advisory and assistance contractors for dissemination of confidential or proprietary information.

For applications submitted under the SAFETY Act, DHS requires companies to provide highly sensitive business data such as cost and margin data. According to directions in the SAFETY Act application, applicants are instructed that DHS

has established instructions for accepting, processing, evaluating and reporting on technical, business and insurance data and information that are proprietary and sensitive. All Applications, whether electronic or paper, will be subject to these stringent safeguards. There is no need for Applicants to be unduly apprehensive and to constrain the scope of the material offered to DHS as part of any Application. Limiting information in your Application may delay evaluation. Neither is there any need to identify and distinguish any specific data elements or segments of materials as being proprietary or sensitive – as everything in the Application will be accorded the same secure handling and treated as if it were proprietary.

However, under the FAR, DFARS, and 10 USC 2320 et seq, contractors must mark all data that they consider proprietary or sensitive when submitting to the U.S. Government or risk losing any protection.

These circumstances leave contractors without legal redress for disclosure of confidential or proprietary information. There is no waiver of sovereign immunity, so the Federal government cannot be sued for disclosure. Without an NDA, there is no contract which would provide a right to sue for damages resulting from disclosure. Finally, contractors cannot turn to Federal or state law for a right of action because none of the statutes provide for a private right of action or, again, a waiver of sovereign immunity.

RECOMMENDATION:

ARWG recommends amending the “Rights in Technical Data,” as codified at 10 U.S.C. 2320 (a)(D), by adding a paragraph (iv) that would provide for a private right of action by a contractor who is not party to a non-disclosure agreement that exists between the U.S. Government and another contractor upon disclosure of confidential or proprietary information, as defined in the Economic Espionage Act. We also recommend a corresponding change be made to 41 U.S.C. 418a (“Rights in Technical Data”) for civilian agencies.

ISSUE: MAKE PERMANENT APPLICATION OF SIMPLIFIED ACQUISITION PROCEDURES TO CERTAIN COMMERCIAL ITEMS

PROBLEM STATEMENT:

The 1996 Clinger-Cohen Act established a test program for the use of simplified acquisition procedures when acquiring commercial items up to \$5,000,000. These procedures are generally authorized for purchases of commercial items in excess of the simplified acquisition threshold of \$100,000 (10 U.S.C. 2304). This authority has been extended several times. Section 1443 of the 2003 Services Acquisition Reform Act (SARA) (P.L. 108-136) extended this authority on a Government-wide basis through January 1, 2006. And, more recently, Section 817 of the FY05 National Defense Authorization Act (P.L. 108-375) extended this authority through January 1, 2008

Section 812 of the FY03 National Defense Authorization Act (P.L. 107-314), which had extended the authority until January, 2004, also required the General Accounting Office (GAO) to report on the use of this special authority, as well as the benefits and any impact on competition. That report (GAO-03-1068, September 2003) stated that because the Federal Procurement Data System contains unreliable data about the simplified acquisition test program, GAO was unable to determine the extent to which Federal executive agencies have used the test program or have realized any benefits.

However, a 1999 survey of procurement executives conducted by the Office of Federal Procurement Policy noted that these executives believed the program had a positive impact on the Federal procurement process and that it should be made permanent. That this authority is used sparingly demonstrates that Federal buying activities are policing its use and ensuring that the authority is not abused. The need, however, for frequent reauthorization of this authority has inhibited its use, based on informal comments received from contracting officers.

NEED FOR CHANGE:

ARWG believes this authority is a valuable tool for acquisition streamlining through the combined use of the Federal Acquisition Regulation (FAR) Parts 12 and 13 to maximize efficiency and economy and minimize administrative costs. Congress has expanded this authority for use against terrorism to reduce cycle time in acquiring commercial items.

RECOMMENDATION:

The extension in SARA is the fifth temporary extension for this test. ARWG recommends making this authority permanent.

ISSUE: PROVIDE TRADE AGREEMENTS ACT EXEMPTION FOR COMMERCIALY AVAILABLE OFF-THE-SHELF ITEMS

PROBLEM STATEMENT:

The Trade Agreements Act (19 U.S.C. 2512(a)) and its implementing regulations (FAR 52.225-5) require that all products being delivered to the Government be U.S. made or substantially transformed in a designated country, Caribbean Basin country or NAFTA country. While the law allows a bidder to identify products being proposed that do not meet that requirement, the Government may only purchase such products if no competing contractor is bidding those same products from compliant countries. Even when the contractor certifies that all products being delivered are compliant products, the contractor still must monitor the subject contract for the entire period of that contract to assure that any manufacturing source changes do not invalidate the certification made at the time of award.

NEED FOR CHANGE:

By imposing this restriction on contractors providing commercially available off-the-shelf (COTS) items to Federal agencies, the U.S. Government is denying itself access to state-of-the-art COTS items. Ironically, no such restriction is placed on any individual or private sector business in the U.S. These products are readily available to personal and business consumers without regard to where they are manufactured.

Further, this constraint does not influence COTS manufacturers in determining where to “source” their products. U.S. manufacturers of COTS items “source” their products around the world in order to be cost competitive in the fiercely competitive worldwide marketplace. The percentage of such firm’s revenue derived from sales to the Government is typically very small, and therefore, unique Government requirements do not drive manufacturing decisions.

The requirement, however, to track where products are being manufactured at any given time necessitates that contractors establish and maintain costly and labor intensive management systems which, but for this unique Government provision, are not necessary to manage their business to meet private sector needs. This is clearly inconsistent with the acquisition reform initiatives of the past several years – and the additional cost of monitoring is not in the best interest of the U.S. taxpayer.

