

Federal News Network

By: Jason Miller | March 28, 2019

OTAs aren't the only answer to satisfy DoD's need for procurement speed

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One of the overarching themes in the Section 809 panel's recommendations to improve Defense Department acquisition is speed to market.

A focus area of Congress over the last few years has been to simplify how the Pentagon buys innovative products and services.

Both of these reasons are why the use of Other Transaction Authority (OTAs) are a popular solution to these challenges. Bloomberg Government reported last August that DoD spent more than \$2 billion a year through OTAs.

Air Force Lt. Col. Sam Kidd, the general counsel and a professional staff member of the Section 809 panel, said while OTAs may be the latest "shiny object" many acquisition professionals are following, the approach is only a small solution to the larger problem the panel is trying to address.

"The desire for the OTA comes from the desire for more speed. Our system has become so laden with bureaucratic requirements, with clauses and provisions and a system that isn't rapid enough to meet the needs of our warfighters, our commanders and those who are supporting them. They hear about this other transaction authority that gets them out from under the Federal Acquisition Regulations and the Defense FAR where they can be more agile in whatever contracting tool they are going to use. And there is a desire to use that without really fully understanding what they are for," Kidd said in an interview with Federal News Network after he spoke at the recent National Defense Industrial Association event in Washington, D.C. "That's where you get people who should never be working with OTAs, contracting officers in Wyoming doing normal base support. There is no need for OT, they aren't doing research and development, but they've heard about this tool that is supposed to be faster, easier to work with and they want some of that."

Procurement reforms since the 1990s

Kidd said the desire for [procurements to move faster and be more agile](#) isn't a new one. It was one of the reasons why there was major procurement reform in the 1990s, and why Congress has consistently added [new authorities](#) to the Defense Authorization bill year over year.

But Kidd said the over the last 20 years the system, particularly to buy commercial products and systems, became [gummed up with too many clauses](#). He said the acquisition regulations went from fewer than 60 in 1994 to more than 160 today to buy commercial products and services. Additionally, the panel looked at data from 2012 and 2017 and found the number of dollars spent using commercial procedures under FAR Part 12 also declined.

“We are on wrong trajectory with commercial buying. We need to reset that trajectory,” he said. “We think that with readily available concept we outlined in the report and some other recommendations that support that concept, it will open the aperture up to buy from more sources than we are buying from now.”

The 809 Panel's [third and final report](#) recommends that Congress clarifies and expand OTA authority, while also replacing commercial buying and existing simplified acquisition thresholds with a new concept called readily available and readily available with customization.

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.

The panel also said Congress should expand and clarify OT authority around production agreements “under exceptional circumstances to address a high priority warfighter need that would be at risk for going unmet if an OT were not awarded.”

Kidd said the current processes to buy commercial products and services may not be driving competition or increasing competition because of the requirements to bid on federal solicitations.

“We think we should be able to reach out to the marketplace, buyers who are doing their market research, finding the best products from the most capable vendors, using oral solicitations, standing prices solicitations and using a credit card to buy up to a higher threshold, say \$15 million threshold,” he said. “Things have changed dramatically since 1994 when the Federal Acquisition Streamlining Act (FASA) was passed. But the department is still stuck with our old system of buying unless something is under \$25,000 then we have some flexibility or we go an OTA route. That’s where everyone is stuck. They see these OTAs as a way to go faster and be more agile, but they are only there for certain things, for that research and development. So how do we make it easier for the department to go get those things that you and I could go out and buy, that other companies can go out and buy and that maybe our adversaries could go out and buy?”

Concerns about changing commercial buying

Opening up the commercial buying aperture, as the panel describes it, doesn’t come without a host of challenges and unanswered questions. The Coalition for Government Procurement has [expressed several concerns](#) about this approach including the lack of public advertising for as much as \$15 million worth of products or services.

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Others have brought up concerns about meeting federal procurement statues like small business requirements, the Trade Agreements Act and even supply chain security.

Kidd said the panel tried to address these and other regulatory and policy concerns. The panel recommended updates to “socioeconomic laws to encourage purchasing from non-traditional suppliers by (a) adopting exceptions for DoD to domestic purchasing preference requirements for commercial products, and (b) adopting a public interest exception and procedures for the Berry Amendment identical to the ones that exist for the Buy American Act,” and by increasing “the acquisition thresholds of the Davis–Bacon Act, the Walsh–Healey Public Contracts Act, and the Services Contract Act to \$2 million.”

Kidd said the panel recognizes the move toward OTAs are the symptom of a bigger disease, which is the growing challenge to buy commercial products and services.

He said the one thing Congress could do immediately is raise the requirement to advertise opportunities above the current \$25,000 threshold.

“That threshold hasn’t changed in 30 years. If they could bump that threshold up and give us more latitude to be able to use what we have proposed around readily available market based competition,” Kidd said. “The other thing that the services could do is go back and take a look at the clauses that are currently included in commercial contracts and take a hard scrub and eliminate as much as they think they possibly can. Congress actually told them in the last NDAA to go back and evaluate all commercial clauses that are included and make a determination about whether they should apply.”

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