

NCMA

By: Laurence Trowel | June 1, 2019

# Section 809 Panel Recommendation to Streamline and Simplify Selection of Sources For Commercial Products and Services

By now you are probably well aware of the Advisory Panel on Streamlining and Codifying Acquisition Regulations, more commonly referred to as the “Section 809 Panel” after the section of the 2016 National Defense Authorization Act (NDAA) that established the Panel.

The Panel was charged with reviewing the acquisition regulations applicable to the Department of Defense (DOD) with a view toward streamlining and improving the efficiency and effectiveness of the defense acquisition process and maintaining a defense technological advantage. The Panel issued its findings and recommendations in three volumes, releasing the final volume this past January.

One of the many policy areas the Panel addressed was the acquisition of commercial items. This article discusses the Panel’s recommendation to simplify the selection of sources for commercial products and commercial services.

The Panel carefully researched existing statute, policy, and professional literature and met with frontline practitioners to identify obstacles and best practices for simply and efficiently acquiring commercial products and services. This article includes the results of that work as well as the recommendations the Panel made to statute and to the *Federal Acquisition Regulation (FAR)*.<sup>[1](#)</sup>

## Background

The Federal Acquisition Streamlining Act of 1994 (FASA) made notable changes to acquisition, including modifications to commercial buying (FAR Part 12) and simplified acquisition (FAR Part 13) procedures. FAR Part 12 established streamlined policies and procedures for acquiring commercial products and services with no dollar limit. Part 13 established streamlined policies and procedures for buying any product or service (com-

mercial or noncommercial) up to the simplified acquisition threshold (SAT) – currently \$250,000. This applicability overlap has caused confusion since the implementation of the two FAR parts in 1995.

Adding to the confusion, guidance in FAR 12.102 instructs contracting officers to use FAR Part 12 in conjunction with Parts 13, 14, and 15 when selecting sources for commercial products and services. FASA provided authority to publicize a synopsis for less than the standard 30 days, but offered little additional flexibility for selecting sources for commercial products and services. As a consequence, when acquiring commercial products and services, contracting officers used a mixture of Part 13 simplified acquisition procedures (SAPs) below the SAT and the more formal Part 15 source selection procedures both below and above the SAT.

Section 4202 of the Federal Acquisition Reform Act of 1996 (FARA), “Application of Simplified Procedures to Certain Commercial Items,” offered the possibility of substantially simplifying the acquisition of commercial products and services.<sup>[2]</sup> This statute amended 41 USC 1901(a) and 10 USC 2304(g), authorizing use of SAPs for acquiring commercial products or services at amounts greater than the SAT, but not greater than \$5 million when the contracting officer reasonably expects, based on the nature of the commercial items sought and on market research, that offers will include only commercial items. This authority was initially set to expire on January 1, 2000.

The proposed implementation of Section 4202 of FARA was published in the *Federal Register* on September 6, 1996.<sup>[3]</sup> The proposed rule established FAR Subpart 13.5, “Test Program for Certain Commercial Items,” and explained that –

[The purpose of the proposed rule was] to vest contracting officers with additional procedural discretion and flexibility, so that commercial items acquisitions in this dollar range [\$100,000–\$5,000,000] may be solicited, offered, evaluated, and awarded in a simplified manner that maximizes efficiency and economy and minimizes burden and administrative costs for both the Government and industry.<sup>[4]</sup>

The *Federal Register* notice further explained:

It is clear that the drafters of this legislation intended for commercial items to be purchased in as simplified a manner as possible. A report by the House Committee of Government Reform and Oversight (No. 104-222) on H.R. 1670 noted that “The purchase of a

commercial item logically lends itself to simplified procedures because there exists a yardstick in the commercial marketplace against which to measure price and product quality and to serve a surrogate for Government-unique procedures.”

The intent of this proposed rule is to ensure the benefits of this new authority can be fully realized by giving contracting officers a clear understanding of the procedural discretion and flexibility they have, so that acquisitions of commercial items conducted under these regulations may be solicited, offered, evaluated, and awarded in a simplified manner that maximizes efficiency and economy and minimizes burden and administrative costs for both the Government and its suppliers.<sup>[5]</sup>

The final rule implementing the test program was published in the *Federal Register* in January 1997 and was amended several times in subsequent years to raise the threshold to \$7 million and extend the end date of the test program.<sup>[6]</sup>

Section 815 of the 2015 NDAA made the test program permanent for the procurement of commercial products or services with a value greater than the SAT, but not exceeding \$7 million (\$13 million for certain emergency-related acquisitions).<sup>[7]</sup>

### **Are We Missing Opportunities to Streamline?**

Selecting sources can be one of the most important, time-consuming, and skill-intensive responsibilities of a contracting officer. On occasion, it can result in an unsuccessful or disappointed offeror filing a protest. It is important contracting officers use the most appropriate and streamlined selection technique, taking into consideration factors such as the product or service being acquired, the expected value, technical complexity, and government-unique requirements.

