

## Executive Summary

This White Paper summarizes discussions held at the Grant Thornton LLP Roundtable on January 30, 2002. Roundtables provide a unique forum for CEOs, CFOs and senior executives of high technology companies to exchange ideas and hear the latest information about issues affecting the high-tech and government contractor industries.

The morning's discussion began with a list of reasons to contract with the federal government for those who may not have embraced it in the past. Then the speakers provided an overview of working with the government, from using the schedules to sell commercial products and services to the government to protecting your intellectual property.

Co-sponsors of the January 2002 Roundtable were Grant Thornton LLP and Piper Marbury, Rudnick & Wolfe, LLP.

Mike Lisagor, with Celerity Works; Carl Vacketta and Kevin Mullen with Piper Marbury Rudnick & Wolfe, L.L.P.; and Glenn Baer with ARINC led the discussion and answered questions from participants.

### Why Do Federal Contracting?

Michael Lisagor began with the most crucial question – why go into this market? He pointed out that government information technology (IT) contracting is a solvent business. However, government contracting requires companies to know who makes the government buying decisions. He urged the executives to:

- Decide what your company offers – high price, good quality; mid-level price, terrific service, or low-cost?
- Get organized and focus on what you want to do, the right mix of current and future growth

- Provide incentives so all your executives and managers become marketers
- Identify your internal growth inhibitors
- Implement your strategic plan
- Develop important relationships

### Selling Commercial Items

Carl Vacketta pointed out that sales from the GSA's Multiple Award Schedule (MAS) and VA's Federal Supply Schedule have increased significantly over the last three years. He discussed how to get an MAS schedule contract and the nuts and bolts of working under the schedules.

### Protecting Intellectual Property

Kevin Mullen had the following practical suggestions for protecting your company's intellectual property when you are working with the government:

- Propose alternatives to the government intellectual property rights during the pre-solicitation stage
- Identify the proprietary technology in the contract and list it
- Segregate commercial from non-commercial data and software
- Place restrictive legends on all data and software delivered to the government
- Minimize the data and software you actually deliver to the government under the contract

### Working in Government Markets

Glenn Baer listed the following items as the most formidable barriers stopping commercial companies from entering the military market: adjusting to government cost accounting practices, military specification, technical data rights, DOD unique clauses and payment issues. He then explained how to work within the government regulations about transfer pricing.

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## **Introduction**

Cal Hackeman, National Director of Technology Industry Practice for Grant Thornton LLP, opened by introducing the Roundtable co-sponsors and speakers.

Michael Lisagor, president of Celerity Works, has more than 25 years experience in the successful development and implementation of business development strategies and projects in the public sector. He is a member of the Association for Federal Information Resources Management (AFFIRM) Board of Directors and recipient of the AFFIRM 1999 Exemplary Service Award. He founded Celerity Works in May 1999 to help companies accelerate their government business growth. He has an M.S. in management and has taught marketing management to industry and government managers.

Carl Vacketta is a partner with Piper Marbury Rudnick & Wolfe. He has more than 35 years experience with government contracts law, including pre-award and post-award counseling on supply, service, and construction contracts with the federal, state, and local government agencies. He has extensive experience representing companies selling information technology, telecommunications equipment and professional and technical services as well. He has particular expertise in GSA's multiple awards schedule contract (MASC) program. He does due diligence reviews to support mergers and acquisitions and he works on termination disputes, socioeconomic obligations and small business acquisition matters.

Kevin Mullen is a partner with the government contracting practice of Piper Marbury Rudnick & Wolfe. He provides counseling and litigation services to both large and small companies on a broad range of

government contracting matters including due diligence for mergers and acquisitions, subcontracting, real estate leasing, and intellectual property disputes. He is co-leader of the firm's GSA leasing and compliance team.

The final speaker, Glenn Baer, is Corporate Senior Director of Contractors with ARINC. He is responsible for the efficient operation of the corporate contracts and pricing department. He currently serves as chairman of the National Defense Industrial Association (NDIA) government policy advisory committee.

For further information about the speakers, see pages 9-12 of this White Paper.

## **Why Do Federal Contracting?**

First, government information technology (IT) contracting is a solvent business. You can still get better quality market resource information than in the commercial IT market.

Second, it is an attractive market for companies that do their homework. Government contracting involves more decision makers and influencers than is typical in the commercial world. However, once you find out who ultimately makes the government buying decisions, you can succeed.

