

By: Baker Tilly | January 23, 2019

# Section 809 panel volume 3 report: seven more key takeaways

In last week's [Insight](#), we highlighted a few of the 809 Panel's Volume 3 recommendations. If implemented as intended, we believe they will create lasting benefits for both auditors and contractors. In addition to those recommendations, Baker Tilly contributed significantly to the Panel's recommendations on streamlining subcontract flow-downs and supply chain risk.

This Insight highlights seven key takeaways from these and related aspects of the 809 Panel's Volume 3 Report that are most noteworthy for the defense contracting community. (We'll leave it to the legal community to weigh in on the Panel's bid protest recommendations). We encourage you to take a closer look at the full text of each of these Panel recommendations and connect with our experts for matters that could meaningfully impact your organization:

## **1) Make buying from the commercial marketplace easier and faster.**

The Panel's first recommendation in Volume 3 is its most innovative yet: replace commercial buying and the existing simplified acquisition procedures and thresholds with simplified "readily available" procedures for procuring readily available products, services and products and services with customization. While this recommendation is unlikely to shake things up for traditional defense contractors, it could redefine the way DoD interacts with the commercial marketplace to buy "readily available" goods and services. The Panel recommends streamlined procurement procedures at significant spending thresholds under a revised construct of commercial marketplace definitions. While the proposed readily available procedures appear positioned to break down barriers and provide streamlined access to nontraditional sources of commercial goods and services, achievement of the Panel's vision likely faces a long road of formidable implementation and change management challenges. (Section 1, Recommendation 35)

## **2) Speed up contract close outs.**

The Defense Contract Management Agency (DCMA) must close its backlog of 65,000 over-age contracts at a much faster rate. To hasten this, the Panel recommends making permanent DCMA's Quick-Closeout class deviation and extending DCMA's recently-implemented Low Risk Quick Close Out process. This low risk direction allows Contracting Officers to close out contracts with less than \$750,000 of remaining funds by accepting a contractor's proposed final indirect cost rates through a bilateral agreement without DCAA audit. This expanded authority—coupled with DCAA's progress on indirect cost rate audits and DCMA's new FY2019 funding for 30 full-time employees—should accelerate contract closeouts. Given this and our recent client experiences, contractors should brace themselves for increasing DCMA emphasis on this high priority task. (Section 4, Recommendation 58)

## **3) Ease up on commercial item subcontract flow down clauses.**

Here, the Panel leverages ideas from the Volume 1 Report to reduce burdens on DoD's commercial supply chain, taking aim at decreasing costs, preventing delays, removing barriers and encouraging innovation. Like Recommendation 2 in the Volume 1 report, the Panel urges the Department to eliminate, or significantly reduce, the FAR and DFARS clauses that flow down to subcontracts for commercial items when incorporated by non-commercial prime or upper-tier contractors. We believe this recommendation will relieve some of the administrative tension between prime contractor operational teams and their procurement shops, as well as between prime contractor procurement personnel and subcontractors. (Section 6, Recommendation 62)

## **4) Manage supply chain risk more effectively and efficiently.**

The Panel notes that DoD's mitigation of asymmetrical supply chain risks (e.g., counterfeit electronic parts, specialty metals, etc.) via symmetrically-applied DFARS clauses creates more confusion and inefficiencies than benefits. Instead, DoD should tackle supply chain risks head on by developing "a system for directing risk mitigation requirements across the enterprise outside of the DFARS." This approach sounds a lot better to us, and would be a step in the right direction away from the Department's recent one-size-fits-all approach to contract risk and administration. Coupled with the Panel's Portfolio Man-

agement Framework (Section 2), targeted supply chain risk management becomes a real opportunity. (Section 6, Recommendation 63)

## **5) Adjust antiquated labor law thresholds to break down barriers and reduce administrivia.**

Labor laws such as the Service Contract Act, Davis-Bacon Act and the Walsh-Healy Act were implemented decades ago with the laudable purpose of protecting employee wages and benefits. However, the way in which contractors must apply these wages and benefits impose significant administrative burdens and increase labor costs for government contractors (and the taxpayer). To exacerbate the issue, the laws apply to contracts at minuscule dollar value thresholds, unadjusted from two or three generations ago. While the Panel questioned the ongoing need for these laws, it stopped short of recommending repeal. Instead, it recommends limiting the applicability of these requirements to contracts valued at \$2 million or more. The increased threshold will bring immediate relief to many small businesses; however, the implications are unclear for larger contractors (with contracts exceeding the \$2M threshold) and their supply chains. If the \$2 million threshold applies to subcontracts, prime contractors will feel some relief from reduced labor law compliance oversight of the smallest subcontractors, as well as reduced financial risks associated with subcontractor labor law noncompliance. (Section 6, Recommendation 65)

## **6) Don't bog down unclassified contracts with security clearance and investigation requirements.**

The Panel notes that inappropriate security clearance and investigation requirements on unclassified contracts place a substantial burden on contractors, constrain the available talent pool, and exacerbate the substantial investigation backlog. The National Background Investigations Bureau (NBIB) backlog exceeds 657,000 personnel investigations, which, on average, requires more than 200 days to complete each background investigation. This recommendation could drastically reduce the number of unnecessary clearances by requiring DoD to base the clearance requirements on valid security needs and to use role-based planning. We recommend bringing this initiative to your DoD customer's attention if unclassified solicitations or contracts include these unnecessary requirements. (Section 7, Recommendation 77)

## **7) Use more Other Transaction agreements.**

To improve DoD's access to the capabilities and technologies it needs, the Panel recommends that Congress expand the Department's authority to use Other Transaction agreements (OTs), including for follow-on production of prototype projects. OTs help overcome barriers to commercial participation in the government market by allowing DoD to make purchases in a manner more consistent with private-sector practices. The Panel believes OTs for production will help maintain our military's technological edge. While we applaud a commercial-like acquisition footing for critical DoD needs, we remain concerned that DoD's cold-war era inertia will quickly transform OTs into FAR Part 15 contracts with a sexy new name. Be wary of FAR/DFARS clause creep. (Section 7, Recommendation 81)

**For more information on this topic, or to learn how Baker Tilly specialists can help, [contact our team](#).**