The policies and procedures in FAR Part 13 provide contracting officers with considerable discretion and flexibility. The Government Accountability Office (GAO) has recognized and supported this discretion and flexibility in numerous decisions.<sup>[8]</sup> Extending the authority to use these simplified procedures for acquisition of commercial products and services up to \$7 million has the potential to substantially simplify and speed those acquisitions.

The Section 809 Panel reviewed 2017 Federal Procurement Data System (FPDS) data that indicated a majority (~99%) of DOD contract actions for commercial products or ser-

vices were under the \$7 million threshold for using the SAPs to procure commercial products and services (see **FIGURE 1**).<sup>[9]</sup> Although the data set cannot be used to identify which of these obligations already used the streamlined procedures, it does support the notion that DOD could garner significant benefits from clarifying and simplifying the use of FAR Part 13 SAPs for commercial products and services up to \$7 million.

Streamlining the processes for acquiring commercial products and services is also likely to benefit small business. Small businesses are among the most affected by the heavy administrative burdens imposed by government contracts. Small businesses typically lack the overhead staff to establish and maintain business systems compliant with government-unique requirements.

FPDS data indicates that in recent years between 35% and 39% of DOD's commercial buys have been from small business. The federal government's commercial buys from small business for that time period are in the same range.

A 2001 GAO evaluation of the simplified acquisition test program showed that although federal agencies argued there were positive benefits to the authority provided in the test program, there were little empirical data to support the program.<sup>[10]</sup> The Section 809 Panel's review of more recent FPDS data on the use of the test program suggests the test program is not being widely used, but the data reporting is also likely to be inaccurate due to confusion over the test program's reporting process. Anecdotal information supports the assertion that streamlined procedures for acquiring commercial products and services up to the \$7 million threshold are underused.

The Panel concluded that contracting officers are not taking full advantage of the simplification in selecting sources offered by the SAPs. If contracting officers took greater advantage of the SAPs, they would substantially streamline acquisition of commercial products and services.

One well respected professional publication addressed this issue, stating:

One of the most remarkable and disappointing phenomena of Government contracting is the unwillingness or inability of many contracting officers to take advantage of the streamlining and labor-saving contract formation procedures that became available dur-

ing the acquisition reform era of the 1990's. [Contracting officers] needlessly resort to [FAR] Part 15 solicitation, offer, and award procedures when making simplified acquisitions, when competing task orders under multiple award service contracts, and even when placing orders under General Services Administration schedules.<sup>[11]</sup>

The article cites a GAO decision in which a DOD buying activity used the more complex FAR Part 15 procedures to select a contractor to provide room and board for military recruits.<sup>[12]</sup> The article cites another GAO decision in which a civilian agency clearly stated they were using Part 13 simplified procedures, but then proceeded to use the more complex Part 15 procedures to solicit, offer, and select from among numerous providers of an existing commercial product with millions of units sold in the commercial marketplace all around the world.<sup>[13]</sup> The article concludes by observing the following:

[S]everal factors contribute to this problem. First, many of the buyers doing simplified acquisitions lack confidence in their own know-how, so procedural formality makes them feel safe, while creative simplicity seems dangerous. Second, those buyers lack a sound conceptual grounding in procurement and contract formation, which makes it hard for them to improvise simple procedures that are suitable for the acquisition at hand. Third, FAR Part 13 is poorly organized and sometimes confusing.<sup>[14]</sup>

### **Obstacles and Recommendations to Simplified Acquisition of Commercial Products and Services**

There are abundant opportunities for more streamlining in the procurement of commercial products and services. Much of the authority needed to further simplify these procurements is already in place, but appears not to be widely used. The Section 809 Panel identified several statutory and regulatory obstacles to increasing the use of SAPs for commercial products and services, providing recommendations to improve the selection of sources for commercial products and services.<sup>[15]</sup>

#### ***Outdated Requirement to Publish Notices of Contract Actions***

Subject to certain thresholds, 41 USC 1708(a) and 15 USC 637(e) require publication of notices in three circumstances –

- Notice of an intent to issue a solicitation,
- The posting in a public place at the contracting office of that notice, and

- The publication of a notice announcing the award.