The 2003 Services Acquisition Reform Act (SARA), as reported favorably by the House Government Reform Committee, included a provision (Section 505) to provide a TAA class waiver for IT products. While provisions of SARA were included in the FY04 National Defense Authorization Act, this was not one of them. A similar provision also was included in the FY04 Transportation/Treasury Appropriations bill, as reported by the House Appropriations Committee, but was eliminated on a point of order during debate by the House. Additionally, the Administration has proposed changing the FAR to waive TAA and BAA for the acquisition of COTS items under authority granted by the 1996 Clinger-Cohen Act (41 U.S.C. 431).

RECOMMENDATION:

In order to grant Government access to highly critical, state-of-the-art COTS items, ARWG recommends that a class waiver be granted to the Trade Agreements Act, as well as for the Buy American Act, for all COTS products. ARWG recommends the following language to address the waiver issue:

Notwithstanding any other provision of law, in order to promote Government access to commercial items, the restriction on purchasing non-domestic products set out in the Buy American Act, Section 10a of title 41 of this code, and the prohibition on acquiring non-eligible foreign products under the Trade Agreements act, Section 2512 (a)(1) of title 19 of this code, shall not apply to the Government's acquisition of commercially available off-the-shelf products (COTS). COTS item is a subset of commercial item as defined in Section Title 48, Code of Federal Regulations, Section 2.101 and means any item of supply that is (i) a commercial item as defined in Section 2.101.

It should be noted that Information Technology products were granted a one-year exception from the provisions of the Buy American Act under both the FY04 Consolidated Appropriations Act (P.L. 108-199), and again in the FY05 Consolidated Appropriations Act (P.L. 108-447). The omnibus provisions state that in order to promote Government access to commercial information technology, the restriction on purchasing non-domestic articles, materials, and supplies set forth in the Buy American Act (41 U.S.C. 10a et seq.), shall not apply to the acquisition by the Federal Government of information technology (as defined in section 11101 of title 40, United States Code, that is a commercial item (as defined in section 4(12) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(12))).

The effect of ARWG’s recommendation would be to (1) expand the exemption to all COTS products, and (2) broaden the exemption to include both the Buy American Act and the Trade Agreements Act, and (3) make such exemptions permanent.

ISSUE: ENCOURAGE PRUDENT USE OF EXCEPTIONAL WAIVERS OF COST OR PRICING DATA (TINA)

PROBLEM STATEMENT:

The Truth in Negotiations Act (TINA) was established to ensure that the Government purchases supplies and services from responsible sources at fair and reasonable prices. In establishing the reasonableness of the offered prices, the contracting officer may require contractors to submit cost or pricing data. Cost or pricing data is not required if (1) there is adequate price competition; (2) prices are set by law or regulation; (3) the item is a commercial item under FAR Part 12; or (4) in exceptional cases where the head of a contracting activity (HCA) waives the requirement through written authorization and supporting rationale. These exceptions provide flexibility both to encourage commercial contractors and subcontractors to do business with the Government, and also to provide more efficiency by enabling contracting officers to use market research and historical data to determine price reasonableness.

Section 817 of the FY03 National Defense Authorization Act (P. L. 107-314) required the issuance of guidance on the use of exceptional case waivers that added three new criteria to justify “exceptional case” determinations:

- (1) the property or services **cannot reasonably be obtained** under the contract, subcontract, or modification, as the case may be, without the grant of the exception or waiver;
- (2) the price can be determined to be fair and reasonable without the submission of certified cost and pricing data or the application of cost accounting standards, as the case may be; and
- (3) there are demonstrated benefits to granting the exception or waiver.

These requirements were added in response to concerns about the Department of Defense (DOD) providing adequate written documentation justifying waivers. These concerns were outlined in a DOD Inspector General report dated February 28, 2001 (D-2001-061) and a GAO report, “DOD Needs Better Guidance on Granting Waivers for Certified Cost or Pricing Data (GAO-02-502, April 22, 2002).

The Director of Defense Procurement published detailed guidance on granting waivers of cost or pricing data on February 11, 2003, which included the requirements of Section 817. Contracting officers have been reluctant to make “exceptional case” determinations because of the difficulties in meeting the first criterion in section 817 – determining that the property or services **“cannot reasonably be obtained”** without the grant of the exception or waiver. The number of waivers granted has been severely reduced even in cases of repetitive follow-on buys where there is little value in repetitive submissions of financial data to support pricing of annual buys. DOD issued a report to Congress indicating that only nine waivers were granted during the entire 2003 fiscal year.

NEED FOR CHANGE:

The Defense Department and industry have been making great progress in the prudent use of exceptional waivers of cost or pricing data. Section 817 and the DOD implementing guidance have reminded contracting officers of the importance of having sound and documented justifications for such waivers. Since FY1996, there have been numerous reported successes in using TINA waivers to reduce procurement administrative lead-time (PALT) by as much as 20 to 40%. From the record of waivers granted in the past – which have included multi-year procurements for ACAT 1 weapons systems – it has been demonstrated that these waivers facilitate DOD’s ability to conduct efficient acquisitions while also protecting the public trust. This is particularly true with respect to follow-on additional unit requirements for major weapons systems procurements, by limiting the demands for cost or pricing data from the small company suppliers that support those systems, where reasonable alternatives exist to demonstrate price reasonableness.

