



Challenges Related to Government Practices for Commercial Items and Services Acquisitions

Stephanie Gilson, Assistant General Counsel

Danielle Berti, Senior Counsel

March 23, 2017

Where We Align on Procurement Objectives and Practices

- Obtain high quality, reliable products and services
- Cost-effective expenditure of funds
- Protect against fraud and abuse

How do the current government rules serve these goals? If they don't, how can they be reformed?

Practices that Support these Objectives

- Clear contract terms and requirements
- Actively seek and develop diverse and 'responsible' suppliers
- Clear compliance expectations, due diligence, monitoring and auditing
- Care and protection of people, our communities and our environment

The Problem is that we differ in *HOW* we seek to achieve these objectives

Although many of *goals* are aligned, many of the *specific* USG procurement requirements and contract terms do not fit well within our business practices, or those of our suppliers.

Common Challenges Encountered with USG Minimum Requirements

- Excessive burden to comply with even the market entry clauses
- System is driven by highly prescriptive, mandatory requirements rather than preferences
- Takes too many lawyers to decipher clauses
- Cross-border complications

We considered the following:

1. The most common clauses that apply to companies seeking to do business with the government.
2. Those clauses that drive the greatest deviation in practice from our commercial practices.
3. Potential benefit to the government of those clauses

Recommended Areas to Harmonize, Clarify, and Simplify Requirements

- System For Award Management function/role
- Flow Down Clauses
- Use Preferences where possible, rather than Mandatory Requirements
- Supplier Diversity
- Accounting
- Record Keeping and Reporting