These statutes also require publication of solicitations for all procurements for which the contract value is expected to exceed \$25,000. These publication requirements are vestiges of the commerce era when paper notices, mailing of documents, and paper solicitations were commonplace.

Both statutes, however, do recognize the effect of modern electronic media (such as FedBizOpps, FPDS, and USASpending) on the need for and method of making such publications. For example, an exception to these notice requirements is provided by 41 USC 1708(b)(1) if the following criteria are met:

(A) the proposed procurement is for an amount not greater than the simplified acquisition threshold and is to be conducted by —

(1) using widespread electronic public notice of the solicitation in a form that allows convenient and universal user access through a single, Government-wide point of entry; and

(2) permitting the public to respond to the solicitation electronically.<sup>[16]</sup>

A similar exception is provided by 15 USC 637(g). These exceptions are limited, however, to procurements not greater than the simplified acquisition threshold, so the effect on streamlining commercial buying using the special simplified procedures in FAR Subpart 13.5 is limited to acquisitions under the SAT (\$250,000) and does not apply to procurements of commercial products and services between the SAT and the \$7 million SAP threshold for commercial products and services. The language at 15 USC 637(g) leaves in place the outdated procurement notice process for electronic procurements and creates an unnecessary restriction that limits the streamlining Congress is trying to achieve.

Further, solicitation posting requirements have not changed since 1984 and do not reflect the extent to which the commercial marketplace has evolved during the last 30 years.<sup>[17]</sup> According to FAR 5.002, the purposes for publicizing contract actions are to:

- “Increase competition,”
- “Broaden industry participation in meeting government requirements,” and
- “Assist [the various different types of] small businesses concerns...in obtaining contracts and subcontracts.”<sup>[18]</sup>

Congress has recognized the changing landscape of buying commercial products through e-commerce in Section 846 of the 2018 NDAA and the proposed expansion of micropurchase procedures for procurement through the Section 846 e-commerce portal.<sup>[19]</sup> These changes will streamline purchasing up to the \$25,000 threshold, but contracting officers will still be unable to use processes that already exist in the *FAR* for purchases above that threshold. FAR 13.103 authorizes individuals to use standing price quotations as part of the SAPs, and 13.106-1(c) directs contracting officers to use oral solicitations to the maximum extent practicable when they are more efficient. Both of these procedures, however, have very limited application for purchases above \$25,000 because of the requirements in 41 USC 1708, 15 USC 637, and FAR Part 5.

Increasing the 30-year-old threshold will enable contracting officers to leverage market research, standing price quotations, and oral and direct electronic solicitations. Currently, FAR Part 5 is confusing and complicated, with multiple different thresholds requiring different publicizing requirements. In addition to the \$25,000 threshold, 41 USC 1708 and 15 USC 637 still require public posting on a bulletin board in the contracting office of all proposed contract actions expected to exceed \$15,000 but not exceed \$25,000. This public posting function is even further out of touch with the pervasive use of e-commerce and electronic communication in business today.<sup>[20]</sup>

Setting a single publication threshold that is consistent with obligations under U.S. trade agreements for all acquisitions will help alleviate confusion created by the requirements in FAR Part 5 that are in tension with the simplified procedures in FAR Parts 12 and 13. A public solicitation threshold of \$75,000 is consistent with the increased simplified acquisition and micro-purchase thresholds and is only slightly more than \$60,000, which is what the \$25,000 threshold established in 1984 would be in inflation-adjusted dollars.<sup>[21]</sup>

- **Panel Recommendations:**

- Revise 15 USC 637(g) and 41 USC 1708(b) to extend the exemption to the requirement to publish notices of contract actions to procurements using simplified acquisition procedures (SAPs). The current exemption has an upper limit of the simplified acquisition threshold (SAT). By revising the statutes' threshold from the SAT to

the SAPs, procurements under the SAPs for commercial products and services under 41 USC 1901 and 10 USC 2304(g) will be included.

- Revise 15 USC 637(e) and 41 USC 1708(a) to eliminate the requirement to post solicitation documents in a public place and to increase the threshold for the requirement to publish notice of a proposed contract action on the governmentwide point of entry from \$25,000 to \$75,000. This revision eliminates the obsolete posting requirement and raises the 30-year-old synopsis threshold.