### **Decide What You Do**

Are you selling what the government is buying? You need to determine if you are:

high price, good quality?  
mid-level price, terrific service?  
low-cost?

Your decision will influence your strategy in the marketplace and, ultimately, your reputation.

How do you spend your money? What do you invest in? Where are you going to focus?

Government decision makers need to know you, trust you, and want to have lunch with you.

You need to determine what makes you different and why the government will want to buy what you are selling. Too many small companies have a difficult time focusing. Since they do everything for everyone, they make money at first. Eventually, since they don't stand for anything, their growth stalls, making them good acquisition candidates for companies with a vision.

To avoid this fate:

- Get organized and focus on what you want to do—the right mix of current and future growth

- Provide incentives so all your project managers and division vice presidents become marketers for your company

- Identify your internal growth inhibitors

- Plan scenarios by asking “What if”?

### **Implement Your Strategic Plan**

A lot of companies do strategic planning; not too many successfully execute them.

Appoint someone in your company to implement the plan. Invest in your plan, or there is no point in developing it.

Then make smart decisions based on your strategic plan.

- Build and track your own leads.

- Use a bid matrix with 10 or 20 standard criteria against which you force your organization to make decisions.

- Only pursue indefinite delivery, indefinite quantity (IDIQ) contracts that you are going to market.

- Protect yourself by looking for real business.

### **Develop Important Relationships**

Ultimately, all business is about relationships with clients and partners. You can develop relationships in many ways. Some of the best can be found in the industry advisory

council. Network with government people through the council. A lot of government IT issues are described on the AFFIRM.org website.

Research a particular agency to find out which incumbent companies will best complement the skills of your company. Team with companies that honor their agreements. Share experiences and establish teaming criteria before you team.

“Marketing to the federal government is not that different from marketing to the commercial world. If people work together, they will grow business. Dialogue is the key. Don't sell first. Listen, then sell,” said Mike Lisagor.

### **Selling Commercial Items**

Sales of commercial items under the Federal Government's Multiple Award Schedule (MAS) Program are significant. They are run by (a) the General Services Administration (GSA) by its Federal Supply Service (FSS) and (b) the Veteran's Administration (VA). Your company can have a number of different MAS contracts or schedules at one time. In fact, more than four million commercial products and services are available for sale under the MAS/FSS program and sales are increasing every year. Information Technology (IT) is the largest MAS schedule.

GSA sales exceeded \$13.5 billion in FY99; \$15.5 billion in FY00, and were slightly over \$20 billion last year. While VA schedule sales were less, they still equated to several billion dollars.

### **How to Get a Contract**

The MAS/FSS program begins when GSA places a virtual (also called evergreen) solicitation on its website for response by companies. The solicitation is prepared as a commercial item acquisition, in accordance with FAR Part 12. A commercial item is defined in the Federal Acquisition Regulation (FAR) as either a product

or service. If it's a product, it's generally any item sold, leased, or licensed to the general public or offered for sale, lease or licensed to the general public. On the services side, it's basically commercial support services – like maintenance or training – in support of a commercial product, or stand-alone services, such as technical or professional services.

Using the solicitation (RFP), you prepare and submit your proposal. In the RFP, you fill in the blanks and respond with further information. The key is responding to the “Commercial Sales Practices” (CPS) chart/questionnaire (a part of the RFP). You essentially resubmit the solicitation to the government with added information.

Among other things, you provide commercial sales information for that product or service over the last year, estimate the price at which you expect to sell to the government over the next year, and answer the following three questions:

- (1) What are your written discounting or sales practices?
- (2) What discount will you offer the government for your products and services?
- (3) Have there ever been any deviations from your normal discounting process?

Four to five weeks after you submit the proposal, the government will notify you of any questions it has. The government evaluates this information and attempts to negotiate a discount from your commercial price(s). The GSA or VA's goal is to get “most favored customer” treatment.

After you and the government agree to (1) a so-called “Basis of Award” (BOA) customer and (2) the discount or price relationship that will be maintained between you and the government – compared with your BOA (i.e., most favored)

customer – throughout the contract life, you sign the contract.

