

Section 809 Panel: The Commercialization of Government Contracting

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The Section 809 Panel has issued a series of recommendations to the DoD. This second installment of Pillsbury’s Section 809 Alerts focuses on recommendations to better align DoD’s acquisition process with the private market.

Takeaways

- Section 809 Panel recommends making contracts for “readily available commercial items” under \$15 million exempt from written solicitation or public advertising requirements.
- Section 809 Panel recommends simplifying and reducing FAR and DFARS flow-down requirements for commercial item subcontractors.
- Section 809 Panel recommends expanding the authority to use OTAs for follow-on production of prototypes.

As we [previously reported](#), the Congressionally mandated Section 809 Panel recently issued Volume 3 of its Final Report. Volume 3 of the Final Report makes additional recommendations for improving the Department of Defense’s (DoD) acquisition process. This is the second of four alerts about the substance of Volume 3 of the Final Report. In this client alert, we explore recommendations that the DoD replicate the commercial contracting process.

Promoting Use of Readily Available Commercial Items

The Section 809 Panel found that “DoD’s business practices have only been able to evolve to a certain degree, leaving it with tools and processes that are not optimized for the current economic reality—one in which DoD often has limited or no influence in affecting price, terms and conditions, and product and service development in highly competitive markets.” ([Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations](#), Vol. 3, Pt. 1 at 17.) To address DoD’s shortcomings in the acquisition of readily available commercial products, the Section 809 Panel recommended evolving from DoD’s current practices in the commercial marketplace to a simplified and “more private-sector-accessible” process. (*Id.* at 18.) Under this process, acquisition of readily available commercial items under \$15 million would be exempt from written solicitation or public advertising requirements. The process would rely on “market-based competition,” under which contracting officers would conduct market research “commensurate with the value and complexity of the procurement to identify potential sources of readily available products and services and procure those ... using the most efficient means necessary.” (*Id.* at 60.)

Managing FAR and DFARS Flowdown Requirements

In Volume 3 of the Final Report, the Section 809 Panel targeted the complicated FAR and DFARS flowdown requirements that currently frustrate prime-subcontractor negotiations and relationship-building. Describing such flowdown requirements as “excessive” and creating “additional burdens on DoD’s supply chain,” the Section 809 Panel recommended limiting the number of FAR and DFARS clauses that flow down to commercial subcontracts and consolidating all such requirements into one clause. (*Id.*, [Pt. 2](#) at 324.) The Section 809 Panel further recommended minimizing “government-unique” flowdown terms and conditions applicable to commercial purchases. (*Id.* at 512.) Specifically, the panel recommended revising FAR 52.244-6 and DFARS 252.244-7000, both entitled “Subcontracts for Commercial Items,” to include only those clauses that have been determined necessary to satisfy Congressional direction. The panel also recommended that the aforementioned FAR and DFARS clauses serve as the single point of reference for flow downs for subcontracts for commercial items. (*Id.* at 324-325.)

The Section 809 Panel also noted that flowdown requirements pose supply chain risk issues which have grown in importance as the supply base has become increasingly more global. (*Id.* at 326-327.) Volume 3 of the report noted that the breadth and number of FAR and DFARS contract clauses create a real or perceived barrier to entry for new gov-

ernment contractors and subcontractors, and that many flowdown clauses for which applicability is based on the risks associated with what is being procured should be addressed in specific contract requirements or statements of work. (*Id.*) In order to address these issues, the Panel recommended DoD implement tools for supply chain risk mitigation policies through the requirements generation process rather than through the DFARS, in order to avoid having a “one-size-fits-all” solution to a dynamic marketplace. (*Id.* at 328.)

Expanding Use of OTAs

Finally, the Section 809 Panel recommended that the DoD clarify and expand its Other Transaction Authority (OTA) usage. OTAs are flexible transaction procedures not subject to standard procurement regulations that are designed to allow innovative business and alternative funding arrangements and/or entice non-traditional government contractors to carry out prototype projects as authorized by 10 U.S.C. § 2371b for “follow-on production” and “rapid fielding existing technologies.” (*Id.* at 440.) While many restrictions in place for follow-on production using OTAs were removed by Congress in 2016, the Section 809 Panel recommended making OTAs even more flexible, noting that OTAs “can help overcome barriers to commercial participation in the government market,” “allow the government to conduct business with industry on more familiar terms and foster[] nontraditional contractors’ willingness to provide innovative solutions.” (*Id.* at 443.) The Section 809 Panel recommended giving service acquisition executives discretion to authorize OTAs (rather than undertaking standard competitive procurement procedures) for follow-on production of the prototype built under a prior OTA in exceptional circumstances. (*Id.* at 443-448.) The Section 809 Panel recommended that participants in prototype projects have the right of first refusal for a follow-on production. When participants refuse or do not have the capacity to move into production, then the DoD could select a different supplier for production. (*Id.* at 447-448).

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