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Section 809 panel's final report prescribes 'revolutionary' changes to DoD buying

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The independent commission Congress chartered to hunt for methods to streamline the Defense acquisition system is recommending dramatic changes to the ways in which the Pentagon interacts with industry, particularly when it comes to products and services that are already sold in the commercial sector.

Critiquing the terms and conditions the Defense Department currently imposes on firms as an "industrial age" model, the Section 809 Panel said in its [final report](#) on Tuesday that the department needs more streamlined approaches to buy goods and services from what it termed the "dynamic marketplace" that makes up the 21st Century economy.

Under the panel's proposed revisions, a wide range of boxes defense contracting officers must check when they buy purely-commercial items – from publicly advertising their procurements to setting some of them aside for small businesses – would cease to exist.

The recommendations are premised on the widely-accepted notion that DoD, and the government in general, is no longer the primary customer or market driver for many of the products it depends on to perform its missions. But some of them would up-end long-held assumptions about how the government procurement system is supposed to operate.

"We think of this as revolutionary, and we think of it as a cultural change as well," Charlie Williams, one of the commissioners, said in an interview with Federal News Network. To the extent that the Congress adopts the statutory requirements that make this happen, I think it will be a win-win for the department and the industry."

Three new procurement groups

Current law gives DoD procurers a set of simplified procedures they can use when they're buying commercial items. Those processes are laid out in Part 12 of the Federal Acquisition Regulation. But as the 809 panel has already [pointed out](#), the government's processes for determining whether something is or isn't commercial are so unwieldy that they sometimes consume even more time and paperwork than the traditional development contracts that are designed for military-unique systems.

So instead of trying to divide procurements between "commercial" and "non-commercial," the panel's recommendations would divide DoD's purchases into three groups: A bucket mostly made up of goods that are "readily available," a second category of goods and services that are readily available for DoD use with some modifications, and a third for truly Defense-unique procurements.

"It is time to abandon some of the more onerous and outdated concepts, as compared to private-sector practices, that create unnecessary friction in the acquisition system," commissioners wrote. "This friction inhibits rapid fielding of readily available products and services that increase lethality, ensure technological dominance, and provide critical warfighter support."

In the "readily available" category, acquisition officials would be able to buy items on a fixed-price basis worth up to \$15 million – or higher with senior official approval – via direct solicitations or price quotes. They would not have to publicly advertise their requirements at all, and would not have to set aside those requirements for small businesses.

On the other hand, they would also be able to make purchases from small and nontraditional businesses that haven't registered in the government's System for Award Management (SAM), and small businesses would get a 5 percent "price preference."

Also, existing constraints – like requirements to comply with the [Buy American Act](#) and the [Berry Amendment](#) would not apply, and the department wouldn't be allowed to demand any more intellectual property from its vendors than those companies already supply to their commercial customers.

Restricting bid protests

Under the proposals, bid protests would also be seriously curtailed. A winning bidder's competitors could not turn to the Government Accountability Office or the Court of Federal Claims to complain about how procurements were handled. Instead, they'd be restricted to filing complaints with DoD itself, and only in limited circumstances, such as when the item the department bought didn't meet the new "readily available" standard.

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Concerns about providing for adequate competition and making sure the government is getting a reasonable price would be handled by contracting officers' market research, the panel wrote.

"Market forces set the prices that consumers pay for these products and services because they are publicly available for consumers to compare and evaluate," commissioners wrote. "Even when a new product is only offered by one vendor, pricing and product quality are driven by what the market will bear. Issuing a competitive RFP for these products typically does not increase competition. In fact, soliciting the product or service using today's processes presents a barrier to entry for many companies, and likely increases the total procurement cost and delivery timelines."

Williams said the panel's rationale for setting up highly-streamlined, almost protest-proof procedures for truly off-the-shelf items has partly to do with a desire to free up time within the acquisition workforce, letting its members concentrate on the challenging parts of their profession where they can add value.

Ultimately, he said, the panel anticipates that a majority of DoD's contracting actions could fall under the "readily available" procedures.

"When [they] think about 'readily available,' often folks think of the very low end stuff. But really it cuts across a significant set of products and services that the warfighter requires and uses on a daily basis to accomplish their mission," he said. "And I would say there's another way of thinking about this: to the extent that we can take what represents maybe 90 percent of the actions inside of the department's acquisition business and reduce the burden, that allows those people to focus on those very complex actions."

A second category the panel envisions – “readily available with customization” – would follow similar principles, but allow for slightly more government contract stipulations, oversight and transparency.

For example, those contracts, which would also cover most of DoD's services spending, would usually need to be publicly-solicited if they're worth more than \$15 million. And losing bidders would be able to file both pre and post-award GAO protests.