### **How it Works**

The MAS/FSS schedule runs for five years with three five-year renewals. After award, you are also required to prepare a schedule price list and send it to all authorized buyers. Any government office can purchase from the schedule. Authorized buyers include any federal executive branch agency plus 50 other eligible buyers, (such as the House and Senate, North Atlantic Treaty Organization (NATO), and the World Health Organization (WHO)).

The “Price Reductions” clause, one of the most important clauses in the MSA contract, specifies that you must maintain the government price or discount relationship with the “Basis of Award” (BOA) customer during the life of the contract. If you drop your price to any commercial customer, you must drop the price to the government. A price reduction to a government buyer is thus triggered by a deeper discount being given to the BOA customer.

The MAS contract also requires you to agree to certain socio-economic contract obligations. In return for selling a commercial item, you contractually agree to follow certain Equal Opportunity requirements – i.e., not to discriminate in hiring and in treatment of your employees.

Your company may also be required to have a written Affirmative Action Program for minorities and women. Other Affirmative Action contract obligations exist, including:

- Affirmative Action for Workers with Disabilities
- Affirmative Action for Disabled Veterans and Veterans of Vietnam Era
- Employment Reports on Special Disabled Veterans and Veterans of the Vietnam Era
- Filing of Employment Reports on

Special Disabled Veterans and Veterans of the Vietnam Era.

Furthermore, if you are a large business and have a contract of \$500,000 or more, and you have subcontracting opportunities, you will have to prepare a Small Business Subcontracting Plan.

### Protecting Your Intellectual Property (IP)

“As far as many companies are concerned, their intellectual property are their crown jewels and deserve as much protection as the company can muster. That doesn’t change when you enter the government contract realm. In fact, your guard should be up so you understand the context in which your intellectual property will be exposed,” Kevin Mullen pointed out.

As a general framework, when you do business with the federal government, you retain ownership rights on your intellectual property developed during performance of that contract. You retain title to technical data, computer software, inventions, and patents that result from inventions that occur during performance of the contract.

The government receives a license for using that intellectual property. The scope of that license depends on the nature of the intellectual property. Is it data, software, or an invention? What is the relative source of the funding of that development? Did it come from your own company’s funds, the government itself, or was it a mixture?

Intellectual property provisions are subject to some negotiation from the standard provisions typical in government contracting clauses.

### Practical Suggestions for Protecting Your Intellectual Property

First, participate in the acquisition process. Pay attention before the final solicitation is printed. At that point, the provisions have been determined and it is difficult to overcome them. Comment on intellectual property provisions in the draft solicitation to see if you can protect what you think is important.

If it makes sense, request commercial item acquisition under FAR Part 12. Commercial items are more protected in the intellectual property realm. For these purposes, a commercial item does not have to be straight off the shelf; it can be a product modified in a minor way or one that includes modifications “of a type customarily available in a commercial marketplace.”

For companies that provide commercial research and development services to the government, consider whether you should request the use of other transactions authority. This authority is different from the standard procurement contract because it provides the government with more flexibility in a lot of areas, including how intellectual property is treated.

Propose alternatives to the government intellectual property rights. During the pre-solicitation stage, consider whether you can address the government’s need for intellectual property with something that can address its future needs. Can you provide the government with:

Logistics support?

Warranties that address those issues?

A right to a lifetime purchase of that kind of technology?

You can also negotiate with the government for reduced intellectual property transfer.

The government is now more flexible with their treatment of intellectual property and is often

*Other modifications to standard government clauses are possible, subject to negotiation. The host of potential solutions is limited only by your review of the standard clauses or what you think is a sensitive point for your business.*  
KEVIN MULLEN

willing to negotiate items such as:

Special licenses -- must be royalty-free, worldwide, irrevocable and non-exclusive for the government

Third-party escrow agreements for critical technical data and source code -- the government can get a copy of the data if certain circumstances come into play during the escrow period

Deferred right to technical data under certain circumstances -- the government can order data if they determine they need it

Limit the license for technical data to the client agency or program

Limit disclosure outside the government or to certain kinds of recipients

When you conceive of an invention during the performance of a government contract, before you put it into practice, negotiate with the government for a longer time to file for that patent. This gives you flexibility to determine whether that potential patent is worth pursuing.

Then tailor the government contract. Identify the proprietary technology in the contract and list it. That becomes the exclusive list of the kinds of data that can include restricted legends. Segregate commercial from non-commercial data and software because DOD approaches the associated IP rights in different ways.