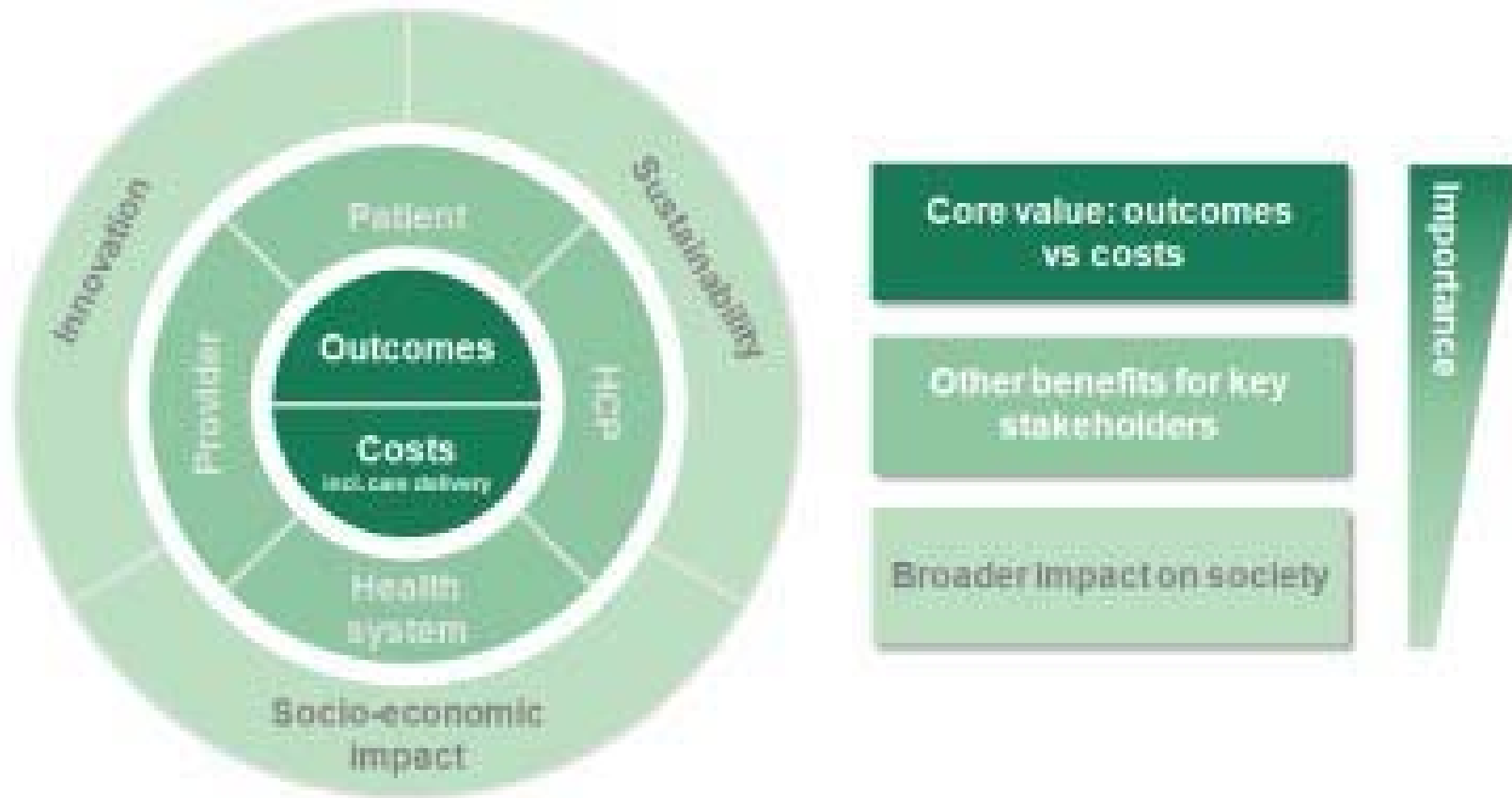
System for Award Management

- Requirements complicated and excessive
 - create a barrier to entry
- Questions are confusing and duplicative
- Not evident that all of the information is used or understood by Contracting Officers

Flow Down Clauses

- Flow down requirements are often expansive, prolong negotiations with suppliers and subcontractors
- Cannot be reconciled with global nature of partnerships
 - Legal conflicts
 - Practical application
- Inclusion of these clauses in commercial item and COTS companies conflicts with USG goal of streamlining and simplifying these acquisitions
- No uniform approach: each clause carries its own rule(s) for flowing it down

Value-Based Public Procurement Framework— EU Medical Devices--



Source: Boston Consulting Group for MedTech Europe,
December 2015

Streamlining Supplier Diversity

- Current small business categories do not align with commercial diversity practices
- Agency lack of clarity on applying rules
- Potential for misuse
- Pricing impact

Accounting--*Significant* barrier for global companies engaging in R&D

- CAS requirements are overly complex and burdensome for commercial enterprises
- Foreign application exacerbates the complexity
- Timeline for government auditors to make determinations impacts efficient operation of commercial business
- Record-keeping challenges given extended timeline for audits

Record Keeping and Reporting

- Multiple, duplicative reporting requirements and portals for making reports –*often require system changes*
- *Poor evidence that reported information is used in a meaningful way.*

Specific Proposals for Consideration

Short Term:

1. Revise approach to COTS
2. Recognize non-traditional *government* contractors
3. Eliminate and/or restate, other SAM requirements
4. Consistent contract terms for same type of contract

Longer Term:

1. Value-based procurement framework—move from a system of mandatory minimum requirements to a system of preferences for clauses that are not essential to the procurement
2. Align Supplier Diversity practices

Industry RFI for suggestions of best practices?

Quick hits--clauses to consider for review, reform, or removal

- 52.204-14, Services Contract Reporting
- 52.204-10, Executive Compensation
- 52.223-22, Greenhouse gas emissions reporting
- 52.222-17, Non-displacement of qualified workers
- 52.222-26, -35-, -36 (pre-award audit; affirmative action target requirements)
- 52.222-54, E-Verify
- 52.222-59 (overturned already)
- 52.223-9, -11, -12, -13, -14, - 15, -16, -18 (environmental reporting/compliance; texting while driving)
- 52.226-6, Promoting Excess food