

# DOD's Section 809 panel proposes a revolution in contracting

By: Steve Kelman | January 22, 2019

An unlikely band of revolutionaries has [proposed major changes](#) in how the Department of Defense chooses what contractors to do business with. These change agents are members of the Section 809 panel on streamlining and codifying acquisition regulations, set up by Congress in 2016. They include a number of well-known names in the contracting world, several of whom I have known since myself serving as the administrator of the Office of Federal Procurement Policy in the nineties. That latter group includes David Drabkin, the committee chair (who worked on acquisition reform at DOD as a civil servant and later spent many years at GSA); retired Gen. Darryl Scott (maybe the best contracting professional I ever met -- I wanted him to be my successor, but that was impossible while he was in uniform); Allan Burman (my predecessor); and Elliott Branch (head of contracting at the Navy).

The lead on the source selection portion of the report was Charlie Williams, who retired a few years ago as a senior DOD civil servant after a number of jobs including director of the Defense Contract Management Agency. This part of the report hasn't been discussed much; for example it was unmentioned in FCW's [article](#) on the issuance of the report.

The report has recommendations in many areas, and I would probably need at least five blog posts to discuss them all. I will concentrate here on the [recommendations](#) on how the government does source selection for DOD buying -- the process of choosing to whom to give a contract. This currently is a resource-intensive activity for government, with RFPs, proposals, and proposal evaluation, as well as the possibility of bid protests on the government's decision. It is also at the center of how contractors do their job in interacting with the government. Source selection is a big deal.

The report itself characterizes these recommendations as "revolutionary" -- recommending a fundamental rethink of source selection for contracts up to \$15 million and under certain circumstances higher. The report divides DOD purchases into weapons systems and "readily available" products or services, with or without customization. It defines

readily available as "any product or service that... can be ordered directly by customers," including "products and services that only governments buy."

"Readily available with customization" means "products and services that are sold in the private sector, including to other public-sector customers, for which customization or manufacturing that is consistent with existing private-sector practices is necessary to meet DOD's needs." (So, for example, if ways to customize software are used all the time in the private sector, this would be customization consistent with private-sector practices, though the specifics of customization will vary from case to case.) This part of the report does not recommend any major changes in source selection for weapons systems, only for readily available items.

These new categories represent a shift from the traditional government categorization of "commercial" and "non-commercial" items, which in turn drove policies about requirements for contractor-provided cost information and for government audits, and also to some extent source selection methods. These had produced complex and time-consuming determinations of whether something was commercial or not, and ongoing policy debates about what constituted "commercial."

The report proposes replacing the current system, for contracts for readily available items up to \$15 million, with one where source selection is based on government market research (learning about what vendors have available) and "market-based competition." This means no solicitations and often no proposals from bidders would be used in source selection, though the government would be free to request proposals if it felt they were necessary.

For products bought significantly on the basis of price, market-based competition would involve the government comparing price lists. For readily available services where factors other than price might be important, it would involve learning more about vendor offerings and performance. The government would decide, based on market research, from whom it would gather further information about prices, offerings and past performance. On the basis of this information, the government would then make source selection decisions.

As the report points out, this would make government buying dramatically more like buying in the commercial world, where the buyer chooses whom they want to consider, and where proposals may or may not be requested.

For buys over \$15 million, the process looks more like the current one. The presumption (to which an exception can be granted one level above the contracting officer) would be that a solicitation would be issued. However, it would not be required to be open for anyone to respond to. When proposals were received, they would be evaluated similarly to the current system.

The biggest revolution the report recommends is for buying services, such as IT services, because there are already IDIQ contracts for products where customers can in effect order off a pricelist without proposals -- though often the government is required to ask for discounts and sometimes will receive bids for larger buys with discounts off IDIQ prices. But for services, even for IDIQs, proposals are generally required and must be evaluated.

This new approach would significantly reduce the cost of awarding contracts for both government and industry. Much of the cost of writing proposals (for industry) and evaluating them (for government) would vanish. This would make it dramatically easier for new vendors to enter the federal marketplace. They would not need to learn the arcana of understanding the many unique elements of RFPs or of writing proposals. They could participate in government contracting without already have been awarded an IDIQ contract or subcontract. The [barriers to entry for new vendors](#) would go down significantly. For those of us, including me, who believe the current system is too dominated by insiders and established players, this is very good news.

One way to think about this proposal is that it would allow purchases in a way somewhat similar to the [micropurchase threshold](#), which recently was raised to \$10,000, at dramatically higher amounts. The difference for government with this proposal is that market research and a comparison of vendor offerings would be required, which it is not for micropurchases. For vendors, the difference is that many contract clause thresholds, perhaps most importantly for Buy America laws, are already eliminated without needing to go back to Congress.)

This new approach would require significant statutory changes. The question is whether the political system is ready for a revolution here. The big worry would be about favoritism by government officials toward a vendor whom they already have in mind. There would be fears for a less-than-level playing field and even corruption -- fears that are very deeply rooted in our procurement system. And many would worry that the current procedures will encourage government contracting officials, even if they don't show

favoritism or take bribes, to be lazy and not exert themselves to get a good deal for the government.

The main way these new procedures deal with this is through increased transparency to balance the dramatically reduced procedural hoops. The government would be required to publish the contract file, which includes the market research and price comparison the government conducted, and the basis for award decision if based on factors other than price. This would produce a dramatic increase in transparency; currently such information is made available only if there is a bid protest -- and even then, only to the protester, not the public.

The panel also recommends not allowing bid protests on contracts under \$15 million, except to an agency's competition advocate.

The main argument that DOD will make for statutory changes is that they are required given the growing military competition in the world from countries without our legal restrictions (read: China), though why these arguments would not have applied during the Cold War is not clear.

Still, I vote for trying out the 809 panel's proposals. The transparency requirements are a big improvement over the status quo, and reduce reasons for anxiety. I think maybe a decisive argument on their behalf is what is sometimes considered the crowning achievement of the current system, the promotion of competition. The current system drives the government into using IDIQ contracts to reduce the burdens of proposal writing and evaluation, but this makes it difficult for the government to buy from other than IDIQ holders, which is a problem especially for services. And writing government proposals is a major barrier to the entry into the federal marketplace of nontraditional contractors. Let's try this for a few years at least and see what happens.

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