Place restrictive legends on all data and software delivered to the government. Whatever restrictive rights you are asserting on that information, you need a practice firmly in place within your company to make sure that happens. If not, you're potentially conceding those rights to the government.

Minimize the data and software you actually deliver to the government under the contract. While you are constrained by what the government wants, the form it takes is typically open to some negotiation and interpretation. Err

*Consult the IP Guide for Procurements. This timely, complete document, titled "Intellectual Property: Navigating Through Commercial Waters," is available at [www.acq.osd.mil/ar/doc/intelprop](http://www.acq.osd.mil/ar/doc/intelprop)*  
KEVIN MULLEN

on the side of minimizing what you actually deliver and the amount of detail in the deliverables

Propose on-site data review in lieu of delivery, especially for sensitive data. If they need the data, the government customers might agree.

### How to Work in Government Markets

The procedures are different in the government to ensure fairness and equal opportunity to all bidders. Some procedures allow the government to unilaterally change its mind as a sovereign. According to Glenn Baer, the four items below represent the most formidable barriers for a commercial company to enter the military market:

- Adjusting to all the allowances associated with government cost accounting practices
- Military specifications—you may not be able to produce the same product the same way when you're selling it to the government



Technical data rights—clearly a big issue. You never want to give up your data, particularly if you have a successful commercial market

DOD unique clauses and payment issues

There have been dramatic changes since passage of the Federal Acquisitions Streamlining Act and changes are continuing today.

Procurement changes are slow in coming because the government acquisition process wasn't designed to be efficient; it was designed to be accountable, to deal with the public trust and the issues associated with that trust.

One of the more dramatic issues is Commercial Item Reform. The government continues to move toward reducing the cycle from design to final fielding of items from 11 years to a goal of 3 years.

### **Transfer Pricing**

On the commercial side, transfer pricing is no problem. You can transfer a cost at will. The government has a rich body of regulation that present issues and solutions to the problems involved with transfer pricing.

FAR 31.205-26, Material Cost, says that materials, supplies, and services that are sold or transferred between divisions, sub-divisions, or subsidiaries under common control shall be on the basis of cost. The government doesn't want you to pyramid your margins. Agencies want to have some assurance that you're within the statutory limitations or margins.

This FAR regulation provides some narrow allowance for transfer at price--when it's an established practice at the transferring organization, when it's commercial work as defined in the FAR, and when the price for that work is viewed as reasonable by the contracting officer and it qualifies for an exception under cost or pricing data.

This means that you have to write a business plan that says this organization will

always transfer at that price between sister organizations to establish that practice. Second, verify the product meets the test of commerciality.

The real problem comes when trying to determine that the price is reasonable. The contracting officer has huge latitude on this issue.

Obsolete parts create problems because there is no catalogue pricing mechanism or a lot of marketing data on which a contracting officer can rely. Even if you use a standard process where you mark up, in a consistent way, the margins associated with each obsolete part, based on the urgency and need for each individual part, the contracting officer can still question the costs.



### Question & Answer Session

*Question:* Mike, selling to the government is a much longer process than the commercial world. If you were coming into an organization, how would you measure a program's efficacy?

*Answer:* (Lisagor) The measures would be different if you're talking about products or sales. In general, you're looking at what salespeople call a pipeline. What kinds of qualified leads are being generated? It's a reasonableness test. It's a funnel that's used. If you pour in a hundred marketing leads, and you qualify them, you may end up with 20 good ones. Then you might bid 25% of those. Set up measurements of activity and progress with a reasonableness factor that says, "this effort should generate this type of revenue or award."

*Question:* What types of incentives do you see in cash flow enhancement?

*Answer:* (Lisagor) You can't do much with the sales side in terms of receivables. However, you can insist they control overhead more.

One example is to have a collection goal for managers. As an example, reduce 67 day collections to 61 days. Everyone has a comparable goal and they recognize certain clients in the government traditionally pay worse than others.

I don't understand companies that won't give employees more money for meeting their goals. The logic of that just fails me. It can only be greed.

*Question:* Glenn, why hasn't there been any change in pyramiding G&A (general and administrative) divisions?

*Answer:* (Baer) Each division has its own G&A, so each division requires its G&A. Then there is a core G&A.

*Question:* Carl, if a sale is not made under a GSA schedule contract, do you have to pay the 1% Industrial Funding Fee (IFF)?