We believe Congress did not intend for Section 817 to be so restrictive as to preclude the prudent use of the waiver process to enable contracting officers to streamline the acquisition process where there was a sufficiency of historical, market or other than cost or pricing data to determine a fair and reasonable price.

RECOMMENDATION:

ARWG recommends repealing the first criterion under Section 817 of P.L. 107-314, “the property or services cannot reasonably be obtained under the contract, subcontract, or modification, as the case may be, without the grant of the exception or waiver.” The following should be included in the Committee’s report language, as part of the legislative history:

The Committee believes that the Truth in Negotiations Act is an important safeguard to ensure that the Government purchases supplies and services from responsible sources at fair and reasonable prices. The Committee also believes that having a reasonable amount of flexibility enables contracting officers to use judgment in the amount and nature of data require to support the waiver process. The Committee believes that the Department of Defense must continue to oversee exceptions and waivers of TINA over \$15,000,000, and continue to report annually to Congress. However, the Committee no longer considers the first requirement in Section 817 of P.L. 107-314 to be necessary for ensuring appropriate oversight and have repealed it. The Committee encourages the Department to continue sharing best practices on the appropriate use of TINA waivers.

ISSUE: ENSURE COMPATITBILITY BETWEEN TINA AND COST ACCOUNTING STANDARDS THRESHOLDS

PROBLEM STATEMENT:

Currently, the regulatory provision at CFR 9903.201-1(b)(2) and FAR 30.201-4(b)(2) provides a fixed threshold of \$500,000 for individual contracts covered by the Cost Accounting Standards (CAS). The threshold for Truth in Negotiation Act (TINA) is periodically revised to reflect the impact of inflation. As a result, the threshold was recently increased from \$500,000 to \$550,000. However, the CAS threshold has no similar provision. As a result, the individual contract thresholds for TINA and CAS are not the same. This can result in confusion by contractors and Government personnel in determining when the particular provisions apply, resulting in a significant increase in the potential for misapplication and dispute. In addition, the use of different thresholds discourages participation by commercial contractors by complicating the regulatory application requirements.

NEED FOR CHANGE:

While there is no burden to contractors or Government from making this change, there are significant benefits. The change should reduce the potential for misunderstanding/misapplication of TINA and CAS provisions. The change also should simplify regulatory application, thereby removing a potential barrier for commercial contractors into the Government marketplace.

This change simply brings the CAS and TINA thresholds into alignment – and would keep them in alignment whenever there is an inflation adjustment (which also would impact on the various trigger thresholds). Under Section 807 of the FY05 National Defense Authorization Act (P.L. 108-375), the Federal Acquisition Regulatory Council is required to adjust acquisition-related thresholds every five years.

RECOMMENDATION:

ARWG recommends amending section 26(f)(2)(A) of the Office of Federal Procurement Policy Act to increase the CAS threshold to \$550,000; this would correspond with the TINA threshold. Also, the CAS statute should be revised to include the same inflationary impact language as is currently allowed for TINA so that when the individual contract thresholds change for TINA, they also will change for CAS. These changes are reasonable technical corrections and should not have any impact on contract cost.

ISSUE: EXTEND PROMPT PAY ACT INTEREST PAYMENTS BEYOND 12 MONTHS

PROBLEM STATEMENT:

Under the Prompt Payment Act (31 U.S.C. 3901), agencies that fail to make timely payment on proper invoices submitted for payment are required to automatically pay interest on those late payments – but only for the first twelve months. After that 12-month time period has passed, interest no longer accrues, and the Government has no incentive to make timely payments of both the principal and interest owed; in many instances, as agencies approach their twelve month obligation window, there are incentives to not make payment on the underlying invoice.

Section 851 of the FY04 Department of Defense Authorization Act (P.L. 108-136) requires the Comptroller General of the U.S. to submit a report on the timeliness of contract payments made to small business by the Department of Defense (DOD) during fiscal years 2001 and 2002; under this reporting requirement, a payment is considered not timely if interest accrued under the Prompt Payment Act. However, neither the statute nor the conference report provides a due date for this report.

NEED FOR CHANGE:

When the Prompt Payment Act was significantly updated in 1988, Federal agencies denied that they failed to make payments in a timely manner, but, in every case, agreed that payments (and interest on those payments) should be made within twelve months after a proper invoice is received by the agency. Thus, as an element of cash management and budget scoring, regulations limit to twelve months the Federal Government's obligation to pay interest on overdue payments. However, since the enactment of the 1988 Prompt Payment Act amendments, there are examples where, as the twelve-month window approaches, Federal agencies divert funds to other contract payments so as to lower their outstanding payments and improve their payment statistics.

RECOMMENDATION:

ARWG recommends amending 31 U.S.C. 3901 to eliminate the cap on a Federal agency's obligation to pay interest on overdue proper invoices under the Prompt Payment Act beyond the 365 day limit. To further incentivize agencies to make timely payments, particularly to small business, the Congress should consider imposing a penalty that doubles the Prompt Payment Act interest utilized for invoices that take in excess of 365 days beyond the contractual payment due date. The penalty would be comparable to that required when federal agencies fail to make Prompt Payment Act interest payments within 10 days after the date a delinquent invoice is paid.