### ***Insufficient and Confusing Guidance is Provided for the Use of Commercial Policies and Procedures***

The FAR's direction regarding which procedures to use when acquiring commercial products and services can be confusing and does not drive contracting officers to use the simplest procedures available. For example, FAR 12.102 requires that the contracting officer do the following when acquiring commercial items, regardless of dollar value:

[U]se the policies in this part in conjunction with the policies and procedures for solicitation, evaluation and award prescribed in Part 13, Simplified Acquisition Procedures; Part 14, Sealed Bidding; and Part 15, Contracting by Negotiation, as appropriate for the particular acquisition.[\[22\]](#)

FAR 13.000 states that when making an acquisition between the micro-purchase threshold (MPT) and the SAT, the contracting officer must use Part 13, which “prescribes policies and procedures for the acquisition of supplies and services, including...commercial items.” With this vague direction, it is understandable that contracting officers do not more widely use the streamlined acquisition procedures for procuring commercial products and services.

- **Panel Recommendation:** Revise FAR 12.102 and 13.000 to clarify the relationship between FAR Parts 12 and 13. That is, contracting officers are required to use —



- FAR Part 12 when acquiring commercial products and services with an expected value greater than the MPT; and
- FAR Part 13 on all purchases below the MPT, and on purchases of noncommercial products and services between the MPT and SAT.

### ***FAR Guidance for Streamlined Authority for Commercial Buying is Misplaced***

The authority to use FAR Part 13 SAPs for acquiring certain commercial products and services was implemented in FAR Subpart 13.5, “Test Program for Certain Commercial Items.” Placing the policy and procedures in Part 13 makes some organizational sense, but it would be more appropriately placed in Subpart 12.6, “Streamlined Procedures for Evaluation and Solicitation for Commercial Items” – where buyers would be looking when preparing to make a commercial buy, especially if a contracting officer were preparing to make a commercial buy with an expected value greater than the SAT.

#### **• *Panel Recommendations:***

- Revise the *FAR* to move the authority to use SAPs for commercial products and services from FAR Subpart 13.5 to a new Subpart 12.6 section. This change will make the simplified procedures for procuring commercial products and services available in the logical part of the *FAR* that primarily focuses on procurements of commercial products and services.
- Revise FAR 12.203 and Subpart 12.6 to focus more broadly on the selection of sources for commercial products and services. The existing language implies a more complex process for selecting sources. With the clarification of the relationship between Parts 12 and 13, and the incorporation of special streamlined procedures for acquiring commercial products and services in Subpart 12.6, the revised Subpart 12.6 would focus on using simplified procedures for selecting sources and only using more complex procedures when procuring products and services over the SAT.

***Use of Simplified Acquisition Procedures is not Sufficiently Emphasized***

FAR Subpart 13.5, “Simplified Procedures for Certain Commercial Items,” does not require use of the SAPs, but merely gives contracting officers the authority to use the SAPs and provides that they may use any SAP. As previously noted, contracting officers may be uncomfortable with the flexibility it provides or may simply find greater comfort with the more structured procedures in Parts 14 or 15. If DOD is going to take greater advantage of the commercial marketplace, it must take a more aggressive approach to using streamlined acquisition procedures when acquiring commercial products and services. Commercial sellers are demanding more simplicity, Congress has provided more simplicity in statute, and contracting officers have indicated they want more simplicity for acquiring commercial products and services.

• ***Panel Recommendations:***

- Revise FAR 12.602(d) to require contracting officers to use SAPs when acquiring commercial products and services with an expected value between the MPT and the \$7 million threshold (41 USC §§ 1901 and 1903).
- Require contracting officers to obtain approval before using the more complex policies and procedures in FAR Parts 14 or 15 to acquire commercial products or services below the threshold in FAR 12.602 (c).

***Existing Procedures for Using SAPs are Disjointed***

There is no shortage of references to the use of SAPs for acquiring commercial products and services. However, simply stating that contracting officers should use SAPs when acquiring commercial products and services is not enough. As previously noted, FAR Part 13 is poorly organized and confusing. For example, in researching the simplified procedures available under the authority in FAR Subpart 13.5, it was necessary to review policies and procedures in FAR Parts 2, 5,

6, 10, 11, 12, 13, 18, and 19. As the Section 809 Panel was told in focus groups with contracting officers, “simplified procedures need to be simple.”

- **Panel Recommendation:** Create a new FAR Subpart 12.6 to organize in one location the SAPs available to contracting officers under the authority of 41 USC §§ 1901 and 1903. This change gives contracting officers more clarity, direction, and confidence in using simplified procedures rather than the more familiar, but possibly inappropriate, complex procedures in FAR Parts 14 or 15 for procuring commercial products and services.