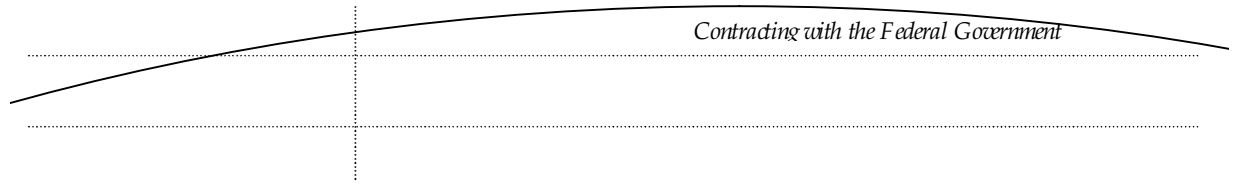
*Answer:* (Vacketta) No. If the sale is not being made under the schedule contract, you don't have to pay the IFF. There are other federal agency programs, however, where the agency has found this IFF is a great idea and have started charging an IFF. Be aware that the government is now aggressively auditing companies to see if they are properly reporting their sales and also paying the 1% IFF.

*Question:* If you don't offer discounts to other customers, do you have to offer one to the government to obtain a GSA schedule contract?

*Answer:* (Vacketta) No, you don't have to, but the government ALWAYS wants to obtain one.

*Question:* What about further discounting to agencies during the life of the schedule contract? Do you have to give all agencies the same discount?

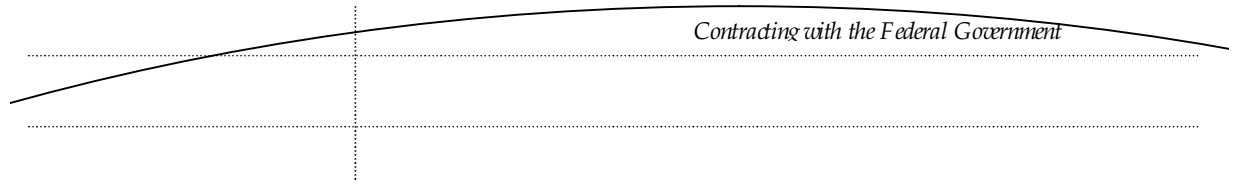
*Answer:* (Vacketta) No. You can drop the discount to one federal agency without triggering the "Price Reductions" clause. Also the "Price Reduction" clause specifically says if you sell at a firm, fixed price to any commercial customer with specified delivery in excess of the "maximum order" amount, you do not trigger the price reduction clause.



**Roundtable Moderator**  
**Cal Hackman**

*National Director of Technology Industry Practice*  
Grant Thornton LLP

Cal is Partner and Director of the e\*tech Practice for the Washington, DC area offices of Grant Thornton. Cal is an active provider of value-added assurance and business advisory services, primarily to information technology clients involved in government contracting, Internet commerce and professional and engineering services. Cal has worked extensively with local public and private government contractors and technology companies in his more than 25 years with the firm. Cal has assisted his clients with meeting SEC filing requirements, implementation of new FASBs, acquisitions and divestitures of businesses, business planning, implementation of stock option and executive incentive compensation plans as well as numerous other matters. In addition, Cal has helped his government contracting clients to prepare and revise disclosure statements, design and modify indirect rate structures, implement executive compensation plans, and succeed in the ever-changing Federal marketplace.

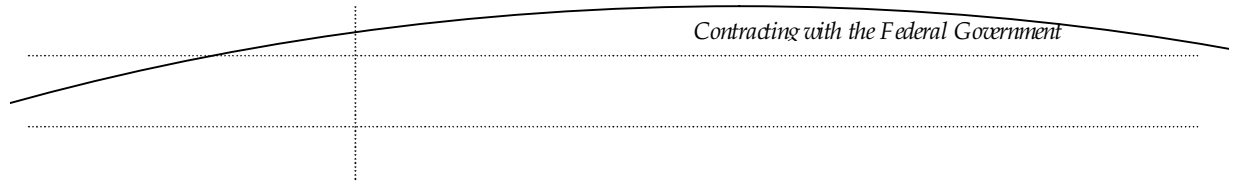


**Roundtable Speaker**  
**Kevin Mullen**

*Partner*

Piper Marbury Rudnick & Wolfe, LLP

Kevin Mullen is a partner with the government contracting practice of Piper Marbury Rudnick & Wolfe. He provides counseling and litigation services to both large and small companies on a broad range of government contracting matters including due diligence for mergers and acquisitions, subcontracting, real estate leasing, and intellectual property disputes. He is also a co-leader of the firm's General Services Administration (GSA) leasing and compliance team. He is experienced in the preparation and litigation of contract adjustment claims and contract terminations. Mullen is especially experienced in bid protest litigation and has represented protesters and contract awardees.