ISSUE: ESTABLISH UNIFORM PAYMENT STANDARDS FOR CONTRACT FINANCING

PROBLEM STATEMENT:

In recognition of the need for optimal cash flow to permit contractors to deliver goods and services at the most favorable price, the Department of Defense (DOD) has payment terms for contract financing authorized by the Defense Federal Acquisition Regulation Supplement (DFARS) that lower contractor working capital investment requirements. Without these terms, most Defense contractors would be forced to seek more costly financing in the private sector to perform on the contracts. Financing billings should not be considered invoices and should be exempt from the cash management requirements imposed on invoices covered under the Prompt Pay Act (31 U.S.C 3903). Unfortunately, other Federal agencies have adopted payment terms for contract “financing” based on guidance for contractor “invoice” payment terms detailed in the Prompt Payment Act.

NEED FOR CHANGE:

If payment terms on financing billings for other Federal agencies were made consistent with those utilized by DOD, it is estimated that the cost of doing business with these agencies would be reduced by \$121 million on an annual basis and the average working capital investment required would be cut by \$2 billion. The result of the savings and reduced working capital investments would lower the cost of goods and services provided to other agencies, and it would act as an incentive for new suppliers to participate in the Federal marketplace.

In the international and commercial project marketplace it is common for contractors to seek and regularly attain cash flow neutral or positive results. Unfortunately, the limitations of the Federal Acquisition Regulations (FAR) prevent Federal contractors from attaining even a neutral cash flow position on projects. Establishment of payment terms for financing of all Federal agencies’ contracts consistent with those utilized by the Defense Department would not solve all of the challenges faced by industry, but it would be a significant step in the right direction.

RECOMMENDATION:

ARWG recommends that Congress direct the FAR Council to establish uniform payment terms/standards for contract financing not covered by other Public Laws that are consistent with those in the Defense Federal Acquisition Regulation Supplement by amending the FAR with the new clause below:

32.904 Determining payment due dates.

(g) (i) All Federal Agencies policy are to make contract financing payments as quickly as possible. Generally, the contracting officer shall insert the standard due dates of 7 days for progress payments and 14 days for interim payments on cost type contracts in paragraph (b)(1) of the Prompt Payment clauses at FAR 52.232-25, 52.232-26, and 52.232-27.

(ii) The contracting officer should coordinate payment terms with offices that will be involved in the payment process to ensure that terms specified can be met. Where justified, the contracting officer may insert a due date earlier than the standard. In determining payment terms, consider—

- (A) Geographical separation;*
- (B) Workload;*
- (C) Contractor ability to submit a proper request; and*
- (D) Other factors that could affect timing of payment.*

ISSUE: IMPROVE EFFICIENT PAYMENT

PROBLEM STATEMENT:

Timely contract payments that improve cash flow are critical to the financial health of Government contractors, regardless of size. The expectation that payments will be timely frequently affects a contractor's willingness to do business with the Government. Over the last five years, great progress has been made by the Department of Defense (DOD) to improve the efficiency and timeliness of its payments to contractors through the deployment of a comprehensive suite of electronic invoicing solutions. Unfortunately, other Federal agencies, for the most part, have yet to develop comprehensive procedures for receiving invoices electronically, or they have implemented procedures that are unique, forcing contractors to modify their systems and processes to develop invoicing procedures that are compatible with multiple electronic commerce systems. This requires contractors to significantly increase their training, document maintenance, systems development, and systems maintenance costs at a time when contractors are being encouraged to seek ways to effect cost reductions in the performance of Government contracts.

NEED FOR CHANGE:

If all Federal agencies deployed electronic invoicing solutions, substantial cost savings and cash flow improvement would be achieved. ARWG estimates that cost savings to the Government from process improvements and interest expense avoidance could range between \$60-\$100million dollars annually if all agencies deployed comprehensive electronic invoicing solutions. Process savings would be achieved by eliminating the labor, postage, and material costs associated with the activities noted in paragraph above. Interest savings could be achieved by eliminating the time required to mail, deliver, open, sort, and load contractor invoices into the Federal agency's payment system.

The deployment of electronic invoicing by Federal agencies also has the potential to improve industry cash flow and working capital balances by up to \$700 million if fully implemented. Improved cycle times and reduced working capital requirements that could result from delivered by electronic invoicing will serve as an incentive for companies not doing business with the Government to consider doing so in the future.

Unfortunately, if each agency continues to develop and deploy unique solutions the potential savings would be degraded as contractors would be forced to develop different interfaces and processes for each agency system. In order to maximize savings, agencies should work together to establish and utilize one front-end system to transact with contractors. A similar approach was taken when Federal agencies agreed to utilize the DOD Central Contractor Registration (CCR) system as the common system for contractors to satisfy the electronic registration requirements established by the Federal Acquisition Regulations (FAR).

RECOMMENDATION:

ARWG recommends that Congress establish a requirement that all Federal agencies deploy electronic invoicing systems for contractor billings by the end of FY06. In order to achieve the maximum cost savings described above, all agencies should be strongly urged to adopt an Electronic Invoicing System. Congress also should establish a requirement for contractors to utilize the electronic invoicing system(s) for contracts awarded after 1 October 2007 by amending the FAR to add a mandatory electronic invoicing clause similar to the one contained in the DOD FAR Supplement. (For further information, see 10 USC 2227 and DFARS 232.70 Electronic Submission and Processing of Payment Request clause.) A one year transition period between the time Federal agency systems are deployed and the time contractors must start utilizing them would be essential to provide contractors with the time to make necessary systems design and process changes.