But the department would have to keep government-unique contract clauses to a minimum, and current procurement laws such as the Buy American Act still would not apply.

In the third category – Defense-unique development projects – the panel acknowledged that DoD and Congress had already done significant work to develop alternative acquisition approaches that could deliver systems more quickly, including [Other Transaction Agreements](#) (OTAs), the newly-implemented [Middle-Tier Acquisition](#) authority and the [Commercial Solutions Opening](#) process first pioneered by the Defense Innovation Unit.

But Williams said there are concerns about how scalable those authorities are, since they tend to be used and championed only by particular corners of the Defense acquisition bureaucracy.

“Often what the department does to achieve the agility it needs is to create these one-off kinds of organizations and structures,” Williams said. “And while they do great work for the specific purpose that they are designed, they're not scalable. What we're trying to do is create a framework of processes and procedures that cut across the department's entire space of work.”

Taking a ‘portfolio management’ approach

In order to create a more cross-cutting approach to purchasing, the panel also recommended that Congress and DoD adopt a “portfolio management” approach to acquisition.

In short, it would require the department to group the systems each of the military services are buying into coherent bundles, and manage them as sets of capabilities instead of one-off programs.

There are several problems with the “program-centric” approach the Pentagon uses today, the panel concluded. Among them: it involves step-by-step approval processes that treat each system as an island unto itself. Each of them has to clear multiple paperwork and coordination hurdles in the acquisition chain of command, and each is paid for by a separate line item in the military services’ budgets.

In the notional structure the 809 panel is putting forward, weapons systems would be realigned into a new structure overseen by “Portfolio Acquisition Executives.”

“The PAE should make acquisition, procurement, and sustainment decisions for agility and responsiveness in executing emerging needs in a timely and effective manner,” the report suggests. “PAEs need to be empowered to prioritize needs, make early go/no-go decisions about alternative solutions, and allocate resources to portfolio priorities for mission impact within fiscal constraints. The PAE would manage risk and opportunities across the portfolios for greater overall cost, schedule, and operational effectiveness.”

The realignment would also put a new premium on accounting for long-term sustainment costs in DoD’s procurement decisions, said David Drabkin, the chairman of the 809 panel.

“Sustainment is huge, and while many programs consider sustainment up front, they fail to deliver on the back end,” he said. “And more importantly, individual program managers really don’t become responsible for sustainment through the lifecycle of a program. That results in sustainment being treated as a stepchild, often not having the funds that needs, and having to rob those funds from other accounts.”

The commercial item and portfolio management reforms were only a subset of the changes the panel of acquisition experts recommended to Congress after two years of work.

The final report spans 2,000 pages, about half of which is made up of proposed line-by-line legislative or regulatory language. The notion is to make the nearly 100 recommendations as plug-and-play as possible for Congress and the FAR Council by not requiring them to write their own detailed legal amendments.

The approach has been successful so far: Many of the panel’s initial recommendations [made their way](#) in to the House’s version of the 2019 National Defense Authorization Act, and have already become law.

Among the other broad topics covered by the final report:

- Reforms to DoD's management of its acquisition workforce
- A "cleanup" of the U.S. Code to make existing acquisition law more navigable for that workforce
- Improving acquisition professionals' access to existing business and financial data to help structure their procurements
- A proposed overhaul of information technology procurement
- Streamlining the existing "labyrinth" of compliance concerns for the government and industry

But Drabkin cautioned that the nearly 100 recommendations the panel made in the three volumes of its reports are, in many ways, interdependent on one another.

"To that end, we're going to provide a another volume, which right now we're calling "Volume X," because we can't really figure out else to call it. It won't provide any new recommendations, but we're going to tie all of our recommendations together as a capstone piece, and we'll deliver that before the 15th of February," he said. "That volume should hopefully help people view our recommendations as a whole. You can adopt some of our recommendations, but if you don't look at the whole picture we've provided, you really won't be able to move into the state we're envisioning where we should be faster, we should be bolder, we should be more like the private sector."

And although the panel itself will be disbanded this summer, its dying wish is for the DoD procurement study it launched midway through 2016 to live on in perpetuity.

The report's final recommendation is for all of the panel's records to be transferred to a proposed Center for Acquisition Innovation at the National Defense University's Eisenhower School.

"The need to identify challenges associated with the DoD acquisition system will continue to exist, as will the need to propose policy alternatives for addressing those challenges," commissioners wrote. "CAI would have a unique opportunity to leverage the 300-plus students and faculty at ES, and the acquisition community, to track the adoption of the Section 809 Panel recommendations and CAI future policy alternatives. This process would ideally mirror the congressional legislative process, and allow for adjudication of real-time challenges each recommendation or policy alternative faced when submitted to Congress."

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