Good News for New Tech: Panel Recommends DOD IT Acquisition Reform

Perkins Coie
By: Brenna Duncan | March 15, 2019

As information technology (IT) companies have known for years, the U.S. government regularly acquires inferior technology, often slowly and at high prices. The U.S. Department of Defense (DOD), which stands to benefit the most from state-of-the-art technology, is encumbered by a web of complex and archaic procurement regulations. For emerging technology companies looking to serve the government, DOD's procurement approach can be a major source of frustration, discouraging many of them from entering the federal arena altogether.

Fortunately, meaningful reform may be on the horizon. The Section 809 Panel, a group tasked by the 2016 National Defense Authorization Act to identify ways to improve the defense acquisition system, has recently set forth three recommendations aimed at streamlining DOD's IT procurement process. These IT-focused recommendations are found in Section 3 of the panel's Volume 3 Report, at numbers 43 through 45. The panel recommended the following:

- Rec. 43: Revise acquisition regulations to enable more flexible and effective procurement of consumption-based solutions.
- Rec. 44: Exempt DOD from Clinger-Cohen Act provisions in Title 40.
- Rec. 45: Create a pilot program for contracting directly with IT consultants through an online talent marketplace.

Each recommendation is discussed in more detail below.

Revise Acquisition Regulations

The first of these recommendations suggests adopting a new contract "type" to move beyond the traditional models—contracts for supplies or services—found in government contracts. This new contract model, for IT "solutions," would look much like a time-and-

material (T&M)–type contract, whereby the contracting firm charges the federal agency for direct labor hours at specified fixed rates (including overhead, general and administrative, expenses and profit) and for actual costs of materials. Traditionally, T&M contracts are disfavored in government contracting because they are considered higher risk to the government. In IT, however, where technology prices tend to decline over time, this model would capture price reductions in contractors' commercial pricing.

Recommendation 43 also contemplates giving DOD the ability to contract for services not yet available at the time of initial contract award, along with greater funding flexibility. The first of these strategies has already gained some traction, such as in the JEDI procurement, where the request for proposal included a contract-specific clause for new technology.

As for the second strategy, however, budgeting rules and appropriation law remain significant barriers to allowing DOD to pay for IT on a consumption (on-demand) basis. Currently, if an agency obligates more than the amount required on the contract, it risks losing funds for future budgets. Conversely, if the agency under-obligates funds, the contracting officer risks violating the Anti-Deficiency Act. The panel has pointed to the carryover authority that Congress provided to the Defense Health Agency for drug and medical services indefinite-quantity contracts as a model worth considering for IT contract funding. This carryover authority allows the agency to move unexpended funding over to the next fiscal year for certain spending. If Congress approves a similar measure for IT contracts, the risk to agencies of overestimating IT services would go down, making budgeting easier for these unique and important services.

Exempt DOD From Clinger-Cohen Act Provisions

In Recommendation 44, the panel explains that while the Clinger-Cohen Act (CCA) was critical in reforming the government's use of IT when it was passed in 1996, its outdated compliance structure has created redundant procedures that add little value to DOD's acquisition process and mainly serve to slow it down. For instance, DOD CCA compliance guidance, found in DoDD 5000.01, DoDI 5000.02, and DoDI 5000.74, requires contracting officials to generate and review documents that are already reviewed and approved within the traditional acquisition review chain. Further, Chief Information Officers lack authority to fully implement CCA-directed oversight.

The panel accordingly recommends that Congress (1) exempt DOD from the CCA requirements implemented in Title 40 of the U.S. Code and (2) instruct DOD to replace these requirements with processes that empower the lower-level workforce, shorten delivery schedules and reduce paperwork.

Create a Talent Marketplace

Finally, in Recommendation 45, the panel conceptualizes an IT consultant marketplace made up of prequalified independent consultants. Under this approach, DOD could use expedited procedures to contract with these consultants. This "talent marketplace" pilot program is an important recommendation, specifically designed to connect DOD with commercial IT experts, instead of the government-unique IT firms and professionals on whom DOD usually relies. To make the talent marketplace more attractive to new and first-time contractors, the panel recommends allowing consulting services to be purchased with a government purchase card, with no Federal Acquisition Regulation–based contract necessary. Alternatively, consultant services could be purchased with a dramatically simplified contract.

If implemented, this program could radically shift the kinds of persons and companies doing business with the U.S. government. For established IT contractors, however, this shift presents possible oversight and fairness concerns that will have to be hammered out in the program's implementation language.

In short, these IT-focused recommendations, if implemented, have the potential to upend DOD's IT procurement system as it is known today. Emerging IT companies especially should watch for new legislation and rulemaking that makes doing business with DOD more desirable.