ISSUE: REAUTHORIZE “SHARE IN SAVINGS” INFORMATION TECHNOLOGY INITIATIVE

PROBLEM STATEMENT:

Section 210 of the E-Government Act authorizes Government-wide use of Share-in-Savings (SIS) contracts for information technology (IT). Such contracts offer an innovative approach for encouraging industry to share creative technology solutions with the Government. Section 210 authorizes an agency that awards a SIS contract for IT to retain its share of the savings, with certain exceptions. As a general rule, agencies would be required to ensure that funds are available and sufficient to make payments with respect to the first fiscal year of the contract, and cover termination or cancellation costs. SIS contracts entered into under section 210 are generally limited to a performance period not greater than 5 years; awards may be made up to 10 years, under certain circumstances and with appropriate approvals.

The Federal Acquisition Regulation (FAR) Council issued a proposed rule in July 2004; however, no final rule has ever been issued; this inaction may have hindered use of this authority – which expires at the end of fiscal year 2005.

NEED FOR CHANGE:

Originally proposed, on a Government-wide basis, for all categories of services in the 2003 Services Acquisition Reform Act (SARA), as introduced, the Share-in-Savings concept was ultimately limited to information technology-related contracts, and included in the 2003 E-Government Act

Share-in-Savings is an effective form of performance-based contracting that is intended to help an agency leverage its limited resources to improve or accelerate mission-related or administrative processes to meet strategic goals and objectives and lower costs for the taxpayer. Through a properly structured SIS contract, with performance standards that identify the true requirements of the buying activity, agencies may lower costs and improve service delivery without large “up front” investments. This is accomplished by having the contractor provide the technology investment, and allowing the contractor to share with the Government in the savings achieved. Beyond the IT realm, the Energy Savings Performance Contracting program within the Department of Energy is a prime example of such SIS contracting.

However, to reap the full benefits of the SIS concept, agencies must have more than the two years authorized to try it out. Currently, the authority for SIS contracts expires at the end of FY05. In a report to Congress on December 17, 2004, the Office of Management and Budget (OMB) recommended that the authority be extended for another three years.

RECOMMENDATION:

ARWG recommends that the authority for the use of SIS contracts for information technology be made permanent – or at minimum extended for a significant period of time to truly test its application.

ISSUE: REMOVE EXPIRATION OF NASA ADMINISTRATOR'S AUTHORITY TO GRANT INDEMNITY TO DEVELOPERS OF EXPERIMENTAL AEROSPACE VEHICLES UNDER THE SPACE ACT

DISCUSSION:

Section 309 of the National Aeronautics and Space Act of 1958, as amended (42 U.S.C. Section 2458c), and Section 203(c)(1) authorizes the NASA Administrator to provide liability insurance for or indemnification to developers of experimental aerospace vehicles (EAVs) developed or used under an agreement between NASA and the vehicle developer. An indemnification agreement between NASA and a developer may provide that the Government will indemnify the developer against claims (including expenses of litigation or settlement) by third parties for death, bodily injury, or loss of or damage to property resulting from activities carried on in connection with the launch, operations or recovery of the EAV, to the extent such claims are not compensated by liability insurance carried by the developer.

NEED FOR CHANGE:

The statute contained a sunset provision with an expiration of December 31, 2002, which the NASA Administrator could extend out until September 30, 2005. On December 30, 2002, NASA Administrator Sean O'Keefe extended NASA's authority under the Act until that date, September 30, 2005. The statute must be modified to provide for further extension of this authority to grant indemnity.

This extension will allow the NASA Administrator to continue to consider requests for indemnity. NASA will need to examine and approve each request for coverage, and coverage would only be granted when this is in the Government's interest. The benefits of providing for this are a reduction of contractor insurance costs and in the certainty as to risk assumption to NASA's development contractors, reducing procurement costs to NASA and ensuring its access to the best technology.

RECOMMENDATION:

ARWG recommends revising 42 USC Section 2458c by deleting the current termination provision at subsection (f)(1) and inserting instead:

(f) (1) The provisions of this section shall terminate on September 30, 2008, except that the Administrator may extend the termination date periodically for three years at each extension, provided the Administrator determines that such extension is in the interests of the United States.

ISSUE: TREAT SALES TO FOREIGN, STATE, AND LOCAL GOVERNMENTS AS COMMERCIAL SALES

PROBLEM STATEMENT:

After enactment of the 1994 Federal Acquisition Streamlining Act (FASA), the definition of a commercial item, at Federal Acquisition Regulation (FAR) 2.101 (a), was changed to read:

“Any item, other than real property, that is of a type customarily used for non-governmental purposes and that

- (1) Has been sold, leased, or licensed to the general public; or*
- (2) Has been offered for sale, lease, or license to the general public.”*

There was no indication that the phrase “used for non-governmental purposes” would be interpreted to exclude sales to foreign, state, and local governments. There were two reasons for this. First, there was no indication that anyone would depart from what had been well understood as to the meaning of the term non-governmental purposes that always included direct commercial sales to a foreign government and sales to state and local governments. Second, even at the time of adoption of the new definition, the Federal Acquisition Regulation’s (FAR) pricing rules in Part 15 [FAR 15.804-1(b)(2)(v)] defined the term “general public,” a critical element in the determination of commerciality under the new definition, as follows:

The general public ordinarily consists of buyers other than the U. S. Government or its instrumentalities, e.g., U. S. Government corporations. Sales to the general public do not include sales to affiliates of the offerors or purchases by the U. S. Government on behalf of foreign Governments, such as for Foreign Military Sales (FMS). If the contracting officer can determine without requiring information from the offeror that sales are for Government end use, these sales need not be considered sales to the general public.