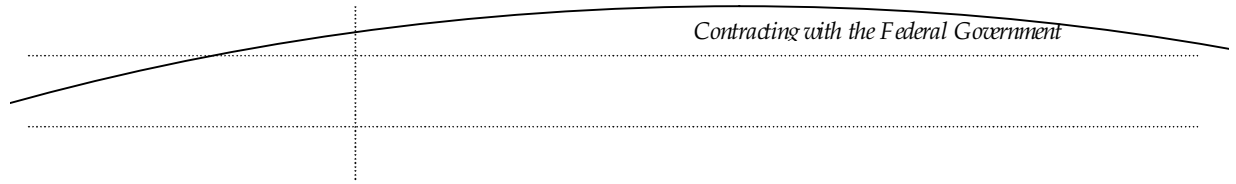


**Roundtable Speaker**  
**Michael Lisagor**

*President*

Celerity Works

The president of Celerity Works, Mike has more than twenty-five years experience in the successful development and implementation of business development strategies and projects in the public sector. A former vice president of marketing for IT companies, he founded Celerity Works in May 1999 to help companies accelerate their government business growth. His clients have included IBM, ACS, UNISYS, McDonald Bradley, Soza, AAC and Grant Thornton. Mike is a member of the AFFIRM Board of Directors, Chair of the Emerging Issues Forum and Recipient of the AFFIRM 1999 Exemplary Service Award. He is also a 1999 and 2002 Fed 100 award winner. He has an MS in management and has taught marketing management to industry and government managers.

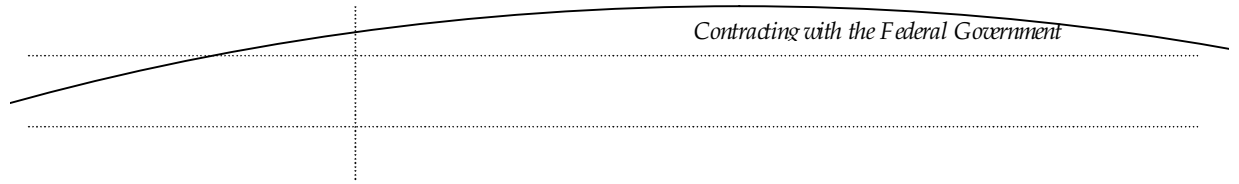


**Roundtable Speaker**  
**Carl Vacketta**

*Partner*

Piper Marbury Rudnick & Wolfe, LLP

Carl is a partner and the practice group leader for the government contracts practice group of Piper Marbury Rudnick & Wolfe. He has more than 35 years of experience in government contracts law, including pre-award and post-award counseling on supply, service, and construction contracts with federal, state and local government agencies and public transit authorities. Mr. Vacketta has extensive experience representing companies selling information technology, telecommunications equipment, and professional and technical services to the government. He has gained particular expertise in GSA's multiple award schedule contract (MASC) program; due diligence reviews to support mergers and acquisitions; termination disputes; socio-economic obligations; and small business acquisition matters. He also has led teams of attorneys, accountants, and engineers in the investigation and preparation of multimillion-dollar claims.



**Roundtable Speaker  
Glenn Baer**

*Corporate Senior Director of Contractors*  
ARINC

Glenn is the corporate senior director of contracts for ARINC Incorporated. In this capacity, he is responsible for the efficient operation of the corporate contracts and pricing department. He currently serves as chairman of the National Defense Industrial Association (NDIA) government policy advisory committee. Mr. Baer is also past chairman of the NDIA procurement planning committee, Washington procurement committee and the contract acquisition management subcommittee. In 2000, Baer was recognized as an individual who has made significant contributions to the field of government procurement. He is past chairman of the Professional Services Council (PSC) government affairs committee. Grant Thornton is proud to serve as ARINC's independent public accountants and business advisors.

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