### ***Important Streamlining-Related Terms are Not Defined***

One of the simplified procedures available in FAR Part 13 is the use of standing price quotations,[\[23\]](#) which allows the use of “available pricing” without obtaining individual quotations, yet this term is not defined. Similarly, contracting officers are authorized in FAR 11.103 to require offerors to demonstrate that items offered have achieved “commercial market acceptance,” yet that term is also not defined. The Panel believes both of these techniques offer potentially significant simplification opportunities if properly used. Providing a definition for both techniques is a first step to wider use.

- **Panel Recommendations:**
  - Revise FAR 2.101 and 11.103 to define the term *market acceptance*.
  - Revise FAR 2.101 and 13.103 to define the term *standing price quotation*.

These terms are already contained in the *FAR*, but are undefined. Both terms represent techniques that may offer contracting officers the opportunity to streamline the procurement of commercial products and services.

### **Summary**

As is often the case, the tools we need to improve our processes are already in hand and we need only to use them fully and creatively. The Section 809 Panel believes this is the case for streamlining the selection of sources for commercial products and services. The tools Congress has given us have not failed to streamline commercial buying; they have not really been fully tried. With the Panel’s recommendations for further improvement,

these tools for buying the majority of our commercial products and services will reach their full potential. **CM**

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### **Laurence M. Trowel**

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- Colonel, USAF (Ret.)
- General Manager, GE Government Business Practices and Processes (1996–2012)
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### **Endnotes**

[1] While the Panel’s charge was specifically to look at DOD acquisition regulations, most recommendations for regulatory change are to the *FAR* because it is impractical to simplify DOD’s commercial buying without changes to the commercial buying-related policies in the *FAR*.

[2] FY 1996 NDAA, *Pub. L.* 104-106.

[3] 61 *Fed. Reg.* 47384 (Sep. 6, 1996).

[4] *Ibid.*

[5] *Ibid.*

[6] 62 *Fed. Reg.* 262 (Jan. 2, 1997).

[7] 80 *Fed. Reg.* 38311 (Jul. 2, 2015).

[8] See, e.g., *American Artisan Products.*, B-293801.2, June 7 2004, 2004 CPD ¶ 127 at 3; and *United Marine International, LLC*, B-281512, 99 CPD ¶ 44.

[9] Data from FPDS, extracted March 22, 2018. Dollar categories are based on the number of modification-zero actions with reported “base and all options value” falling within

the dollar amounts listed. USTRANSCOM (agency ID 9776), which makes up a majority of DOD contract actions, is omitted from this dataset.

[10] GAO, “Benefits of Simplified Test Procedures Not Clearly Demonstrated,” GAO-01-517 (April 2001), available at <https://www.gao.gov/new.items/do1517.pdf>.

[11] 21 NO. 7 *Nash & Cibinic Report* ¶ 31, July 2007 (hereinafter, “*Nash & Cibinic*”).

[12] I.e., *Finlen Complex, Inc.*, Comp. Gen., B-288280, Dec. 2001 CPD ¶ 167.

[13] *Bio-Rad Laboratories, Inc.*, Comp. Gen. B-297653, 2007 CPD ¶ 58, 49 GC ¶ 198.

[14] *Nash & Cibinic*, see note 11.

[15] See “Recommendation 28” of the Panel’s report for the complete, detailed recommendations at <https://section809panel.org/>.

[16] 41 USC 1708(b)(1)(A)(1)–(2).

[17] See *Pub. L. 98-369*, 98 STAT. 1196, Sec. 2732 (1985), codified at 41 USC 1708. The SAT has increased from \$100,000 to \$250,000, with simplified acquisition procedures authorized for commercial purchases over \$7 million, over that same period of time. The micro-purchase threshold has also been increased from \$2,500 to \$10,000. (See Ron Smith, “Keep it Simple (Sometimes): Acquisition Thresholds are Changing (or Not),” *centrelawgroup.com* (August 19, 2015), available at <http://dev.centrelawgroup.com/keeping-it-simple-sometimes-acquisition-thresholds-are-changing-or-not/>; and 2018 NDAA (*Pub. L. 115-91*), §§ 805–806.)

[18] FAR 5.002(a)–(c).

[19] 2018 NDAA, *Pub. L. 115-91*.

[20] In fact, for DOD, most contracting activities are on military installations that the public does not have easy access to. Only those contractors that already have access to the installation would be able to see notices posted to bulletin boards.

[21] See Bureau of Labor Statistics Consumer Price Index Inflation Calculator at <https://data.bls.gov/cgi-bin/cpicalc.pl>. (October 1984 and May 2018 were the dates used to calculate the inflation adjusted threshold.)

[22] FAR 12.102(b).

[23] FAR 13.103.