Earlier regulatory coverage, formerly at FAR 15.804-3(c)(3) and (5) included:

“Commercial items” are supplies or services regularly used for other than Government purposes and sold or traded to the general public in the course of normal business operations.

The “general public” is a significant number of buyers other than the Government or affiliates of the offeror; the item involved must not be for Government end use. For purposes of this subsection 15.804-3, items acquired for “Government end use” include items acquired for foreign military sales.

Similar provisions were contained in the DOD’s predecessor Defense Acquisition Regulation (DAR) 3-807.7(b), and the civilian agencies’ predecessor FPR 1-3.807-1(b)(2).

NEED FOR CHANGE:

For decades, direct commercial sales to foreign governments, and state and local government sales were considered sales to the general public and, therefore, not U.S. Government sales for the purpose of determining commerciality of an item or service. Such sales were defined as “non-governmental.”

The definition of “general public” unfortunately was removed from FAR Part 15 when the FAR Council implemented the 1996 Clinger-Cohen Act. This Act removed the phrase “establish catalog or market price” from the statutes pertaining to the Truth in Negotiations Act and Cost Accounting Standards, mostly because they were well recognized as being obsolete and contrary to commercial item acquisition reform. As a result, nowhere in the FAR is there clear guidance that, in the context of commercial item acquisitions, the definitions of “general public” and “Government” meant what it had always meant – U.S. Government. In hindsight, this unfortunate change contributed to the confusion about treatment of sales to foreign, state, and local governments and may have resulted in the perceived need to define governmental use.

Section 803 of the FY99 Strom Thurmond Defense Authorization Act (P.L. 105-261) mandated that specific FAR guidance be established on the meaning and appropriate application of the term “purposes other than governmental purposes.” As a result of the legislation, FAR 12.102 was revised to provide that “purposes other than governmental purposes” meant “those that are not unique to a Government.” The FAR revision of the treatment of direct commercial sales to foreign governments and sales to state and local governments for commercial items determinations exacerbated rather than resolved the confusion.

RECOMMENDATION:

ARWG recommends that the Congress revise Section 4 of the Office of Federal Procurement Policy Act (41 U.S.C. 403) by adding a new paragraph under (12):

“() the term “Governmental” refers only to the FEDERAL U.S. Government. Explicitly excluded from Government sales are direct commercial sales to foreign governments, and sales to state and local governments. Direct commercial sales to foreign governments, and sales to state and local governments are sales to the general public.”

ISSUE: REFORM EXPORT CONTROL LAWS

PROBLEM STATEMENT:

The current U.S. export control system is outdated and hinders U.S. global competitiveness. Fundamental structural reform of our export control system, for both dual-use and military items, is vital to the future of the defense industrial base and to American competitiveness in the global economy.

NEED FOR CHANGE:

The current U.S. export control system originally was established to address threats to U.S. national security raised by the onset of the Cold War. Exports of dual-use items are regulated by the Department of Commerce under the Export Administration Act, and defense/military items are regulated by the Department of State under the Arms Export Control Act. These statutes do not reflect the dramatic changes in the geopolitical and global economic landscape that have occurred over the last 10-12 years, including the collapse of the Soviet Union and end of the Cold War, blurring of distinctions between military and commercial technologies, increasing availability of high-tech equipment and services from non-U.S. suppliers, and the need for greater speed and efficiency in meeting global market demands.

The export control system has not evolved to keep pace with these trends, contributing to the erosion of the competitive position of U.S. companies in the global marketplace. In recent years, a number of our closest allies have formally advised the U.S. Government that its export control policies and procedures are a major impediment to defense cooperation. European contractors have even indicated their preference to exclude U.S. suppliers from competing for work. In their view, this is due to U.S. companies' difficulty in reliably meeting schedule and availability requirements attributable to a cumbersome, slow-moving export control system. Indeed, in recent competitions, a major criterion has been the ability to demonstrate that U.S. export licensing procedures will not impede the U.S. supplier's ability to perform if chosen.

For the better part of four decades, the United States has led the world in civil and defense aerospace technology. Overall, statistics from the Department of Commerce have shown that for every \$1 billion in exports, 14,000 jobs are created. More specifically, the U.S. aerospace and defense industry employs an estimated 800,000 workers throughout the world, approximately 325,000 of which perform functions directly related to the export of products and services. In 2000, the aerospace and defense sectors contributed over \$33B in surplus to the U.S. balance of trade. As the nation's largest net exporter, the aerospace and defense industry has a unique and vital interest in seeking export reform measures that not only support U.S. national security and foreign policy objectives, but also enhance the ability to access international markets in a timely, predictable manner.

Protection of our national security and technological edge in key capabilities must continue to be the principal focus of our export control laws. However, without a fundamental restructuring of the current system, American companies will lose out to foreign competition and our nation's own industrial and high technology base will be significantly undermined.

There are a variety of issues and factors that contribute to current concerns. There is lack of agreement on what should be controlled, along with who controls it and how it is to be controlled. This uncertainty is complicated further as the United States has increased civil-military integration and industry has added more commercial items and solutions into military weapon systems and processes. The distinction between military and commercial products has blurred and the determination for the stringent application of export controls has become more difficult. As a result, the current policy guidelines, criteria and processes for export control need to be revisited and updated for today's global environment.

In late 2002, the Administration launched a comprehensive assessment of the effectiveness of U.S. defense trade policies pursuant to National Security Presidential Directive 19 (NSPD-19). The principal objectives of the study are to identify changes necessary to ensure defense trade policies continue to support national security and foreign policy goals, and to ensure that the U.S. and its allies can make optimal use of defense technologies for shared

security purposes. Among other specific areas of focus, NSPD-19 calls for identifying possible modifications to current U.S. defense trade licensing policies and practices, as well as technology transfer policy changes to facilitate the ability of U.S. military to benefit from commercial developments and international cooperation. The product of NSPD-19 should be an export control system that strengthens U.S. security interests while operating in a timely, transparent, predictable, consistent fashion and focusing on truly critical technologies that are vital to our national security.

RECOMMENDATION:

ARWG recommends that the Congress consider the following reforms:

- (1) Streamline transactions involving allies, re-energizing the concept behind the Defense Capabilities Initiative and moving away from a license-by-license review that too often does not fully distinguish between our closest allies and other countries.
- (2) Remove commercial communications satellites and related items from the United States Munitions List (USML), consistent with the standards established more than a decade ago by the first Bush Administration.
- (3) Establish higher monetary thresholds for congressional notification of defense exports and create a more predictable and transparent process for notifications of export licenses, particularly when Congress is out of session.

LIMITATIONS ON GLOBAL COMPETITION

ISSUE: REVISE DOD EXPORT LOAN GUARANTEE PROGRAM

PROBLEM STATEMENT:

The ability (or inability) to offer a prospective customer a financing package can be critical to being competitive in the international defense market. Most European countries that compete with the U.S. have official export credit facilities that provide loans or guarantees for both commercial and military products. In order to provide the U.S. defense industry with a similar marketing tool, in 1996 Congress approved a self-financing Defense Export Loan Guarantee (DELG) program modeled after the Export-Import Bank structure to be administered by the Department of Defense (DOD) in which loan guarantee fees would be paid by the borrower. Those fees are based on the same risk calculations that are made for the Export-Import (Ex-Im) Bank with respect to commercial exports and are intended to protect the Government against any possible defaults; however, unlike the DELG, the Ex-Im Bank provides the option of capitalizing these fees into the loan and Ex-Im receives an annual appropriation that partially subsidizes the loan-loss reserve, which is required by the Federal Credit Reform Act.

NEED FOR CHANGE:

A number of impediments account for the inability of companies and countries to use the DELG program. The most critical is the prohibition on including the exposure and other fees in the loan to be financed. In addition, the DELG program is required to be self-financing since it receives no annual appropriation. As a result, the entire burden of the exposure fee falls on the borrower, which in effect increases the price of the U.S. product relative to foreign alternatives.

Eligible countries would be much more likely to take advantage of the DELG program if competitive exposure fees were offered, and could be financed as part of the loan amount as is the practice with loans guaranteed through the Ex-Im Bank. This would entail removing or modifying the appropriations act prohibition on financing the exposure fee under the program.

Additionally, Congress may wish to consider other alternatives to make the DELG an attractive financing option. ARWG would recommend that the Department task an independent source to undertake a study to examine alternatives for improving the DELG as well as other approaches to financing defense exports.

RECOMMENDATION:

ARWG recommends that the Congress take several actions to make the DELG an appealing option for financing of defense sales.

First, and foremost, ARWG recommends that Congress modify Section 8065 of the annual Defense Appropriations Act (P.L. 108-287) which allows countries to finance the exposure fees as part of a loan guaranteed under the program as long as there is no increase in the potential liability to the United States; this essentially would repeal the Bumpers amendment. The section would read:

SEC. 8065. To the extent authorized by subchapter VI of chapter 148 of title 10, United States Code, the Secretary of Defense shall issue loan guarantees in support of United States defense exports not otherwise provided for: ... Provided further, that the exposure fees charged and collected by the Secretary for each guarantee, shall be paid by the country involved and may be financed, under the same terms, as part of a loan guaranteed by the United States provided that the exposure fee with respect to such loan guarantee be fixed in an amount that is sufficient to meet the potential liabilities of the United States under the loan guarantee.

Further, the ARWG recommends that the Armed Services Committees insert the following report language the Committee's report as part of the legislative history:

The Committee believes that the Defense Export Loan Guarantee could be better utilized as a financing option in the defense international market, if the exposure fees charged and collected could be financed. Further, the Committee directs the Secretary to undertake an independent study to evaluate alternatives for making the Defense Export Loan Guarantee Program an effective program as well as evaluating other possible financing options for defense sales. The Secretary should provide a report of financing alternatives to the congressional defense committees, the Senate Committee on Foreign Relations, and the House Committee on International Relations no later than 180 days after the enactment of the of National Defense Authorization Act for Fiscal Year 2006.

ISSUE: ENHANCE IMPLEMENTATION OF SUBCONTRACTING GOALS

DISCUSSION:

It is the policy of the Federal government to ensure that small businesses have the maximum practicable opportunity to participate in Federal procurement. Looking at subcontracting opportunities, in addition to prime contracts, would provide a more accurate picture of the extent of small business participation. In many cases, subcontracts can foster small business competitiveness. Including subcontracting achievements in small business goals is an important step toward ensuring a strong competitive base.

PROBLEM STATEMENT:

Prime contractors are required to keep data on their subcontracts (but only those awarded at the first tier). However, this data is often not counted toward achievement of contracting goals (either for the contractor or the procuring agency), which would both help in measuring a contractor's past performance, and in encouraging larger prime contractors to do more business with small firms.

An example of where this would be effective is with the Department of Defense's (DOD) business transformation initiative where the Department relies on the private sector to provide contractor logistics support (CLS) to consolidate the supply requirements and process in order to enhance readiness rates and reduce costs. As this trend and other business transformation initiatives are pursued, small and mid sized business may have additional opportunities for work, but the Department may not get credit for their work because they are performing the work at sub-tier levels. Additional areas where strong subcontracting goals also need to be enforced are the military housing and utility privatization contracts. Such initiatives will improve overall small business involvement in Government contracting.

In October 2003, the Small Business Administration (SBA) issued a proposed rule on subcontracting assistance in Government contracting programs. A final rule was issued on December 20, 2004 that is intended to strengthen the requirements for evaluating a prime contractor's performance and good faith efforts in achieving its subcontracting goals. The final rule also authorizes the evaluation of past performance in meeting subcontracting goals as a source selection factor when placing orders on the Federal Supply Schedules, Government-wide agency schedules, and multiple-agency contracts. ARWG supports a strong subcontracting assistance program that is aimed at establishing realistic goals, and fair and appropriate compliance enforcement.

RECOMMENDATION:

ARWG recommends that the Congress adopt language that would allow reporting at sub-tier levels.

Prime contractors are required to keep data only on subcontracts awarded at the first tier (i.e., by the prime contractor). Yet, even this data is often not counted toward achievement of subcontracting goals, which would help in measuring a contractor's past performance. Furthermore, gathering data on first-tier subcontracts ignores the fact that the other contract teammates also are awarding subcontracts to small businesses, small disadvantaged businesses, Women Owned Businesses (WOB), and Disabled Veteran Owned Businesses (DVOB) for second-tier contracts. The system, however, does not count second-tier subcontract awards toward the goal achievement of either the prime contractor or the first-tier (often a large business) subcontractor. The Department of Defense, in coordination with other Federal agencies and the Small Business Administration, shall develop a process tracking subcontracting with small businesses at the first tier level, as well as at tiers below the first tier, consistent with the goal of increasing small business and small and disadvantaged business, WOB and DVOB participation in Government contracting.

ISSUE: SIMPLIFY SMALL DISADVANTAGED BUSINESS CERTIFICATION REQUIREMENT

PROBLEM STATEMENT:

Small and Small Disadvantaged Business (S/SDB) suppliers are valued partners in all sectors of the defense industry. ARWG is committed to leveraging the varied capabilities and innovation of these companies and others and to helping them grow and prosper. The requirement for SDB re-certification, however, is eroding industry's ability to award contracts to S/SDBs.

NEED FOR CHANGE:

Federal agencies and their contractors have an annual goal to award 23% of their contract dollars to small business and 5% to small disadvantaged business (SDB). Included in the law are provisions for "liquidated damages" for a contractor's failure to exercise good faith to achieve contract goals. In addition, in recent years the Congress has created contracting goals for Women Owned Business (WOB), Disabled Veterans Business (DVB), and other targeted groups.

Over the past three years, industry, in general, has achieved its small business goals (running approximately 40%) but has struggled to achieve the SDB, WOB and DVB goals. Historically, SDBs could self-certify that they meet the criteria of a small disadvantaged business under the law. Through regulations in Federal Acquisition Circular (FAC) 97-07, the Government has mandated third-party certification effective for all new contracts awarded after October 1, 1999. The certification process may cost an SDB thousands of dollars while granting no benefit other than the right to continue to be counted as an SDB in a prime contractor's subcontracting plan. A major source of the complexity in the recertification process is the requirement associated with repeatedly documenting net worth to meet the current SBA limit of \$750,000.

Currently there are only about 10,072 SBA-certified SDBs, including some 7,457 that have been grandfathered because they were previously certified under the 8(a) preference program. Information indicates that many SDBs that previously have been certified are refusing to submit to the cost of re-certification at the three-year expiration point. To surpass its current SDB subcontracting levels, industry would have to have 50,000 to 100,000 additional SDBs complete the SBA certification program. The Defense Department, in recognition of the difficulties posed by this requirement, has exempted itself from requiring certification for the purposes of meeting its five percent SDB prime contract goal. Federal prime contractors, however, still must comply with the requirement when counting SDB participation for their own goals. This has caused many contractors that once met the five percent goal to fall short, despite their good faith efforts to offer certification assistance to their SDB suppliers.

ARWG notes that the Small Business Administration and the Department of Transportation (DOT) signed an inter-agency agreement that permits most small disadvantaged businesses that have qualified under either agency's certification process to automatically receive the same status in the other agency without additional paperwork or examinations. This reciprocity is limited to DOT contractors. While it may increase the number of certified SDBs, it still does not address the fundamental issue raised in this paper.

RECOMMENDATION:

ARWG takes seriously the responsibility for nurturing and growing our business base with small and small disadvantaged businesses. ARWG proposes a legislative clarification on the Third Party Certification issue that would relieve contractors of the requirement to count only certified SDBs in their subcontracting reports. As a short-term step toward the elimination of the SDB certification requirement, ARWG proposes that Congress adopt a revision of the rules for calculating the net worth of economically-disadvantaged individuals.

1) Section 8(d)(3)(F) of title 15, United States Code, is amended by:

- a) *Adding at the beginning of the first sentence: "In complying with the requirements of this subsection,";*
- b) *Striking the word "may" and inserting in lieu thereof "shall be permitted to"; and Adding the word "solely" after "rely".*

2) Amend section 8(a)(6) of title 15, United States Code to include the language similar to section 208 of H.R. 2802 (as reported) from the 108th Congress concerning the formula for determining the net worth of economically disadvantaged individuals and eliminating the requirement for documenting net worth after the initial certification.